
“Unwise,” “Untimely,” and “Extreme”: Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change

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INTRODUCTION

In 1963, Dr. Martin Luther King, Jr. penned his classic *Letter from a Birmingham Jail*¹ to respond to eight of Alabama's most prominent white clergymen who criticized him in a local newspaper's public advertisement. In their "Call For Unity," the eight white clergy appealed for "law and order and common sense," and admonished the civil rights leader, asserting that the laws should be "peacefully obeyed."² They called upon their "own Negro community to withdraw support from these demonstrations," viewing King's non-violent protests as "unwise and untimely" and "extreme measures." They felt the protest was unjustified in Birmingham and "led in part by outsiders."³

Dr. King's powerful response explained not only to the clergymen but to the world "why we can't wait" for social change.⁴ King further reminded the clergy that he came to Birmingham "because injustice is here."⁵ This was not a difficult claim for King to make, since Birmingham enjoyed a reputation of being one of the south's most segregated cities and also for having the greatest number of unsolved bombings of Black churches and homes of civil rights leaders.⁶

It is far easier today to recognize the paternalism, privilege, and paucity of understanding that underlies the Birmingham Eight's message. At the time, however, the sentiments expressed by the eight clergy reflected a dominant view among white moderates who desired change in race relations in the south. As one scholar of the controversy attempts to argue, these were not evil men, nor allies of the segregationist regime, but some of Birmingham's most progressive leaders.⁷ Indeed, it is this very dynamic — to be criticized by those who

¹ Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), reprinted in S. JONATHAN BASS, *BLESSED ARE THE PEACEMAKERS* 237-56 (2001).

² The White Ministers' Good Friday Statement (Apr. 12, 1963) reprinted in S. BASS, *supra* note 1, at 235-36.

³ *Id.*

⁴ Dr. King admonished his brethren: "For years now I have heard the word, 'Wait.' It rings in the ear of every Negro with piercing familiarity. This 'Wait' has always meant never. We must come to see, with one of our distinguished jurists, that 'justice too long delayed is justice denied.'" See BASS, *supra* note 1, at 242.

⁵ *Id.*

⁶ W. Ralph Eubanks, *Before He Had His "Dream," King Wrote Letter*, WASH. POST, Jan. 16, 2005, at B3.

⁷ See generally BASS, *supra* note 1 (advocating for more complicated and sympathetic depiction of eight ministers addressed in Dr. King's "Letter from a Birmingham Jail").

claim to be one's ally, albeit an under-informed, if not arrogant, one that Dr. King addresses so poignantly:

I have almost reached the conclusion that the Negro's great stumbling block in the stride to freedom is not the White Citizen's Council or the Ku Klux Klan, but the white moderate, who is more devoted to "order than justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice"; who constantly says: 'I agree with you in the goal that you seek but I cannot agree with your methods of direct action'; who paternalistically believes that he can set the time-table for another man's freedom; who lives by the myth of time and who constantly advises the Negro to wait for a 'more convenient season.' Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.⁸

I start this paper on employment discrimination and norms of "collegiality" with the "*Letter from a Birmingham Jail*" because I can't help but wonder how Dr. King would have fared had his actions occurred in the workplace as opposed to civil society. Imagine that Dr. King was employed at the same workplace as the Birmingham Eight, and that in response to segregation and violent acts directed towards African Americans at the workplace, Dr. King undertook measures to protest such acts. Of course, one must also imagine that as an employee, Dr. King enjoyed the protections of the Civil Rights Act of 1964. Under these assumptions, how might the employer have fared if it fired Dr. King citing lack of "collegiality" or "inability to get along" in response to any racial discrimination or retaliation claim contesting the firing? With eight co-workers who claimed to support his end goal but denouncing his measures as "extreme," might a court hearing such a case conclude that King's disruptiveness was for a "legitimate, non-discriminatory reason?"⁹ Would the Court find that his dismissal was not a "pretext"

⁸ See BASS, *supra* note 1, at 246.

⁹ As set forth by the Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the burden shifting proof structure for inferential cases of employment discrimination under Title VII entails three steps. First, the plaintiff must establish a prima facie case in which she demonstrates that 1) she was a member of a protected group under Title VII; 2) she was qualified for and applied for a job; 3) she was denied the position; and 4) the employer continued to search for candidates to fill the position. Second, once a prima facie case is established, the burden shifts to the employer to merely articulate a legitimate, non-discriminatory reason for the adverse employment action in question. Finally, after the

for discrimination or retaliation? Unfortunately, courts overwhelmingly defer to the employers' stated rationale of "collegiality" as a legitimate, non-discriminatory reason for an adverse employment action. Moreover, courts consistently fail to inquire into how linked or derivative the underlying act of discrimination grieved by the employee is to the perception of incivility by the employer.¹⁰

I use this hypothetical to illustrate how the legal treatment of an employer's non-collegiality rationale for its challenged actions may have seriously deleterious effects upon the individual claimant, and ultimately, the broader public interest, in creating and sustaining more equitable worksites. Insofar as fee-shifting statutes for civil rights litigation were enacted in part to create a "private attorney's general" to carry out congressional intent to root out and eliminate discriminatory practices, it seems inconsistent that what is granted by the political branch on one hand, is taken away by the hand of the legal branch. What good are fee-shifting statutes to promote private lawsuits if courts are overly deferential in crediting an employer's stated reason for its actions in the determination of discrimination pretext?

I argue in this paper that courts' historic recognition of and deference to the collegiality justification grossly undervalues the role of positive social change in the workplace. In part, the courts' error derives from too narrow a conceptualization of collegiality. The traditional concept of workplace "collegiality," popularly understood as the ability to get along well with others, clearly lacks substance. "Collegial" is what those in power happen to define it as at the time. As such, it absorbs the normative values of the dominant culture. Thus, the utter malleability of the term poses the same dangers to particular identity groups as any other doctrine or rule that suffers from over-vagueness.

A traditional, dominant culture definition of collegiality fails to account for institutional sexism, homophobia, racism, etc., and thus endorses and perpetuates existing cultural norms and castes. Under this "can't we all get along" formulation, those who transgress the cultural

employer articulates a legitimate, non-discriminatory reason, the burden shifts back to the plaintiff to demonstrate that the reason offered is a pretext for discrimination. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas*, 411 U.S. at 802-05; *see also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

¹⁰ Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, 27 J.C. & U.L. 833, 858 (2001) (summarizing how courts have rejected plaintiff arguments that collegiality was used as pretext for discrimination "in the overwhelming number of reported cases").

norm of gendered and racial hierarchy appear to be “impolite” and “uncollegial” regardless of history, context, or power relations. If, for example, one works in an embedded culture of institutional heteropatriarchy and white supremacy, then even minimal resistance to such a culture will likely result in a seeming breach of collegiality. In this sense, collegiality serves to normalize workplace injuries to outsider groups serving as an effective hegemonic censor of race- and gender-based resistance to oppression. I refer to these dominant, uncritical conceptualizations of collegiality as “*hegemonic collegiality*”— i.e., those definitions of collegiality that do not take into account the normative ideal of equalization of power relations among colleagues.

It is interesting to note that *Webster’s Dictionary* actually defines the term “collegial” in a more power-sensitive way than the term is commonly used in the workplace and employed by courts. According to this definition, “collegial” refers to something “characterized by or having authority vested equally among colleagues.”¹¹ Thus, absent an equal sharing of authority, collegiality cannot exist. Because such an equal sharing of authority does not exist across race and gender lines at most workplaces, collegiality among disparate power groups should be viewed as a problematic, conflict-laden prospect. At the very least, collegiality should be seen as an often unarticulated job requirement that may have a disparate impact on the material (and emotional) well-being of people of color and women. Indeed, it could be argued that under unequal social conditions, the struggle to bring about workplace equality (and to resist oppressive cultures) is the true measure of collegiality since it contributes to the equalization of power. I will refer to this more critical conceptualization as “*transformative collegiality*.” Transformative collegiality takes into account the end goal of producing equal sharing of authority among colleagues, in light of race, gender and sexuality among other divides.

In this paper, I examine more closely the role of “collegiality” in employment discrimination cases to reveal the operation of contemporary discrimination through neutral sounding means. I also consider how such norms and standards applied in employment settings may operate to the disadvantage of intersectional subjects, particularly women of color. In addition to the narrow, hegemonic definition of collegiality that favors employers, contemporary employment

¹¹ WEBSTER’S ONLINE DICTIONARY, THE ROSETTA EDITION, <http://www.websters-online-dictionary.org/definition/collegial> (last visited Nov. 7, 2005).

discrimination laws vex plaintiffs by their inability to ferret out the superficial denials and explanations of increasingly sophisticated employers, human resources administrators, and general counsels. In a post-civil rights society professing to be "colorblind," most employers

know that there should be no public pronouncements of their intent to discriminate.

In Part I, I will explore the specific dynamics of the operation of the “collegiality trump card” by scrutinizing the facts in such cases in which “not getting along” forms the basis for the employer’s defense. This Part will examine the standards employed by courts to ascertain whether collegiality operates as a pretext for discrimination. Drawing upon federal claims of race- and/or sex-based discrimination or harassment, I will analyze courts’ operational definitions of collegiality that are (implicitly) applied in the proof structures of Title VII. I argue that judicial interpretations of antidiscrimination law too often permit traditional, power-insensitive definitions of collegiality to frustrate claims of plaintiffs experiencing a hostile, unequal workplace. Unfortunately, courts seldom have acknowledged the link between dominant operative definitions of collegiality and the perpetuation of on-the-job racial and sexual harassment and discrimination. Instead, courts have uncritically credited employer rebuttals of discriminatory inferences that are based on an employee’s alleged lack of “collegiality.”

Part II examines the emerging legal literature on the increasing use of employer deployments of “collegiality” and the limitations and dangers of such a defense, primarily as violative of academic freedom. I suggest that judicial deference granted to the significance of collegiality in the workplace tends to operate as a trump card against assertions of discrimination, hostile environment, or retaliation. I further argue that courts should curtail their deference to employers’ collegiality rationale.

Following judicial and scholarly treatment of the “collegiality” rationale, I will make a few modest suggestions in Part III to improve judicial analysis of an employer’s collegiality-based rebuttal. I will also explore strategies for workers and subjects in hostile environments or unequal workplaces to deploy in redressing their grievances in light of post civil rights era dynamics.¹² For as the first decades of Critical Race Theory reveal, legal reforms are but a starting point (if that) for the realization of a racially just society.

This paper will conclude that a more nuanced and enlightened definition of collegiality must be applied if it is to determine outcomes in workplace disputes and litigation. A better definition of collegiality will

¹² I thank Professor Margaret Montoya for reminding me of the importance of discussing cultural strategies for empowerment and survival in light of the increasingly conservative trend of the courts in employment discrimination doctrine.

recognize power imbalances and oppressive cultures, and be supportive of challenges thereto. Absent such legal and cultural changes, the successful deployment of hegemonic collegiality to rebut employment discrimination claims fosters a form of race- and gender-based “censorship” — one that is imposed externally through the courts’ recognition of the employer-defendant’s collegiality-based rebuttal of the allegation of discrimination, and internally through the operation of the culture of hegemonic collegiality itself.

I. THE LEGAL DOCTRINE AND CULTURAL CONTEXT OF HEGEMONIC COLLEGIALLY

I refer to the culture of hegemonic collegiality as the set of norms that demand that subordinated groups conform their behavior and interactions to the expectations of the group in power in order to “get along.” Such concessions are expected regardless of any antidiscrimination or egalitarian policies in place. Any workplace ruptures or disagreements that occur are judged by standards developed but not necessarily articulated by the dominant majority culture. Hegemonic collegiality fails to account for power dynamics or differentials when assessing the “reasonableness” or lack thereof of workplace behaviors.

