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## The Roberts Court and the Law of Human Resources

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# THE ROBERTS COURT AND THE LAW OF HUMAN RESOURCES

Matthew T. Bodie\*

## Abstract:

*This article looks at twelve of the Roberts Court's labor and employment law cases through the lens of human resources. The rise of HR departments parallels the increase in the myriad statutory and regulatory requirements that govern the workplace. The Supreme Court's decisions in labor and employment law cases are largely monitored and implemented by HR professionals who must carry out these directives on a daily basis. In adopting an approach that is solicitous towards human resources, the Roberts Court reflects a willingness to empower these private institutional players. Even if labor and employment law scholars do not agree with the solicitousness, they should use the opportunity to develop a positive theory of HR, one that directs this workforce in a just and ethical manner.*

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“People make mistakes. Even administrators of ERISA plans.”<sup>1</sup>

INTRODUCTION

Most of the sturm and drang in employment law involves issues related to litigation. In particular, issues of procedure—motions to dismiss, summary judgment, pleading standards, and class actions—take up much of the intellectual space within the field. For example, in the employment discrimination context, the most prominent cases concern the burdens of production and persuasion,<sup>2</sup> the standards for mixed motive evidence,<sup>3</sup> and the availability of punitive damages and attorney’s fees.<sup>4</sup> The Civil Rights Act of 1991 focused almost entirely on litigation-related concerns, much of it in response to prior Supreme Court decisions;<sup>5</sup> similarly, the recent amendments to the Americans with Disabilities Act are also litigation-oriented.<sup>6</sup> And perhaps the most important employment discrimination case of the decade concerned the certification of a class of employees.<sup>7</sup> In the ERISA

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<sup>1</sup> Conkwright v. Frommert, 130 S.Ct. 1640, 1644 (2010).

<sup>2</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

<sup>3</sup> Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009).

<sup>4</sup> Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) (setting forth the test for punitive damages).

<sup>5</sup> Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (providing for jury trials, compensatory damages, and a different litigation standard for disparate impact cases). See also Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 530 (2003) (arguing that the 1991 Act “explicitly rejected” the Court’s decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)).

<sup>6</sup> Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 217 (2008) (discussing how definitional changes will change the litigation landscape).

<sup>7</sup> Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

context, much of the case law concerns the standards of review<sup>8</sup> and the availability of certain causes of action.<sup>9</sup> And all of the fencing back and forth about employment arbitration is largely about procedure-related issues such as class actions<sup>10</sup> and the scope of arbitral review.<sup>11</sup>

Of course, for all this focus on litigation, most employment disputes never go to trial.<sup>12</sup> But beyond the formally settled claims lies an unknown but likely vast number of employment-related disputes that are never even filed. In order to deal with these disputes, as well as to manage the employment relationship more generally, most large employers rely on human resource professionals.<sup>13</sup> Human resources – or “HR” – is the term for the business function tasked with handling the myriad issues that arise from the dealings between employees, supervisors, management, and the firm. Although the term “human resources” dates from the 1960s, it is based on a tradition of employee management dating back to the industrial revolution.<sup>14</sup> HR departments are tasked with managing the details of the employment relationship: recruitment, hiring, compensation, benefit management, training, and dispute resolution.<sup>15</sup> Ever increasingly, the job of the HR professional is to manage legal compliance within these areas.

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<sup>8</sup> *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

<sup>9</sup> *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008).

<sup>10</sup> *ATT Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

<sup>11</sup> *Rent-A-Center v. Jackson*, 130 S.Ct.2772 (2010).

<sup>12</sup> It is well established that most employment claims that are filed nevertheless settle out of court. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) (stating that almost 70% of employment discrimination cases settle out of court); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 135 (finding that in a dataset of 472 employment discrimination cases before a federal magistrate judge, settlement was reached prior to the making of a dispositive motion in 87% of the cases).

<sup>13</sup> See DAVID J. CHERRINGTON, *THE MANAGEMENT OF HUMAN RESOURCES* 5 (4th ed. 1995) (“Most companies with over 300 employees have a human resource manager”).

<sup>14</sup> Sanford M. Jacoby, *A Century of Human Resources Management*, in *INDUSTRIAL RELATIONS TO HUMAN RESOURCES AND BEYOND: THE EVOLVING PROCESS OF EMPLOYEE RELATIONS MANAGEMENT* 147, 148 (Bruce E. Kaufman, Richard A. Beumont & Roy B. Helfgott eds., 2003).