The doctrine of hegemonic collegiality refers to courts’ uncritical embrace of the perpetrator’s norms to define the baseline for getting along in the workplace. Specifically, the problem arises where courts “double credit” the collegiality-based rationale first as an employer’s “legitimate non-discriminatory reason” (“LNR”) for an adverse employment action, and then again at the pretext stage, to defeat a plaintiff’s showing of pretext. To allow an employer to prevail at the pretext stage due to the plaintiff’s alleged uncollegiality produces a Kafka-esque result in which the perpetrators may inflict a “second injury” to a plaintiff by not only discriminating, harassing, and/or retaliating against her, but also by converting the victim into a “troublemaker.” As such, the employer suggests that the employee is responsible for her own undoing and unpopularity with co-workers or colleagues.

A. *Individual Disparate Treatment Cases*

The cases discussed below illustrate Title VII claims in which the employer asserted some version of the “collegiality rationale” by arguing

that the reason for the employer's adverse decision making against the plaintiff involved her inability to "get along." If analyzed under the *McDonnell-Douglas* single motive proof structure, Courts may interpret the "collegiality" rationale as either the employer's "real reason" for adverse employment action, or as "pretext."¹³ Using mixed motive analysis, courts may consider the "collegiality rationale" as the motivating, albeit illegitimate, reason for taking adverse action against the employee that serves to inoculate the employer against most meaningful monetary damages.¹⁴ In either case, note to what extent courts allow employers simply to rearticulate the plaintiff's injury into the plaintiff's shortcomings. Note also the level of deference courts grant to employers articulating a collegiality rationale, even where the complained about action and lack of collegiality resulted from the same set of facts.

1. Early Case: *McKenna v. Caspar Weinberger*: "The Effective Cause of Her Own Dismissal"

In *McKenna v. Caspar Weinberger*¹⁵ the female plaintiff alleging Title VII sex discrimination/retaliation was denied relief in federal district court in the District of Columbia. The court denied her relief on the basis of her "personality difficulties" in which over-aggressiveness and abrasiveness were emphasized.¹⁶ These alleged personality defects and McKenna's inability to get along with others constituted the defendant's LNR to rebut the plaintiff's prima facie inference of discriminatory treatment. On appeal, the court upheld the lower court's finding of non-liability.¹⁷

In *McKenna*, the female plaintiff was a probationary employee of the Defense Intelligence Agency (DIA) who alleged sex-based discrimination and retaliation upon her termination. Ms. McKenna had recounted numerous un rebutted incidents in which women had been "treated condescendingly, were sexualized or had suggestive remarks directed at them. Additionally, obscene jokes, cartoons or photos were

¹³ See *supra* note 9 and accompanying text.

¹⁴ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); 42 U.S.C. § 2000e-5 (2005) (limiting relief in mixed motive cases in which employer demonstrates she would have made "same decision" in absence of illegitimate, motivating factor to declaratory relief, injunctive relief, or attorney's fees).

¹⁵ *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984).

¹⁶ *Id.* at 790.

¹⁷ *Id.* at 791.

conspicuously exchanged."¹⁸ Ms. McKenna filed a claim with Captain Martinez, the superior of one of her supervisors. Martinez ordered an investigation into whether there was sexist bias in the failure to promote McKenna or in her work environment. Shortly after her complaint to Captain Martinez, McKenna was terminated.

In its defense, the DIA claimed that sex discrimination played no part in the failure to promote Ms. McKenna. Rather, her promotion denial was due to her inability to get along with her (male) coworkers. According to the trial court record, Ms. McKenna's supervisor, who had previously given her a positive evaluation, testified that three of McKenna's coworkers (all male) complained that she was "abrasive and uncooperative."¹⁹ At trial, the defendant's nondiscriminatory, legitimate reason for firing McKenna was stated as her "abrasiveness and continuing difficulties in working with her fellow analysts."²⁰ In classic "blame-the-victim" language, the district court found in favor of the DIA, concluding that "Ms. McKenna herself was the source of the problem and the effective cause of her own dismissal."²¹

Upon review, the DC appeals court expressed concern over the lower court's finding: "We are troubled that the vague complaints of three men who were never heard at trial played such a critical role in Ms. McKenna's downfall."²² In fact, the appellate court acknowledged a Title VII violation would exist where male co-workers' sexism frustrates female plaintiff's attempt to work cooperatively with others. Nevertheless, the appellate court left the district court opinion undisturbed, concluding that the record overall was sufficient to support a finding of nondiscrimination. Without stating any test or standard by which workplace sexism would be isolated from the determination of a woman's collegiality, the appellate court affirmed the district court's finding that the plaintiff's inability to get along with her coworkers was a "function of her individual personality difficulties and was not related to her sex."²³ The lack of collegiality similarly provided the

¹⁸ *Id.* at 786-87. As this case precedes the legal recognition of a "hostile environment claim" announced in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the plaintiff did not assert a sexual harassment claim. Instead, the claim is analyzed under a *McDonnell-Douglas* three-part burden shifting proof structure. See *supra* note 9.

¹⁹ *McKenna*, 729 F.2d at 786.

²⁰ *Id.* at 789.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 790; see also *McCarthy v. Griffin-Spalding County Bd. of Educ.*, 791 F.2d 1549, 1550-51 (11th Cir. 1986) (upholding district court's judgment for employer on basis

nondiscriminatory rationale to support dismissal of the retaliation claim.

The *McKenna* case reflects the court's embrace of a traditional notion of collegiality that is unable to separate out oppressive power relations from the determination of appropriate behavior toward one's peers. The office dynamics — the sexist condescension, suggestive remarks and offensive language, joking, and photos — that gave rise to Ms. McKenna's objections, eventually led to her lawsuit. Predictably, McKenna's co-workers who produced the hostile office dynamics would negatively characterize her resistance to the sexist working conditions, thereby producing a conflict-oriented work environment. Thus, her inability to "get along" with colleagues in such an infected environment should not be allowed to support the employer's rebuttal. Absent a power-sensitive definition of collegiality, the conflation of a plaintiff's perceived lack of collegiality and resistance to discriminatory treatment will penalize those who seek to rectify impermissible discrimination and harassment. Certainly, Title VII could not have intended such a result.

2. "Mixed Motive" Cases and *Price-Waterhouse*:²⁴ "Overly Aggressive, Unduly Harsh" and "Universally Disliked"

It could be argued that the *McKenna* case and others like it decided prior to the 1989 *Price-Waterhouse v. Hopkins* case are no longer significant in light of the legal standard now controlling mixed motive cases. Prior to *Price-Waterhouse*, circumstantial cases of employment discrimination were analyzed under the three-step, burden-shifting proof structure established in *McDonnell Douglas v. Green*,²⁵ which considered whether a

that nondiscriminatory reason articulated for female employee's non-promotion — i.e., appellant's "inflexible, overly aggressive, and abrasive" personality — was not clearly erroneous); *Ayon v. Sampson*, 547 F.2d 446, 450 (9th Cir. 1976) (affirming lower court's grant of summary judgment to employer dismissing female appellant's sex discrimination claim on basis of her "personality problems, and not because of her sex"). Again, the appellate court noted, but dismissed the operation of sexism in the determination of collegiality:

We are unable to say that the ability to get along with one's co-workers would not be an important qualification for an individual in a management position, or that a selecting official could not give substantial weight to that factor in making his selection. While such a selection process is dependent upon the individualized judgment of the selecting official and is therefore subject to opportunities for subtle discrimination, we find none here.

Id. at 451.

²⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

²⁵ *See supra* note 9.

"single motive" of discriminatory animus accounted for the adverse employment action. In *Price-Waterhouse*, the Court recognized a more complex decision making possibility, that the adverse employment

action could be the product of “mixed motives,” both legitimate and illegitimate.²⁶

Price-Waterhouse involved a female candidate, Ann Hopkins, up for partnership in an accounting firm. Like McKenna, Ms. Hopkins was criticized for her uncollegial behavior. According to one partner, she was “universally disliked” by staff.²⁷ In contrast to the *McKenna*-type case, the Supreme Court found the employer’s articulated nondiscriminatory reason for non-promotion to be inadequate — i.e., Hopkins’ allegedly deficient interpersonal skills and “overly aggressive, unduly harsh” personality.²⁸

However, what may distinguish *Price-Waterhouse* from the *McKenna*-type case is the existence of overtly sex-based comments. In *Price-Waterhouse*, Hopkins was counseled to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”²⁹ District Court Judge Gesell concluded at trial that being identified as a “women’s libber” at Price-Waterhouse “was regarded as [a] negative comment.”³⁰ Hopkins was also described as “macho,” in need of “charm school,” and a “tough-talking somewhat masculine hard-nosed manager.”³¹ With the assistance of an expert witness, the Court interpreted such sex-based comments as evidence of gender-based stereotyping in the workplace.

²⁶ In *Price-Waterhouse*, the Court sets forth the new “mixed motive” proof structure. First, the plaintiff must establish that discriminatory animus was a motivating factor in the adverse employment action. Should the plaintiff prevail, then the burden shifts to the employer to prove by preponderance of the evidence that he would have made the “same decision” in the absence of discriminatory animus. *Price-Waterhouse*, 490 U.S. at 242. The *Price-Waterhouse* Court stated that an employer could escape liability once the “same decision” defense was successfully invoked. However, Congress rejected the Court’s formulation of liability, and passed the Civil Rights Act of 1991 which provided for the establishment of liability once impermissible motive has been identified as a “motivating factor.” Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075-76 (1991). Should the employer be able to prevail at the “same decision” phase, then the plaintiff is limited to certain forms of equitable relief such as declaratory and injunctive relief as well as attorney’s fees. *Price-Waterhouse*, 490 U.S. at 237-38. Justice O’Connor’s oft-cited concurring opinion in *Price-Waterhouse* advocated for a “direct evidence” threshold to trigger the mixed motive analysis. *Id.* at 270-71 (O’Connor, J., concurring); see *Desert Palace v. Costa*, 539 U.S. 90, 92 (2003) (clarifying that direct evidence is not necessary, only “substantial evidence” — either direct or indirect — would suffice to trigger mixed motive analysis).

²⁷ *Price-Waterhouse*, 490 U.S. at 235.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 236.

³¹ *Id.* at 235.

It's important to note that the *McKenna* case may survive the mixed-motive analysis subsequently announced in *Price-Waterhouse*. The inability of Hopkins to get along with her staff was deemed an insufficient rebuttal of Hopkins' discrimination claims because illegitimate reasons had also motivated the decision. *Price-Waterhouse*, then, fails to interpret a protected group member's alleged lack of collegiality as socially constructed. It merely prohibits an otherwise "legitimate" non-discriminatory reason (inability to get along) from grounding an employer's rebuttal where substantial evidence of illegitimate decision-making exists (here, impermissible sex stereotyping).

3. *Love-Lane v. Martin*:³² A "Personality Conflict" with "Nothing to Do with Race"

Love-Lane v. Martin is a recent case in which an African American female sued the local school board and superintendent over her demotion from assistant principal to teacher, alleging racial discrimination and retaliation for her protest of racial discrimination in the discipline of students.³³ Ms. Love-Lane had worked as an assistant

³² *Love-Lane v. Martin*, 355 F.3d 766 (4th Cir. 2004); see also *Kirk v. Hitchcock Clinic*, 261 F.3d 75, 79 (1st Cir. 2001) (upholding summary judgment by lower court that found that plaintiff failed to demonstrate by preponderance of evidence that employer's proffered justification for adverse employment action — i.e., whistleblower-plaintiff's alleged "lack of collegiality" — was pretextual). See generally *Stavropoulos v. Firestone*, 361 F.3d 610 (11th Cir. 2004). In this case, Carole Stavropoulos, was hired in 1993 as an assistant professor in the School of Art at the University of Georgia. She received excellent performance reviews in 1993 and 1994. In fall of 1994, she was asked to serve on the hiring committee for a computer artist position. Two of the five committee members, including Stavropoulos, determined that a female candidate was the best qualified. But the other three voted for an internal male candidate already employed by the School of Art. Professor Stavropoulos perceived this result to be unfair pre-selection. The two dissenters filed a minority report with the Dean of the School of Art. With the assistance of Professor Stavropoulos, the non-selected female candidate sent a letter to the university legal department stating she believed she was a victim of gender discrimination.

Despite receiving excellent reviews again in 1995, the faculty voted not to renew Professor Stavropoulos' contract in June of 1995, with several faculty members citing the candidate's lack of collegiality that "was insulting and hostile to her fellow faculty members." *Id.* at 613. Stavropoulos appealed the non-renewal successfully, and sued the university for retaliation and violation of First Amendment rights. *Id.* at 615. On appeal of the district court's grant of summary judgment on both claims, the 11th Circuit upheld the lower court on the basis of no adverse employment action since the internal university appeals process returned her to the faculty. *Id.* at 621.

³³ *Love-Lane*, 355 F.3d. at 768

principal at four different elementary and middle schools in the Winston-Salem, North Carolina area before she was assigned to the Lewisville school.³⁴ At each of these prior schools, she received performance reviews that rated her excellent or superior in all aspects of her job, with problem-solving and communications being among her strongest “skill-sets.”³⁵

When Ms. Love-Lane was assigned to Lewisville (a suburban school with a predominantly middle to upper-class white student body with some poor and working-class African American children bused in), the superintendent explained that “an African-American presence” was needed there.³⁶ The teaching staff at Lewisville was “overwhelmingly white” with anywhere from two to six African American teachers at the school out of about one hundred during the time Love-Lane was assigned there.³⁷ The superintendent readily acknowledged that “there were some problematic situations [at Lewisville] in terms of racial perceptions,” and that African American parents viewed the school and the white female principal, Brenda Blanchfield, “negatively.”³⁸ At one faculty meeting when the faculty were discussing when to meet for a satellite PTA meeting, Blanchfield stated, “it did not matter what time the meeting was held since nobody [in that predominantly African American neighborhood] works anyway.”³⁹ In another instance, the principal referred to “CP time” or “colored people’s time.”⁴⁰ Love-Lane accepted the assignment to Lewisville after extracting a promise from Superintendent Martin that he would “monitor” the situation.⁴¹

Soon after her arrival, Ms. Love-Lane discovered a troubling disciplinary practice of teachers disproportionately referring African American boys to the “time out room” for “misbehaving” without proper guidelines for doing so or safeguards to prevent excessive use of the room.⁴² Love-Lane noticed some students were sent to the

³⁴ *Id.* at 769.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 770.

³⁸ *Id.* In particular, Love-Lane had articulated her concerns that she had heard that the principal, Brenda Blanchfield, had difficulty with African American assistants and that the principal had been ineffective or insensitive in addressing the problems and concerns of the Black community. *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 769.

⁴¹ *Id.*

⁴² *Id.* at 770.

disciplinary room for the most minor of infractions and that the room often operated at "standing room only" without any trained staff to supervise activities.⁴³ After holding her tongue the first year, Ms. Love-Lane began to speak out at faculty meetings during her second year at Lewisville about practices and policies she felt were discriminatory to African American and poor white students. She once saw, for example, a teaching assistant "with her foot in a little Black boy's back as he lay on the floor crying."⁴⁴ She also objected to the exclusion of a number of African American and poor white students from a class trip for seemingly minor infractions absent any established criteria for exclusion.⁴⁵ Some of the teachers being criticized for overusing the time-out room and "warehousing" African American boys there resented Love-Lane's criticisms and her allegedly "disrespectful tone" towards them.⁴⁶ Despite receiving a superior evaluation after her first year, and excellent ratings for her work in most areas in her second year, Ms. Love-Lane received lower marks for her communications skills, with the principal finding that 85 percent of the teachers found her "intimidating" and that they objected to her "direct style of communication."⁴⁷

Although Ms. Love-Lane complained directly to superintendent Martin about her perceptions of racial discrimination, he discounted her concerns that Black students were being "denied equal access to education" stating that he "did not agree with her assessment of the situation."⁴⁸ At the end of the second year, Love-Lane requested transfer after the superintendent ignored a second complaint by her about the treatment of African American students. At the close of the second year, Love-Lane was involved in an incident with another teacher in which each accused the other of using profanity. Principal Blanchfield issued a letter of reprimand to both, and the superintendent investigated after Love-Lane filed a complaint, but concluded that Blanchfield's reprimands were justified, that "race had nothing to do with [Love-Lane's problems]" which he deemed a "personality conflict."⁴⁹ He also warned her that another such outburst would be grounds for dismissal.⁵⁰

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 770-71.

⁴⁷ *Id.* at 772.

⁴⁸ *Id.*

⁴⁹ *Id.* at 773.

⁵⁰ *Id.*

Ms. Love-Lane continued to protest what she perceived as unfair racial treatment, and ultimately was demoted to teacher by the principal and assigned to another school. Principal Blanchfield noted on her evaluation memo that she considered Love-Lane's "continued vocal opposition to our implementation of the Time-Out Room as blatant disrespect for me."⁵¹

Love-Lane sued, alleging racial discrimination and retaliation for exercising her First Amendment right to free speech. At trial, the district court granted summary judgment on both claims to the defendants. On appeal, the Fourth Circuit upheld summary judgment on the racial discrimination claim, but reversed on the First Amendment-based retaliation claim. In rejecting Ms. Love-Lane's racial discrimination claim, the court credited the defendant employer's "collegiality" rationale:

The defendants contend that Love-Lane was reassigned because she demonstrated a complete inability to work effectively under Blanchfield and because she failed to meet the expectations laid out for her by [the superintendent] . . . that she had to respect the authority of her principal, register her disagreements in private, and rebuild trust.⁵²

The Fourth Circuit explained that while they reversed on the free speech-retaliation claim, "the fact that Love-Lane has a viable free speech claim does not automatically mean that she has a viable race discrimination claim . . . Love-Lane must demonstrate . . . that she was reassigned because of her race."⁵³ Even more curious, the court determined that Love-Lane's evidence "demonstrates that racial tensions were high at Lewisville during the Blanchfield administration and that Blanchfield herself made racially insensitive comments on at least two occasions, though neither was directed at Love-Lane."⁵⁴

The court relied excessively on the defendant superintendent's determination that Blanchfield's investigation into the altercation incident was not racial. The court also accepted uncritically, the employer's reframing of racial discrimination as legitimate, non-discriminatory "personality conflict" to grant summary judgment on Ms.

⁵¹ *Id.* at 774.

⁵² *Id.* at 788.

⁵³ *Id.*

⁵⁴ *Id.*

Love-Lane's race claim.⁵⁵ The grant of summary judgment under these factual circumstances is particularly troubling considering that courts are supposed to review the facts in the light most favorable to the non-moving party.

Price-Waterhouse provided some initial optimism that the Court's new "mixed motive" framework might offer effective relief for plaintiffs seeking relief from employment discrimination, and more specifically, from the employer's "blame-the-victim" narrative of a difficult employee unable to get along with coworkers that was so effective in the *McKenna* case. However, the significant remedial limitations for the employee-plaintiff and admission of liability for the employer-defendant that attend the mixed motive proof structure render it a much less attractive option for both sides. Unfortunately, the *Love-Lane* case illustrates that recent applications of the classic *McDonnell-Douglas* framework have done little more than accept the employer's assertion of the plaintiff's uncollegiality at face value.

B. Harassment Claims

The cases discussed below involve hostile environment harassment claims. The standard for these claims is whether the hostile or harassing incidents were "pervasive or severe" enough to fundamentally alter conditions of employment and create an abusive working environment.⁵⁶ Despite the "pervasive or severe" standard, these cases invoke the collegiality rationale by importing a shadow *McDonnell-Douglas* structure. This structure seems to credit the employer's "legitimate, non-discriminatory" rationale for an adverse action to explain why the plaintiff's case falls short of the "pervasive or severe" standard.⁵⁷

⁵⁵ *Id.* at 788-89.

⁵⁶ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); *see supra* text accompanying note 17.

⁵⁷ *See, e.g., Hicks v. Gates Rubber Co. (Hicks II)*, 928 F.2d 966, 972 (10th Cir. 1991). In upholding as "not clearly erroneous," the district court's determination that plaintiff Hicks had failed to present proof of evidence of racial and sexual harassment adequate to support a finding of actionable hostile environment harassment, the Tenth Circuit also discussed rather gratuitously for a hostile environment claim, the "evidence in the record that Hicks was discharged for poor performance," including her "trouble getting along with coworkers." *Id.* The poor performance evidence, certainly relevant to an individual disparate treatment claim as the employer's LNR, seems rather curious inserted in *Hicks II* as though to buttress the Tenth Circuit's questionable upholding of the district court's non-finding of sexual harassment.

1. *Hicks v. Gates Rubber Co.*:⁵⁸ "Trouble Getting Along with Co-Workers, Including Women"

In *Hicks*, an African American female security guard sued her employer alleging racial and sexual harassment. When Hicks was hired at Gates Rubber in 1980 as a security guard, she was the only African American woman on the security force, and one of only two Black guards. In her complaint to the EEOC, Hicks stated that her workplace was hostile and that, "[t]he non-Black guards complain about me to one another, make unnecessary comments to one another and to my supervisor about me."⁵⁹ In addition, Hicks alleged that her supervisor named Gleason "patted me on the buttox [sic]" and told her that "he would put his foot up my ass so far that I would have to go to [the] clinic to take it out."⁶⁰ Once, when she was sitting down, Hicks testified that Gleason said "I caught you," or "I got you," and then "proceeded to grab her breasts and get on top of her as she fell over."⁶¹ He also talked of "lazy Mexicans and n**ers" in one incident, and also referred to African Americans as "n**ers" and "coons."⁶² Another guard also harassed Hicks, referring to her specifically as "Buffalo Butt."⁶³ Shortly after filing her charge with the EEOC, Hicks began to receive disciplinary warnings and suspensions, culminating in termination.

At trial, the federal district court for the District of Colorado rejected all of the plaintiff's claims of racial and sexual harassment. The Tenth Circuit upheld rejection of the plaintiff's racial harassment and quid pro quo sexual harassment claims, but reversed and remanded her hostile environment claim.⁶⁴ On remand, the district court found for the employer again and Hicks appealed, arguing that the district court failed to apply the remand mandate set forth by the appellate court to review her case.⁶⁵

The Tenth Circuit once again affirmed judgment for the employer in "*Hicks II*," conceding that while her supervisor's actions and statements

⁵⁸ *Hicks II*, 928 F.2d at 966; *Hicks v. Gates Rubber Co. (Hicks I)*, 833 F.2d. 1406 (10th Cir. 1987).

⁵⁹ *Hicks II*, 928 F.2d at 967.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Hicks I*, 833 F.2d. at 1414, 1416-17, 1419.

⁶⁵ *Hicks II*, 928 F.2d. at 968.

were "boorish,"⁶⁶ there was also evidence that her termination was due to poor job performance.⁶⁷ According to the employer, Hicks was a poor worker who "had trouble getting along with co-workers, including women."⁶⁸ The Tenth Circuit in *Hicks I* specifically directed the lower court on remand to aggregate the incidents of racial harassment and sexual harassment claims to ascertain whether a hostile work environment had been established by Hicks.⁶⁹ However, the appellate court in *Hicks II* seemed to overlook Hicks' intersectionality by emphasizing evidence of an *African American* female's alleged inability to get along with her *white* female colleague. On remand, the district court ultimately concluded that the supervisor's and co-workers' comments were insufficiently hostile and represented little more than "a few isolated incidents of racial enmity."⁷⁰

Thus, not only did the district court fail to recognize incidents of racial harassment as part of a larger sexual harassment claim, thereby acknowledging Hicks' "intersectionality," but the appellate court also adopted a disaggregated subject — i.e., divorcing Hicks' gender identity from her racial one — when it penalized Hicks for not getting along with fellow co-workers, "including women." From a critical race feminist perspective, it was inconsequential that some of the racial epithets were uttered by white women in Hicks' case. At the original trial, Gates' employees testified that the work environment was one in which "racial slurs and jokes were tolerated."⁷¹ Thus, the *female* identity of her co-workers did not undermine her claims of racial hostility, or for that matter, what I'd refer to as "racialized sexual harassment" or sexual harassment that has a racial content or context.⁷² Again, the court

⁶⁶ *Id.*

⁶⁷ *Id.* at 972.

⁶⁸ *Id.*

⁶⁹ *Hicks I*, 833 F.2d at 1416-17.

⁷⁰ *Hicks II*, 928 F.2d at 972-73.

⁷¹ *Hicks I*, 928 F.2d. at 1409.

⁷² See generally Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997) (arguing that women of color are subjected to unique workplace hazard of "racialized sexual harassment" due to complex of raced and gendered subject positions and power relations of harassers and victims); Kimberlé Crenshaw, *Race, Gender & Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992) (discussing dual vulnerability of African American women to sexual harassment due to intersection of dynamics of race and gender); Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183 (2001) (reporting research findings of racial disparity in sexual harassment cases in EEOC charge filings and federal court from 1992 to 1999, suggesting

uncritically applied the construct of collegiality from the perspective of the harasser to effectively silence a plaintiff resisting such harassment.⁷³

2. *Landgraf v. USI Film Products*⁷⁴

In *Landgraf v. USI Film Products*, female employee Barbara Landgraf resigned after filing a sexual harassment complaint at her production plant. She complained of “continuous and repeated inappropriate verbal comments and physical contact” by a co-worker, John Williams, who also served as union steward.⁷⁵ Landgraf’s immediate supervisor took no action despite her repeated complaints. Williams was investigated only after Landgraf complained to the company’s personnel manager. Following a formal investigation in which four other women corroborated Landgraf’s harassment claims of inappropriate touching and verbal comments, the offending supervisor was “technically transferred to another department” although USI officials admitted that he would still regularly visit Landgraf’s work area.⁷⁶ The transfer was not a form of company discipline. Williams was not otherwise disciplined, despite written policies listing sexual harassment as an offense “requiring suspension or dismissal.”⁷⁷

Following her complaint and the company investigation, at least two of Landgraf’s superiors took her aside to notify her that her complaint had been acted upon, but without disclosing the actions taken against her harasser. They further informed her that she was “among [her] own worst enemies” and that she was “very unpopular.”⁷⁸ During the course of the company’s investigation of the incidents, officials inquired not

that harassers target women of color at higher rate than white women).

⁷³ See also *Ramsey v. City and County of Denver*, 907 F.2d 1004, 1011 (10th Cir. 1990) (affirming district court finding for employer on basis that “plaintiff’s personality was the primary force behind her failure to advance with the City”). In *Ramsey*, the appellate court acknowledged that Ramsey’s supervisor was “widely known to have ideas about women’s place in the workforce” and had testified that women are “better suited to some jobs than to others.” *Id.* at 1008. Nevertheless, the appellate court concluded that the female employee had failed to establish a *prima facie* sexual harassment case since “any change in her working conditions or terms of her employment was her own fault.” *Id.* at 1006. The Tenth Circuit noted reports that Ramsey “was difficult to work for” because she was “over-demanding and overbearing” with one employee (whom she complained was an “overt sexist”). *Id.* at 1009-10.

⁷⁴ *Landgraf v. USI Film Prods.*, 968 F.2d 427 (5th Cir. 1992).

⁷⁵ *Id.* at 429.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

only about the alleged harasser's behavior, but also about Landgraf's relationships with other employees. Two shifts later, Landgraf resigned, addressing a letter to her colleagues stating that "the stress that each one of you help [sic] put on me, caused me to leave my job."⁷⁹

Landgraf brought harassment and retaliation claims against USI. The district court found that the employer took reasonable steps to end the harassment, and that evidence did not support the employee's claim of constructive discharge or retaliation. Upon review, the Fifth Circuit agreed with the district court's dismissal of the retaliation claim for lack of adverse employment action. The district court determined as a factual matter (and the Fifth Circuit upheld as not clearly erroneous), that the plaintiff resigned her job because of her "trouble getting along with her co-workers," and not because of the harassment.⁸⁰

What seems perplexing here is the courts' utter inability to imagine how the plaintiff might have resigned for both reasons, and that not getting along with co-workers was a byproduct of the original harassment. It is also startling under these facts, how the district court was unable to connect the dots when it appears that management played a role in creating plaintiff's "trouble getting along with her co-workers." Despite Landgraf's arguments that her troubles with co-workers stemmed from Williams' harassment, the appellate court upheld the district court's contrary finding.

Three problems with employers' "collegiality rationale" emerge from these cases ranging from circumstantial disparate treatment to hostile environment harassment and retaliation cases under Title VII. First, courts have no mechanism or mode of analysis to ferret out whether the "personality conflict," "uncollegiality" or "not getting along with others" has merit or whether it is merely pretext for discrimination complained about by the plaintiff. Second, in the absence of any method of distinguishing between meritorious and pretextual assertions, courts seem to be "double crediting" an employer's "legitimate non-discriminatory reason" not only at the second stage of the traditional *McDonnell-Douglas* burden-shifting structure, but also at the pretext stage where mere articulation of the collegiality trump card serves to undo any pretextual showing of the plaintiff. In harassment cases, courts seem to be invoking the collegiality rationale inappropriately as an employer LNR to further buttress a non-finding of hostile environment

⁷⁹ *Id.*

⁸⁰ *Id.* at 431.

under a “pervasive or severe” analysis. Finally, courts seem to lose sight of complex workplace dynamics involving power and discrimination and its effects on workplace culture. As such, courts seem to adopt an entirely too simplistic “either/or” approach to the she said discrimination/he said uncollegiality paradox. Rather than assuming that it’s either discrimination or uncollegiality, courts should consider that it might be both, and that plaintiffs are viewed by co-workers as uncollegial because they have been discriminated against. Moreover, if unpopularity or uncollegiality is largely a byproduct of discrimination, then courts should not credit such rationales as “legitimate and nondiscriminatory.”

In light of the legal doctrine of hegemonic collegiality discussed above, I will now consider the legal scholarship on the topic for the purpose of developing doctrinal reforms and cultural strategies to contain the operation of the "collegiality trump card" in the workplace and in the courts. It should be noted that the cases discussed above are drawn from a wide range of employment contexts. However, what little legal scholarship exists on collegiality hails from a much narrower range of employment discrimination cases — primarily in academia.

II. EXISTING APPROACHES TO ANALYZING THE "COLLEGIALITY RATIONALE" IN EMPLOYMENT DISCRIMINATION CASES

Despite the social and legal significance of collegiality or "getting along" with others as a performance-based consideration for employment, there has been relatively little written on the topic. The most coverage in legal scholarship has focused upon the application of collegiality in the field of academic employment. Unfortunately, there is far less consideration in the literature about the "getting along" aspect in other workplace contexts, especially in working-class or other professional class jobs outside of academia. Although the discussion of the legal literature on collegiality in this Part focuses on academic employment, I will propose more exacting tests for courts to apply when scrutinizing an employer's "legitimate nondiscriminatory reason." In Part III, I will discuss how these tests apply to workplaces beyond academic institutions.

A. *The Emergence of "Collegiality" as a Legally-Recognized Factor*

The actual term, "collegiality," first emerged in a 1981 Fourth Circuit Court of Appeals decision involving a university tenure denial case, *Mayberry v. Dees*.⁸¹ In *Mayberry*, Assistant Professor Mayberry was denied tenure despite five previous, uniformly favorable annual evaluations.⁸² He sued, alleging that his tenure denial was due to retaliation against him for criticizing the chair of his department in the exercise of his First Amendment rights of free expression.⁸³

At trial, Professor Mayberry prevailed before a jury on both the First

⁸¹ *Mayberry v. Dees*, 663 F.2d 502, 514 (1981).

⁸² *Id.* at 512; see also Perry A. Zirkel, *Mayberry v. Dees: Collegiality as a Criterion for Faculty Tenure*, 12 ED. LAW REP. 1053, 1053 (1983).

⁸³ *Mayberry*, 663 F.2d at 504.

Amendment and breach of contract claims, winning compensatory and punitive damages.⁸⁴ The trial judge awarded five years back pay but no reinstatement. On appeal, a panel of the Fourth Circuit initially upheld the jury verdict, but reversed the trial judge's award of remedies.⁸⁵ In an unusual case history, another reconstituted panel of the Fourth Circuit then decided to rehear the case, and ultimately reversed the findings of liability by the jury and first Fourth Circuit panel, determining that Mayberry had not established his First Amendment claims.⁸⁶

Collegiality became a significant consideration to rebut Mayberry's claim of discrimination. To counteract the five positive reviews and five contract renewals he had received up to his tenure denial, the Fourth Circuit determined that tenure involves far more than the "mere passage of time in service."⁸⁷ It also included plaintiff demonstrating a "developed collegiality."⁸⁸ The court proceeded to define collegiality as "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests."⁸⁹

1. Early Critics of Collegiality: From Professor Zirkel to Dyer

Following the *Mayberry v. Dees* case, the topic of collegiality barely registered in legal scholarship. Professor Perry Zirkel was one of the first and only legal scholars to publish significantly on the topic of collegiality in the first two decades following the 1981 case.⁹⁰ Professor Zirkel warned of the use of collegiality as subterfuge in academic employment decisions that would negatively impact the meaning and operation of "the robust exchange of ideas" at institutions of higher education.⁹¹

In a follow-up article entitled, *Personality as a Criterion for Faculty*

⁸⁴ See Zirkel, *Mayberry v. Dees*, *supra* note 82, at 1054. As Professor Zirkel reported soon after the appellate cases, the trial court decision was not reported and was only referred to "peripherally" in the reported Fourth Circuit opinion of the reconstituted panel. The original Fourth Circuit panel opinion that contained a more detailed account of the trial court's decision in *Mayberry* was subsequently withdrawn.

⁸⁵ *Id.* at 1055.

⁸⁶ *Mayberry*, 663 F.2d at 505.

⁸⁷ *Id.* at 514.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Zirkel, *Mayberry v. Dees*, *supra* note 82, at 1059 (warning that *Mayberry v. Dees* "would seem to encourage the uncritical use of collegiality as overt or even covert criterion for faculty tenure decisions").

⁹¹ *Id.*

Tenure: The Enemy It Is Us,⁹² Professor Zirkel elaborated his critique of *Mayberry v. Dees*. He called for a more exacting judicial review of cases in which institutions of higher education base negative employment actions upon collegiality or other seemingly personality-based criteria.⁹³ Noting that the judicial deference granted to academic institutions historically was for the purpose of promoting academic freedom, Zirkel argued that the standard for review involving cases claiming infringement of individual academic freedom should be less deferential. Rather, Zirkel reasoned that "an approach that pierces the veil of institutional autonomy when there is a threat to individual autonomy is necessary."⁹⁴ In other words, where a university or college interferes with the robust exchange of ideas, it foregoes the judicial deference granted to preserve the free flow of ideas.⁹⁵ To arrive at this conclusion, Professor Zirkel reviewed a variety of alarming examples of faculty behaviors — namely "[s]upport for teacher organizations, Marxist philosophy, or other 'non-Establishment' causes" that are deemed in case law to fall outside of the acceptable limits of "collegiality."⁹⁶

Expanding upon Professor Zirkel's reforms, Professor Edgar Dyer proposes a new standard for the use of collegiality in cases involving claims of freedom of speech in public higher education.⁹⁷ Dyer's objective is to provide "the utmost protection to the spoken, written, or artistic expressions of an academician" who is speaking *as an academician*.⁹⁸ Where academic faculty are speaking within their field of expertise to advance truth-seeking, Professor Dyer advocates for abandoning the *Pickering-Connick* balancing test⁹⁹ traditionally applied in such cases to weigh appropriately the plaintiff's interest in academic freedom against the employer-defendant's interest in a non-disruptive,

⁹² Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223 (1984-85).

⁹³ *Id.* at 237-43.

⁹⁴ *Id.* at 238.

⁹⁵ *Id.*

⁹⁶ *Id.* at 235.

⁹⁷ Edgar Dyer, *Collegiality's Potential Chill over Faculty Speech: Demonstrating the Need for a Refined Version of Pickering and Connick for Public Higher Education*, 119 EDUC. L. REP. 309, 319-22 (1997).

⁹⁸ *Id.* at 319-20.

⁹⁹ In this balancing test, a public employee's comments about a matter of public concern are protected speech. The determination of whether employee speech constitutes a public concern is made by the "content, form, and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

efficient workplace.¹⁰⁰ Referring to a balancing of interests as “absurd” in these circumstances, he suggests that if the speech is purely academic, then no balancing should be able to remove such expression from protection.¹⁰¹ The touchstone to determining whether expressions fall within the “truth-seeking” exception is “intellectual honesty.”¹⁰² Interestingly, Professor Dyer serves as University Counsel for Coastal Carolina University in South Carolina, and contrary to his university official peers, is the only one to advocate for stronger protections for faculty expressions in the face of charges of uncollegial behavior.

Perhaps heeding Zirkel’s and Dyer’s early warnings, the American Association of University Professors (AAUP) adopted a position in 1999 advocating against the increasing use of collegiality as a separate criterion for the evaluation of faculty members, a development the AAUP characterized as “highly unfortunate.”¹⁰³ The AAUP elaborated the dangers of such a standard that has been associated with promoting conformity and homogeneity, “and hence with practices that exclude persons on the basis of their difference from a perceived norm.”¹⁰⁴ While not denying the importance of collegiality generally to academic life, the AAUP concluded that the “very real potential for a distinct criterion of ‘collegiality’ to cast a pall of stale uniformity places it in direct tension with the value of faculty diversity in all its contemporary manifestations.” Certainly, the association argued, a university “replete with genial Babbitts” is not the place for a society “to look for leadership.”¹⁰⁵ The AAUP further argues against collegiality as a separate criterion of evaluation due to its threat to academic freedom and its potential for “chilling faculty debate and discussion.”¹⁰⁶

The early critics of the use of collegiality in academic decision making primarily raise First Amendment or freedom of expression concerns.¹⁰⁷ While they tend to acknowledge the possibility of worksites that promote conformity and homogeneity, most conceive of the university

¹⁰⁰ Dyer, *supra* note 97, at 321.

¹⁰¹ *Id.*

¹⁰² *Id.* at 320.

¹⁰³ AM. ASS’N OF U. PROFESSORS, ON COLLEGIALLY AS A CRITERION FOR FACULTY EVALUATION (1999), available at <http://www.aaup.org/statements/Redbook/collegia.htm> [hereinafter AAUP STATEMENT].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *supra* notes 108-23 and accompanying text.

as a "free marketplace of ideas" utopia to be preserved through careful limitation of the collegiality norm.¹⁰⁸ Far less attention is paid to the problem of deploying collegiality as a cover for employment discrimination, and no scholar seriously considers that the workplace routinely may be a hostile, unequal site for members of outsider groups. Thus, the emphasis for reform revolves around preserving "individual autonomy"¹⁰⁹ or protecting the occasional "gadfly."¹¹⁰

It is very possible that this high-profile, influential statement by the AAUP adopted at the very end of the 20th century (along with some celebrated media cases involving tenure denial on the grounds of uncollegiality) prompted the renewed interest in the topic of collegiality in the first five years of the 21st century, two decades after *Mayberry v. Dees*.

B. Recent Proponents of Collegiality

For the most part, more recent articles assess the treatment of the topic by the courts, observing the main legal challenges to using collegiality as a criterion.¹¹¹ These legal challenges involve primarily breach of contract claims and academic freedom or free speech concerns.¹¹² While most commentators acknowledge the potential abuse of such a standard, they nonetheless uphold the importance of collegiality to the workplace, and merely work to propose reforms to make collegiality work more fairly. In this second generation of legal scholarship, most commentators are proponents of collegiality as a factor in employment. In part, this orientation may be attributable to the authors' positionality within academic institutions, with most writing favorably about collegiality having held positions of authority in the academic hierarchy — either as general counsel to a university, or as upper-level administrators. It makes sense that those charged with running a university on a day-to-

¹⁰⁸ See, e.g., Dyer, *supra* note 97, at 320 (asserting that "[t]he truth is best gleaned from fallacy in a 'marketplace of ideas,' which requires the freedom to express propositions or theories without fear of any form of reprisal" (citation omitted)); Zirkel, *supra* note 92, at 243 (closing commentary with cite from *Gray v. Board of Higher Education*, 692 F.2d 901, 909 (2d Cir. 1982): "[The university] campus [is] a forum whose chief and high purpose is the robust exchange of ideas But academic freedom is illusory when it does not protect faculty from censorious practices but rather serves as a veil for those who might act as censors." (citation omitted)).

¹⁰⁹ Zirkel, *supra* note 92, at 238.

¹¹⁰ AAUP STATEMENT, *supra* note 103.

¹¹¹ See discussion *infra* Part II.B.

¹¹² See *id.*

day basis would most see the need for a cooperative ethic and spirit among the faculty, and be less critical overall of its potential abuses. Moreover, the strong AAUP stand, critical of the use of collegiality as a separate factor in the evaluation of faculty, may have prompted defenders of collegiality to reply at a higher rate than its critics.

1. Connell and Savage: Defending University Use of Collegiality Standards

In their 2001 article entitled, *The Role of Collegiality in Higher Education Tenure, Promotion, and Termination Decisions*, Mary Ann Connell and Frederick G. Savage review the state of the law regarding the consideration of collegiality in academic employment decisions.¹¹³ They review the arguments for and against the consideration of collegiality, and analyze how such arguments have fared in academic employment discrimination claims. On the “pro” side, Connell and Savage summarize that the three main arguments deployed involve the institutional interest in cooperative, collaborative behavior; the reasonableness of such an expectation of collegiality that is without question in the “business world” and therefore should apply to the academy; and that the courts have overwhelmingly supported the consideration of collegiality.

The authors then detail the criticisms of collegiality, detailing the three main arguments used in court to contest the application of collegiality as a decision making factor in employment. According to Connell and Savage, the three main arguments against collegiality are: 1) its use constitutes a *breach of contract*; 2) its use reflects an employer’s *pretext for discrimination*; and 3) its use violates *academic freedom* or freedom of speech. Although Connell and Savage appear to be simply reviewing the pros and cons of collegiality according to its supporters and critics in a “just-the-facts, ma’am” sort of way, they conclude that courts have upheld “at every turn” the deployment of the collegiality rationale in key employment decisions involving faculty, “usually because of the recognition that collegiality is an important factor in the ability of colleges and universities to fulfill their missions.”¹¹⁴

Ultimately, Connell and Savage provide their punch line in the article’s last sentence: “Given the weight of the decisions by the courts on

¹¹³ Connell & Savage, *supra* note 10.

¹¹⁴ *Id.* at 858.

the issue of collegiality, the authors have concluded that institutions of higher learning should feel confident in considering collegiality in faculty decisions and that it is unnecessary for them to specify collegiality as a separate and distinct criterion."¹¹⁵ The neutral stance gives way to that of the university attorney counseling her client: "[G]o ahead and do what you want, because the courts are with you." While I do not find fault with the accuracy of Connell and Savage's assessments of the law, I do not find their proposal to continue the status quo as a helpful contribution to challenging the hegemonic definition of collegiality.

2. Former Associate Dean Seigel: Uncollegiality as Individual Psychoses

Three major law review articles on collegiality appear in 2004, with all three authors favoring the continued use of collegiality in [academic] employment decisions.¹¹⁶ Professor Michael Seigel, provides the strongest defense of collegiality of the three, starting by acknowledging the subjective nature of collegiality and offering his definitions of "baseline (or passive) collegiality,"¹¹⁷ "affirmative collegiality,"¹¹⁸ and "affirmative uncollegiality."¹¹⁹ After providing these categorizations of collegiality, Professor Seigel then engages a cost-benefit analysis of the enforcement of the norm of collegiality as a criterion in academic employment. Here, Professor Seigel is able to draw upon his two years experience as Associate Dean for Academic Affairs at the University of

¹¹⁵ *Id.*

¹¹⁶ Gregory M. Heiser, "Because the Stakes Are So Small": Collegiality, Polemic, and Professionalism in Academic Employment Decisions, 52 U. KAN. L. REV. 385, 420, 427 (2004) (redefining and endorsing collegiality as professionals of equal status taking responsibility for their organization's governance); Leonard Pertnoy, *The "C" Word: Collegiality Real or Imaginary, and Should It Matter in a Tenure Process*, 17 ST. THOMAS L. REV. 201, 223 (2004) (arguing that collegiality is "necessity" that "needs to be taken out of obscurity and added into a rigid list" of criteria for evaluation of professors); Michael L. Seigel, *On Collegiality*, 54 J. LEGAL EDUC. 406, 440 (2004) (concluding that "[f]ailure to maintain collegiality is potentially costly to morale and productivity of an institution").

¹¹⁷ Professor Seigel defines baseline collegiality as "conducting oneself in a manner that does not impinge upon the ability of one's colleagues to do their jobs or on the capacity of one's institution to fulfill its mission." Seigel, *supra* note 116, at 411.

¹¹⁸ In addition to doing their job "exceptionally well," affirmatively collegial faculty also "typically go beyond the call of duty in some aspect(s) of their job." *Id.* at 414.

¹¹⁹ According to Seigel, affirmative uncollegiality is the mirror opposite of baseline collegiality — i.e., "conduct that interferes with the ability of one's colleagues to do their jobs or with the capacity of one's institution to fulfill its mission." *Id.* at 415.

Florida, Levin College of Law, to analyze the benefits of collegiality-based decision making — i.e., providing positive role models for students, retaining and attracting quality faculty, and developing and maintaining a supportive and rewarding workplace environment. In terms of costs, Professor Seigel readily acknowledges the potential pitfalls of the collegiality norm as a subterfuge for illegal discrimination,¹²⁰ as well as the potential tension between the enforcement of collegiality and academic freedom.¹²¹

After reviewing the benefits and costs of enforcing a collegiality norm in the workplace, Professor Seigel concludes that the AAUP position of “eschewing enforcement altogether” is unwarranted and ill-advised as it rewards the few very aggressive “bad actors” on a faculty. He attempts to “strike a balance” by advocating for a “baseline collegiality” requirement for faculty as part of an adopted set of internal guidelines. At the same time faculties adopt this “baseline collegiality” standard, he simultaneously favors “guarding vigilantly against its use to silence or impede the unusual, unpopular, or unorthodox.”¹²²

Professor Seigel then discusses methods to achieve such a delicate balance in the next thirteen pages of the article. But of those thirteen pages, only one page is devoted to policing against potential violations of academic freedom or discrimination.¹²³ The remaining twelve of thirteen pages go to policing against potential uncollegial behaviors, complete with psychological profiles of uncollegial faculty — from “Hostile Aggressives,”¹²⁴ (“HA”s) to “Sarcastic Wits,”¹²⁵ (“SW”s) and “Borderline Personality Disorder”¹²⁶ (“BPD”s). Thus, even though the “balancing” of costs and benefits are discussed, the sheer “unbalance” in the text tipping towards enforcement mechanisms for collegiality seem to reveal the true emphasis of Professor Seigel’s concern. For Professor Seigel, the collegiality problem is largely rooted in the individual psyches and personality disorders of faculty members: “The problem of collegiality in academia is like a crazy aunt in the family: ever present, whispered about in hallways, but rarely acknowledged directly.”¹²⁷

¹²⁰ *Id.* at 426.

¹²¹ *Id.* at 424.

¹²² *Id.* at 427.

¹²³ *Id.* at 428.

¹²⁴ *Id.* at 434-35.

¹²⁵ *Id.* at 435-36.

¹²⁶ *Id.* at 436.

¹²⁷ *Id.* at 440.

3. Assistant Provost Heiser: Collegiality Among Independent Professional Equals — A Sociological vs. "Overconstitutionalized" Approach

Perhaps the most challenging and troubling of the trio of 2004 law review articles on collegiality is that of Professor Gregory Heiser. In Heiser's article, "*Because the Stakes Are So Small*": *Collegiality, Polemic, and Professionalism in Academic Employment Decisions*, he rejects an individualized or psychological treatment of collegiality that Professor Seigel seems to indulge.¹²⁸ Instead, Professor Heiser adopts a sociological definition of collegiality that conceptualizes it as a structural quality of organizations, or more specifically, "as a defining element of self-governing professional organizations."¹²⁹ Contrasted with bureaucracies marked by strict hierarchies, Professor Heiser argues that "[c]ollegiality matters most among independent professional equals, least among subordinate Employees in a bureaucracy."¹³⁰ Professional, collegial organizations, such as medical associations, university faculty, and law firms, differ from bureaucratic ones insofar as the former are comprised of a body of highly trained and autonomous experts who are "theoretical equals" in their levels of specialized expertise.¹³¹ While these professionals are highly autonomous, they are not self-contained. Thus, Heiser argues that collegiality as a value is empirically different in professional settings versus bureaucratic ones. In professional settings, collegiality is important to foster. This includes collaboration among equals in a non-hierarchical organization to further its goals.¹³² In contrast, hierarchical bureaucracies further their goals by relying upon the exercise of authority by superiors, punishing insubordination or subordinates, and incentivizing production.¹³³

Understood in this more structural context, Professor Heiser proceeds to critique the treatment of collegiality in employment cases by the courts. He takes particular aim at the application of the *Pickering-Connick* balancing test to weigh a plaintiff's academic freedom claims against the

¹²⁸ Heiser, *supra* note 116, at 387 (suggesting that collegiality not be considered "personality trait of individuals" but as possessing structural quality as social scientists conceive of it).

¹²⁹ *Id.*

¹³⁰ *Id.* at 388.

¹³¹ *Id.* at 408.

¹³² *Id.* at 412.

¹³³ *Id.*

public employer-defendant's stated concern of collegiality.¹³⁴ Here, Heiser advocates, the "overconstitutionalized" First Amendment approach to *Pickering-Connick*. He argues that courts should cede to the insights of sociologists by taking proper account of the role of collegiality in professional settings. The two-part balancing test first inquires whether the subject matter is one of "public concern" that is afforded protection. If so, then the second part of the test asks whether the expression in question disrupted the efficient operation of the workplace. Professor Heiser seeks to intervene on both prongs of the test, first by expanding the notion of "public concern" to consider the significance of professional academic decisions regarding disciplinary matters; and second, by expanding the employer's interest in efficiency include "unfettered but civil academic discourse" in college or university settings. Much of Professor Heiser's criticisms of the overconstitutionalized approach stem from the insights gleaned from sociological studies of professional organizations marked by the high degree of autonomy and specialization shared by individual and equal members of the collective workplace. But it is important to note that the assumption of equality among the members is exactly what is non-existent in cases involving employment discrimination.¹³⁵

In addition to his criticisms of the *Pickering-Connick* test as applied to the First Amendment/collegiality opposition, Professor Heiser also advocates for continued judicial deference to academic decision-making¹³⁶ on the grounds that such decisions represent the exercise of professional discretion as opposed to "standardless personal prejudices or an inherently suspect imposition of uniformity." However, this contention begs the question: how does one know when "professional discretion" vs. "personal prejudice" is being exercised? While Heiser is quick to embrace sociological approaches to understanding the structural quality of collegiality in the professions, he fails to acknowledge sociological approaches to understanding the cleavages of race, class, gender, and sexuality in the workplace that give rise to pretextual reliance upon "collegiality" as a criterion for adverse

¹³⁴ *Id.* at 399-405.

¹³⁵ See discussion *infra* Part I (providing examples of cases lacking this assumption of equality).

¹³⁶ Professor Heiser acknowledges that collegiality cases may not deserve the full measure of judicial deference afforded to "academic judgments." However, he still advocates for a presumption that such deployments involve the exercise of professional discretion and not personal prejudices. Heiser, *supra* note 116, at 427.

employment actions. The continued judicial deference towards academic institutions on questions of collegiality that Professor Heiser advocates may be in part understood through Heiser’s position within the structure of the professional organization of which he is a part. As Assistant Provost at the University of Oklahoma, Heiser, like Connell and Savage and Seigel may be more accustomed to understanding the benefits versus the pitfalls of the operation of the collegial norm, and identify more closely with the university-defendant when shaping legal reforms.

4. Professor Pertnoy: A Call for “Objective Collegiality”

The third in the trio of articles to appear in 2004 issues a general critique of the vague, subjective nature of the term collegiality, and reviews the possible dangers of its application as an employment criterion. Like Connell and Savage, Professor Pertnoy covers the three most common concerns about collegiality’s use — as “cover-up” for discriminatory pretext, as stifling of academic freedom, and as breach of contract. At bottom, however, he aims to add collegiality as a separate criterion and as a “common sense” measure for academic employment: “Would you work for the rest of your career with others that are uncivilized and lack a positive demeanor?” Pertnoy’s proposal primarily advocates for greater “objectiveness” and for adding collegiality as a fourth factor to be considered in academic employment (contrary to the AAUP position).¹³⁷ “By clearly defining the term and explicitly applying and including it in the tenure evaluation, it is possible to make it as objective as humanly possible.”¹³⁸ For critical theorists, the call towards “objectiveness” appears at best, naïve, as does Pertnoy’s dismissal of the dangers of collegiality serving as pretext for discrimination based upon his belief that discrimination “can be controlled by well established criteria.”¹³⁹

The major law review articles on collegiality to emerge in the 21st century are careful to acknowledge the potential dangers of the use of collegiality as pretext for discrimination or threat to academic freedom as unusual exceptions to the truth-seeking university. Ultimately, however, each scholar advocating for collegiality works to further entrench the use of hegemonic collegiality by courts, which includes maintenance of

¹³⁷ Pertnoy, *supra* note 116, at 222.

¹³⁸ *Id.*

¹³⁹ *Id.* at 217.

historic deference to academic institutions by crediting the face-value importance of collegiality and the existence of its breach. The workplace is understood to be mostly a functioning and fair place to these authors, one for which the benefits of collegiality clearly outweigh its costs. Four of the five authors advocating in favor of collegiality as an employment criterion represent university interests as either general counsels or upper-level administrators. Certainly, it is legitimate for those officials who have had extensive experience with the benefits and pitfalls of university standards employing collegiality as an evaluative criterion. However, my larger point is one of power and context in defining how courts should analyze claims of uncollegiality by employers. It is my aim to reject hegemonic collegiality and to attempt to define a more transformative model of collegiality that can be operationalized by courts and co-workers on the job in a range of employment contexts.

III. TOWARDS A CONCEPTUALIZATION OF "TRANSFORMATIVE COLLEGIALLY"

A more enlightened definition of collegiality must recognize power imbalances and oppressive cultures in the workplace. In essence, I advocate for a "transformative collegiality" that would be supportive of challenges to unequal power exercised in the workplace along the major fault lines of race, gender, sexuality, class, disability, etc. Absent such legal and cultural transformations, hegemonic collegiality will continually be deployed to dismantle employment discrimination claims and to foster a form of outsider-based "censorship." Absent reforms, courts will continue to impose externally a default hegemonic collegiality by accepting uncritically at face value, the employer-defendant's collegiality-based rebuttal of the allegation of discrimination and granting undue judicial deference to an employer's decision making. Thus, workplace cultures will continue to reproduce the status quo internally through the norms and expectations of hegemonic collegiality itself.

If one takes seriously the writings of critical scholars in law, the extant literature on collegiality falls far short of redressing structural and cultural barriers to equality, and fails to account for the ways in which workplace identities are shaped and performed in recognition of structural barriers, including raced and gendered stereotypes.¹⁴⁰ In

¹⁴⁰ See discussion *infra* Part II.

contrast to such scholars as those discussed above, the work of Professors Devon Carbado and Mitu Gulati on *Working Identity* is most helpful to illuminate the problems of hegemonic approaches to the collegiality conundrum.¹⁴¹

In *Working Identity*, Carbado and Gulati surface a form of employment discrimination that lies far below the radar — i.e., the unwritten job description for outsider employees who must perform their identities to the satisfaction and/or comfort of their insider-colleagues and superiors.¹⁴² Unlike the collegiality commentators reviewed above, Professors Carbado and Gulati's starting assumption for the workplace is a site in which widespread stereotyping of outsider groups is the norm, not the exception.¹⁴³ As such, Carbado and Gulati analyze that an outsider attempting to fulfill expectations around institutional values, such as collegiality, faces a "sliding scale" of interpretation based upon the dominant positive or negative stereotypes about one's particular identity coordinates.¹⁴⁴ In other words, the words and actions of the outsider are filtered through the interpretive lens of the dominant cultural insider, an interpretive lens not immune from widespread societal stereotypes. Layered on top of this challenge for outsider employees, is the additional irony of working in a post civil rights era in which colorblindness is the default racial ideal in the workplace. Although there are actual expectations about how a "typical" or "normal" (i.e., stereotypical) African American male or Asian American female should or would act at the workplace, these expectations are never surfaced openly. Thus, the identity performance strategies selected by outsider employees are all the more perplexing as well as hazardous.¹⁴⁵

What is so important about the work of Carbado and Gulati for this topic, is that it reveals how culturally-contingent and power-sensitive the definition of workplace values such as collegiality are, according to one's race and gender among other identity characteristics. Failure to

¹⁴¹ See generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1277-78 (2000) (providing particularly insightful passage about no-win conundrum facing employees of color in navigating between charges of uncollegiality and confirmation of negative racial stereotypes).

¹⁴² *Id.* at 1262-70.

¹⁴³ *Id.* at 1279 (providing but one example of this differing starting assumption, authors state rather matter-of-factly that, "[p]erforming identity consumes resources in the form of time and effort, which is one of the costs of discrimination.").

¹⁴⁴ *Id.* at 1267-70.

¹⁴⁵ *Id.* at 1285-88.

recognize this contingency in the understanding of collegiality results in the problematic mode of utilizing a hegemonic collegiality, which essentially says, “collegial is as the dominant, discriminating group says it is.” In the sections below, I will propose some doctrinal and cultural strategies to help courts and workers apply a more contextually appropriate transformative collegiality that valorizes workplace equalization and positive cultural change.

A. Doctrinal Reframings: Shifting the Burden in Unequal Environments

If one considers as a starting point, the definitional hallmark of collegiality, the equal vesting of power and authority among each of a number of colleagues,¹⁴⁶ one may reconsider existing doctrine surrounding judicial deference to the employer rebuttal of “collegiality.” Specifically, where the workplace is unequal among colleagues, particularly for reasons prohibited by antidiscrimination laws, then the proper work of collegiality is to bring about a state of equality. If one takes such equalization work seriously, one understands that progress will not be made without conflict and tension, particularly for those viewed as “pushing the envelope” of change. Thus, courts should subject the employer’s rationale that the employee did not “get along with others,” was “uncivil” or “uncollegial” to a more exacting review rather than accepting at face value, the proffered reason for negative job action.

The current judicial approach to analyzing competing claims of discrimination vs. uncollegiality tends to simply cycle the claims in rote order through the *McDonnell-Douglas* (or mixed motive) proof structure.¹⁴⁷ However, doing so treats the collegiality trump card of the employer as though it is wholly unrelated to the underlying claim of discrimination, harassment and/or retaliation. Given the inferential proof structure developed for circumstantial cases of disparate treatment employment discrimination, there is a logical fallacy that attaches to such treatment — i.e., that the assertion of uncollegiality as the employer’s LNR for its adverse actions against the employee-plaintiff is presumptively non-discriminatory. Once the employer’s stated

¹⁴⁶ This definition is consistent with the *Webster’s Dictionary* definition. See *supra* note 11, and accompanying text. It is also consistent with the sociological understanding of collegiality summarized in Professor Heiser’s work. See Heiser, *supra* note 116 and accompanying text.

¹⁴⁷ See discussion *infra* Part I.

“collegiality” rationale is accepted at face value by courts as its LNR, the primary route for the plaintiff to carry her burden of proving discriminatory intent is to cast doubt on the veracity of the stated LNR as the “real reason” for the challenged actions.

Thus, by establishing that the non-discriminatory reason offered is “false” and it did not truly motivate the employer decision making, the plaintiff may prevail before fact-finders on the pretextual showing. However, the problem with the “uncollegiality” LNR offered by the employer, is that it very well may be the “true” reason for the employer’s actions, *and* still be discriminatory. The common error inheres in the automatic relegation of “uncollegiality,” “not getting along,” or “personality conflict/disorder” being forwarded as a *nondiscriminatory* reason.

Before such a generally neutral sounding reason can be accepted as nondiscriminatory, courts should adopt more searching inquiries to prevent mere re-articulation of discrimination as the plaintiff’s personality disorder or lack of social skills or judgment. Foregoing this inquiry means that plaintiffs will be subjected to a “popularity contest” for their claims, often in a hostile environment in which their jury may also be the perpetrators, or in the alternative, co-workers under the vise of hegemonic collegiality who prefer not to confront or contradict those in power. As an analogy, foregoing a more searching inquiry might be equivalent to allowing harassers to define whether their harassing behavior was welcome, pervasive, or severe.

B. Ten Criteria to Assess Collegiality as an Employer’s Legitimate, Non-Discriminatory Reason in an Adverse Employment Action

Questions involving normative values and assessments that are socially produced must be analyzed if not in a more “objective” fashion, then in a way that is not completely stacked against the plaintiff-employee. The following set of ten criteria aim to assist courts in employing a more exacting, power-sensitive inquiry into an employer’s claims that a plaintiff is “uncollegial” or “can’t get along.” These questions, inspired in form by sociologist David Wellman’s work for decoding contemporary racism,¹⁴⁸ reflect an approach to defining

¹⁴⁸ Professor Wellman has developed a set of nine criteria for “decoding racism” that can also be applied more specifically to determine whether an employer’s proffered LNR is pretextual in employment discrimination cases:

1. Does fact support the employer’s decision?

collegiality in a transformative, as opposed to hegemonic, way.

2. Does the employer apply standards consistently among people of different races?

3. Does an inconsistency in applying the standards favor whites over African Americans or people who belong to other minority groups?

4. Did the employer's explanation of a decision change when the employee challenged it?

5. Is there statistical data to support the claim of unfair treatment?

6. Did the employer abide by stated rules and standards for granting jobs and promotions?

7. Did the employer properly consider the employee's evidence and claims?

8. Did the employer follow progressive discipline, warning the employee of unsatisfactory performance and suggesting improvement?

9. Did the employer follow stated policies on dealing with racial inequality?

DAVID WELLMAN, PORTRAITS OF WHITE RACISM (2d ed. 1993).

"Same Claim" Derivativeness:

1) Do the plaintiff's claims of employment discrimination and the employer's proffered "legitimate, non-discriminatory reason" asserting a plaintiff's uncollegiality, not getting along with others, insubordination, lack of professionalism, etc. arise out of the same set of facts?

2) Are any of the individuals that the employee is accused of "not getting along with" involved in the employee's discrimination complaint?

3) Does the employer's rationale for its negative employment action revolve solely or primarily around the collegiality standard or "getting along with others"?

Nature, Quality & Consistency of Evidence of "Uncollegiality":

4) Does the employer have evidence of the plaintiff's uncollegial or untoward behavior that predates the underlying facts of the plaintiff's complaint(s)?

5) Did the employer solicit negative information about the employee's relations with others with whom she is accused of not getting along? Did the employer disseminate negative information about the employee to other co-workers?

6) Have the reasons offered for negative employment action changed throughout time? Have the reasons been proven to be false?

7) Do members of the non-protected group engage in similar actions complained about by the offending (uncivil or uncollegial) employee belonging to a protected group without similar sanction?

Workplace Imbalance/Equalization Efforts:

8) Is there statistical or anecdotal support for workplace inequality based on prohibited characteristics in antidiscrimination law (i.e., race, gender, national origin, religion, sexual orientation, etc.)?

a) Is there a disparity between the available pool of employees and actual employees according to protected characteristics?

b) Is there a racial or gender (or other protected category) disparity between the percentages of outsiders as employees vs. decision makers?

c) Have stereotypes about protected groups in question manifested in the workplace?

9) Has the plaintiff attempted to bring about greater equality in the workplace for a protected group, whether at the level of hiring, promotion, benefits, workplace culture, etc.?

Hegemonic Normativity:

10) Do members of the plaintiff's protected group who work at the same workplace support claims of discriminatory treatment? Are the actions of the offending protected-group employee considered to be uncivil or uncollegial by fellow members of the protected group? If intersectionality issues are presented involving a plaintiff asserting membership in more than one protected group (such as women of color), then the appropriate intersectional group should be used to assess the normative claim of discrimination or incivility.

a) If yes, have those members of the protected group who consider the offending employee to be uncivil or uncollegial been rewarded with job benefits by the administration or management?

If courts ask these questions of employers proffering a collegiality-based explanation to defend against discrimination claims and receive a significant number of affirmative responses, courts should not only withhold the standard deference granted to employers (especially academic employers) on the determination of the importance and existence of collegiality. They should also consider a significant number of affirmative responses to reflect a presumption in favor of the plaintiff's pretextual claims. Only by adopting a more rigorous questioning of the employer's stated collegiality-based rationale will courts be able to work towards a more transformative definition of collegiality.

C. Applying Transformative Collegiality Criteria

If we pause for a moment to reconsider the cases from Part I to see how the plaintiffs there might fare under these new criteria for analyzing allegedly uncollegial behavior, we see markedly different results. In *Love-Lane v. Martin*, applying the ten questions above would reveal how contingent the uncollegiality claim is to the plaintiff's original complaints of discrimination, harassment, and retaliation.

1. "Same Claim" Derivativeness (Questions 1-3)

Question One inquires whether the uncollegiality claim and the plaintiff's discrimination claim arise out of the same set of facts to help ascertain whether the "not getting along" charge is truly legitimate and non-discriminatory. In *Love-Lane*, the district court and Fourth Circuit Court of Appeals determined that the plaintiff did not proffer sufficient evidence of pretext, and thereby accepted the employer's uncollegiality

rationale that the plaintiff had failed to respect the authority of her principal, Blanchfield, and to work effectively with Blanchfield and “register [Love-Lane’s] disagreements in private.”¹⁴⁹ However, the troubled relationship stems from facts that give rise to both Love-Lane’s discrimination/retaliation complaints, and the employer’s uncollegiality assertion — namely Love-Lane’s attempts to criticize and change the racial discrimination she perceived against African American boys at the school, as well as the altercation with another teacher in her second-year at Lewisville.¹⁵⁰

Immediately after Ms. Love-Lane began to speak out against the “warehousing” policies in her second-year of teaching, the principal found that 85 percent of fellow (white) teachers found Love-Lane to be “intimidating” and objected to her “direct style of communication.”¹⁵¹ Indeed as Question Two reveals, the very person at the core of Love-Lane’s complaints — principal Blanchfield (whom even the court determined had been racially insensitive)¹⁵² — is the very person with whom the plaintiff is accused of “not getting along.”

Absent the charge of not getting along with the supervisor against whom she has claims, there is no other performance-based criteria upon which the employer grounds its negative action against Love-Lane.¹⁵³ This absence invokes Question Three, which asks whether the employer’s negative action revolves solely or primarily around the “getting along with others” standard. With all three questions answered in the affirmative, it should be clear that plaintiff Love-Lane’s discrimination and retaliation complaints arise out of the same set of facts as the claims about Love-Lane’s inability to get along with supervisor Blanchfield. The people Love-Lane allegedly cannot get along with are the same ones who are implicated by her discrimination claims.

Such a clear overlap between the plaintiff’s original charges of discrimination and the employer’s asserted explanation (which arise out of the same set of allegedly discriminatory events) should trigger

¹⁴⁹ Love-Lane v. Martin, 355 F.3d 766, 788 (2004).

¹⁵⁰ *Id.* at 769-75.

¹⁵¹ *Id.* at 772.

¹⁵² *Id.* at 788.

¹⁵³ *Id.* at 774. The negative performance assessment of Love-Lane by the employer focused on three areas relating to the categories of “communication skills and efforts.” A careful read of the facts reflects that the employer’s criticisms of Love-Lane’s performance relate back to incidents that comprise the plaintiff’s discrimination complaints.

enhanced scrutiny of the employer's explanation for its adverse action against the plaintiff-employee. While it may be possible for the employer's explanation to arise out of the same set of facts as the plaintiff's discrimination claims and still be "legitimate and non-discriminatory," I would argue that the finder of fact should look very closely at the nature, quality, and consistence of the evidence presented to support the uncollegiality claim, as well as the workplace equality context as suggested by the remaining questions. If the employer's defense rests primarily or only upon an alternate interpretation of the same events constituting a discriminatory claim, then employer should be required to provide corroboration of its uncollegiality claim in order to render it reliably non-discriminatory, and not simply a byproduct of discrimination.

2. Nature, Quality, and Consistency of Evidence (Questions 4-7)

In *Love-Lane*, the first year of the plaintiff's employ at the Lewisville school during which time she "was careful not to make any quick judgments," there were no employer claims of her inability to get along with others — either supervisors or co-workers.¹⁵⁴ Not until Love-Lane began to complain about the discriminatory treatment was she characterized as "disrespectful," "unprofessional" and "intimidating."¹⁵⁵ Hence, Question Four, asking whether there is any evidence of uncollegiality predating the underlying facts comprising the plaintiff's discrimination complaint, is answered in the negative. In fact, prior to her second year at Lewisville, Love-Lane had been receiving performance reviews rating her excellent or superior in all aspects of her job, ranking highest on problem-solving and communications.¹⁵⁶

Question Five, about the solicitation and dissemination of negative information about an employee's relationship with co-workers, does not appear to apply to the *Love-Lane* case, but figures prominently in the *Landgraf* case. There, the employer in the course of "investigating" the employee's harassment complaint, saw fit to inquire of employees how she got along with them.¹⁵⁷ Thus, the evidence of "not getting along" in Landgraf's case was developed by the employer as a direct response to her harassment claim. Courts and fact-finders should view the reliability

¹⁵⁴ *Id.* at 771.

¹⁵⁵ *Id.* at 771-74.

¹⁵⁶ *Id.* at 769.

¹⁵⁷ *Landgraf v. USI Film Prods.*, 968 F.2d 427, 429 (5th Cir. 1992).

of such evidence highly suspect, as Question Five suggests.

3. Workplace Imbalance/Equalization Efforts (Questions 8-9)

Insofar as the definition of collegiality suggests, it is a condition meant to exist among equals. Thus, as I have argued, those attempts by employees of protected groups to equalize the workplace (in terms of representation, advancement, and environment) should be understood to be consistent with bringing about a true collegiality in the workplace. In other words, predictable conflict arising out of attempts by a protected group to bring about greater equality in hiring, promotion, or general workplace conditions should not be "charged" against the agents of change consistent with the aims of Title VII. Just as fee-shifting statutes are designed to create market incentives for "private attorneys general," so too must courts reconceptualize Title VII to provide incentives — not deterrents — to employees initiating much needed cultural change in their workplace.

To this end, it is important for courts and fact-finders to carefully assess the workplace environment in which charges of uncollegiality inhere. If the plaintiff is able to establish workplace imbalance of power in terms of classic under-representation relative to a protected group's available pool, or through the prevalence of stereotypes or comments reflecting animus, then the court should subject the employer's assertion of the plaintiff's alleged uncollegiality to greater scrutiny. Courts should also take judicial notice of plaintiffs who have attempted to "equalize" the workplace by bringing about better representation of the protected group, better working conditions and opportunities for advancement, or non-discriminatory policies or treatment generally. The final questions attempt to address workplace equality and culture.

In answer to Questions Eight and Nine in *Love-Lane*, for example, the plaintiff was an assistant principal at an "overwhelmingly white" school where African American teachers comprised only about two to six percent of the teaching staff.¹⁵⁸ *Love-Lane* was likely the only African American administrator.¹⁵⁹ The plaintiff's immediate supervisor and

¹⁵⁸ *Love-Lane v. Martin*, 355 F.3d 766, 770 (4th Cir. 2004).

¹⁵⁹ *Id.* Although the facts do not address the racial composition of the administration at Lewisville, they do note that the superintendent assigned *Love-Lane* to the school because "'an African American presence' was needed." *Id.* at 769. In addition, *Love-Lane* had expressed her reservations to the superintendent at the time because she had heard that the principal had difficulty in the past "dealing with African American assistants." *Id.*

school principal, Blanchfield, a white female, had made statements and comments that even the court granting summary judgment to the employer determined to be “racially insensitive.”¹⁶⁰ Thus, as answers to Questions Eight and Nine reflect, there were both statistical and anecdotal indicators of workplace inequality as well as efforts by Love-Lane to challenge discriminatory policies and treatment she observed as negatively impacting African American students. Under these conditions, it is completely predictable that there will be conflict between agents and opponents of positive racial change. But absent careful questioning by the court and fact-finder to determine the reasons for conflict and how to interpret them, the conflict may simply be used to discredit a complaining plaintiff as a “troublemaker.”

4. Hegemonic Normativity (Question 10)

The last question attempts to go outside of hegemonic normativity to assess the assertion of uncollegiality. Question Ten seems less applicable to the facts as stated in *Love-Lane* as it inquires into whether other members of the protected group either supported the plaintiff’s attempts to equalize the workplace or the employer’s determination of the plaintiff’s inability to get along. However, the record does reflect that the plaintiff had heard that principal Blanchfield “had difficulty in dealing with African American assistants,” and that one of the few African American teachers at the school had commented that “serious racial tension” developed between the school administration and staff after Blanchfield became principal.¹⁶¹ The Superintendent of Schools admitted that “minority parents perceive Lewisville and Brenda Blanchfield negatively.”¹⁶² And the school board’s director of the African American Infusion Project felt that “many teachers at Lewisville were not receptive to diversity training” and that the principal did not seem to address this problem of insensitivity or lack of interest.¹⁶³ When confronting the “she said/she said” challenge of determining whether an employer is forwarding an LNR invoking collegiality norms or an illegitimate one merely derivative of the original discrimination, courts should give greater weight to non-interested parties of the protected group that affirm either discrimination or uncollegiality (as long as they

¹⁶⁰ *Id.* at 788.

¹⁶¹ *Id.* at 769.

¹⁶² *Id.*

¹⁶³ *Id.* at 771.

do not have direct, material interests in affirming discrimination or uncollegiality contention). Here, in addition to the African American teacher and parents, there is even a defendant superintendent making adverse statements affirming the racial insensitivity and negative racial perceptions of principal Blanchfield.¹⁶⁴

In concluding that Love-Lane did not prevail in demonstrating that her employer's rationale of her inability to get along was merely pretext for discrimination, the Fourth Circuit Court of Appeals stated, "[I]t is not enough to disbelieve the defendants here; the fact-finder must believe Love-Lane's explanation of intentional race discrimination."¹⁶⁵ So although the plaintiff may have produced enough evidence for a fact-finder to disbelieve the defendant-employer, she loses because she cannot prove racial animus to satisfy the Fourth Circuit. Exactly what sliver of evidence separates disbelief of the employer's LNR from intentional racial discrimination is unclear and clearly subjective, and therefore, normatively hegemonic given the demographic and employer-friendly composition of federal and appellate courts. It certainly matters, therefore, whether the collegiality rationale is afforded a searching inquiry, or none whatsoever.

The proposed ten criteria attempt to assist courts and fact-finders to determine whether a collegiality rationale is truly non-discriminatory, or whether it tips the scales towards establishing pretext. While concededly not a comprehensive list (as yet), the criteria identified above begin to set some standard for evaluating where uncollegiality claims of an employer may be wholly rearticulating discrimination, and where they may be able to stand on their own. I turn next to the cultural reframings necessary to bring about greater equalization of the workplace, and strategies to survive predictable ruptures in the workplace culture most hazardous to the "agents of change."

D. Cultural Reframings: Taking Cultural Change Seriously and Developing Strategies for Survival

Of course, proposed legal reforms go only so far, especially in the realm of critical legal scholarship. Because the courts' treatment of the collegiality rationale represents more of a socio-legal problem than an individual shortcoming of plaintiffs, it is appropriate that a range of

¹⁶⁴ *Id.* at 769.

¹⁶⁵ *Id.* at 788.

strategies are considered for “outsider employees.” As such, my remaining proposals address the strategies for cultural change and survival in hostile environments in which collegiality may be used against outsider employees.

1) Maintain strength in numbers. In order to defeat a white-normative or hegemonic definition of collegiality, outsider employees must form support groups or “diversity collectives” or “equality collectives” to discuss openly the ways in which “working identities” are interpreted and cast in a raced, gendered, yet “colorblind” world and to guard against pretextual charges of incivility or uncollegiality.

2) Practice “strategic activism.” This takes full account of existing workplace identity constructions to determine who should bring forward complaints, concerns, or criticisms of management or supervisors in a workplace with the least amount of negative repercussions or retaliation.

3) Surface the operation of dominant normativities. Discuss white normativity, heterosexual normativity, and male normativity as a societal and workplace “given.” Make more approachable insiders aware of their insider status and how it may impact upon their interpretation of the perceived value, contributions, as well as transgressions of outsider colleagues.

4) Socialize or interact with insider colleagues with a critical mass of insider colleagues. Greater interaction among insider and outsider colleagues may help outsiders to see individual differences and the autonomy of group members.

5) Contest or question inaccurate, negative interpretations of other outsider employees. Too often, an outsider employee may adopt a “comforting” strategy that aims to make the insiders feel comfortable with difference. This strategy amounts to engaging in “degradation ceremonies” — i.e., degrading one’s larger out-group (e.g., racial minority group) in order to differentiate and distance oneself from affiliation with the dominant in-group (e.g., whites) to gain greater acceptance by the in-group. Such a comforting strategy may be understandable within the realities of “working identity,” but more must be expected of outsider employees in order to transform oppressive or unequal worksites. In this regard, rather than “going along” with negative assessments of outsiders in order to gain insider status, one should reject, or at least question such negative assessments.

These doctrinal and cultural reframings represent only beginning steps to begin unpacking an employer’s collegiality-based rationale from

its discriminatory actions. I hope others who read and appreciate this work will see fit to critique, refine, and supplement these reframings with additional questions or inquiries. Most importantly, I offer these sets of questions to open up the existing discussion of collegiality among courts, scholars, and workers to consider how the transformative goal of building truly equal worksites is often lost through the doctrine of

antidiscrimination law, as well as post civil rights workplace cultures of colorblindness and dominant normativities.

CONCLUSION

We are living in a post civil rights era. An era in which those who speak out against discrimination are depicted as the cultural transgressors. An era in which one who complains of mistreatment may easily be “cast out of the sandbox.” An era in which racial classifications to remedy past discrimination are the moral equivalent to racial classifications to perpetuate discrimination.¹⁶⁶ An era in which “playing the race card” so-to-speak (which to some, means the mere mentioning of acts of racism), is rendered the moral equivalent of a discriminatory or hostile act by a racist.¹⁶⁷ An era in which “race-thinking” and “race-consciousness” are to be purged from our consciousness.¹⁶⁸ Indeed, race has about the same level of public respectability as pornography. Both are to be hidden out of sight, never to be considered by legitimate state actors when making important decisions.

In a post civil rights era, serious forms of discrimination are understood to have largely disappeared from the workplace. Accordingly, courts have shifted dramatically since the brief period in

¹⁶⁶ See, e.g., *Adarand v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

It is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. . . . There can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance it is racial discrimination, plain and simple.

Id.

¹⁶⁷ Think back to the O.J. Simpson trial, where the successful litigation strategies of Johnnie Cochran referring to the role that race and racism may have played in the gathering of evidence against his client was commented upon as negatively (as “playing the race card”) as the acts of the white police officer, Mark Fuhrman, who admitted to using the “n-word” and objected to interracial dating between Blacks and whites.

¹⁶⁸ The language of Proposition 209 amending the California Constitution, the so-called “Civil Rights Initiative” banning the consideration of race or gender-based affirmative action in education and employment, provides an ominous example of this racial transcendence. CAL. CONST. art. I, §. 31, provides in pertinent part: “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

the early 1970s to mid 1970s, in which they attempted to ferret out discrimination in the work environment using creative doctrines such as "disparate impact" as noted in the *Griggs v. Duke Power* case.¹⁶⁹ Today, courts are more likely to deny the existence of discrimination in the workplace by imposing higher standards of causation, higher burdens for plaintiffs, and higher hurdles for interpreting "inferential" modes of discrimination. By heightening the requirements for a successful employment discrimination claim, unsuccessful plaintiffs simply appear as though their cases lack merit.

The employment discrimination cases described in Part I in which courts applied a traditional understanding of collegiality in employment discrimination worked to the detriment of female plaintiffs attempting to remediate hostile work environments. By supporting such power-insensitive definitions of "collegiality" and valorizing "getting along with [oppressive] co-workers," courts normalize hostility in the workplace. Collegiality as defined in these cases must be challenged in both law and culture, in favor of a more "relational" power-sensitive definition that takes into consideration the existence and extent of unequal power relations in the workplace. I advocate for a more explicit recognition of, and accountability for, the uncritical legal and cultural definitions of collegiality that are power-insensitive. These uncritical, power-insensitive definitions of collegiality pervade both the workplace and courts and serve to censor claims of race- and gender-based workplace hostility.

More than four decades after Dr. King smuggled out of prison and published his celebrated *Letter from a Birmingham Jail*, we face courts and cultures that still support a hegemonic notion of what getting along in the workplace means, de-contextualizing power relations and ideals of social transformation from the inquiry into what does and what does not constitute acceptable, collegial behavior. The judiciary's current Kafkaesque approach asking the alleged offender of equality to determine whether the complaining plaintiff "plays nicely with others" (including those who may have contributed to a hostile or discriminatory work environment) allows bad faith employers to play a "collegiality trump card" against employees claiming employment discrimination. Had we allowed norms of the Birmingham Eight on the appropriateness of Dr.

¹⁶⁹ In *Griggs*, the Court recognized a new theory and proof structure for employment discrimination that transcended intent to address neutral devices that produce disparate impact upon protected groups. *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971).

King's "unwise," "untimely," and "extreme" strategies to have dictated

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"Unwise," "Untimely," and "Extreme"

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the pace and course of the African American freedom struggle, one wonders what kind of world we would find ourselves in today.