<sup>15</sup> See, e.g., SHAWN SMITH & REBECCA MAZIN, *THE HR ANSWER BOOK: AN INDISPENSABLE GUIDE FOR MANAGERS AND HUMAN RESOURCES PROFESSIONALS* xi-xii (2004).

HR employees often have a bad reputation for enforcing needless rules, focusing on trivial matters, and having a vindictive streak against their fellow employees.<sup>16</sup> However, looking at its small but important pool of labor and employment decisions, the Supreme Court under Chief Justice John Roberts has shown a special solicitude for HR departments. The Roberts Court has recognized that most of the employment law dramas play out in the private sector well short of litigation. Given the number of employees, and the expanding legal standards for employees set down by employment law, it would be impossible for courts to resolve these disputes *en masse*. As a result, private actors must be counted up to do the ground-floor work of addressing workplace compliance. Thus, the Court may be looking to enlist and empower this powerful wing of human resources professionals to manage workplace issues more quickly and effectively.

In so doing, the Court is following the general trend of privatization and governance reform that is alive and well in employment law. Although most employment law remains regulatory in nature, scholars and practitioners have increasingly pointed to public-private partnerships, as well as so-called self-regulation, to help overcome the enforcement gap in employment law.<sup>17</sup> A self-governance approach has most obviously been used in the OSHA context, where the law specifically accommodates private compliance mechanisms.<sup>18</sup> But self-governance approaches, coming in many shapes and sizes,

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<sup>16</sup> See, e.g., Stewart J. Schwab, *Studying Labor Law and Human Resources in Rhode Island*, 7 ROGER WILLIAMS U. L. REV. 384, 384 (2002) ("Human-relations professionals are sometimes said to be hypocrites giving a fake smile to employees while looking solely at the bottom line."); Keith H. Hammonds, *Why We Hate HR*, FAST COMPANY, Aug. 1, 2005, at: [http://www.fastcompany.com/magazine/97/open\\_hr.html](http://www.fastcompany.com/magazine/97/open_hr.html) ("Why are annual performance appraisals so time-consuming -- and so routinely useless? Why is HR so often a henchman for the chief financial officer, finding ever-more ingenious ways to cut benefits and hack at payroll? Why do its communications -- when we can understand them at all -- so often flout reality? Why are so many people processes duplicative and wasteful, creating a forest of paperwork for every minor transaction? And why does HR insist on sameness as a proxy for equity?").

<sup>17</sup> See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>18</sup> Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1104-15 (2005) (describing OSHA's new governance regulatory programs).

have spread across the employment landscape. They generally seek to pair private efforts to enforce the law with some system of accountability, whether through reconfigured governmental scrutiny or non-governmental third parties, such as NGOs or unions. The critical question about these efforts is where they fall on the spectrum: are they meaningful efforts that lead to greater compliance, or are they merely window dressing? The Roberts Court has demonstrated more comfort with a traditional form of private regulation: namely, internal enforcement by HR and compliance departments. By enlisting private compliance actors, the Court is looking to leverage its authority across a much wider set of firms than would be possible with a litigation focus. Through its holdings, its inferences, and its dicta, the Court can move these departments to enforce the law at the front lines, well before outside counsel must be called in. Litigation fades into the background. It becomes the shadow in which the actual stuff of employment law takes place.<sup>19</sup>

Of course, it is impossible to know what the Supreme Court – an assemblage of nine<sup>20</sup> individuals – actually intend with their slate of opinions, beyond what those opinions themselves say. But looking at the areas of employment discrimination, retaliation, privacy, and ERISA, I contend that the Roberts Court has focused more on the role of human resources departments than on the role of litigation in enforcing the employment laws. The Court's decisions have not been uniformly pro-defendant, but they have been fairly uniform in promoting the importance of HR professionals and other private compliance actors in managing the enforcement of the law. This concern for private compliance cuts across the other labels, such as judicially modest or conservative or pro-business, that have been applied to the Roberts Court.

Moreover, these decisions call into questions our notions about the political economy of employment law. In the area of criminal justice, scholars such as William Stuntz and Eric Miller have questioned the resource allocation driven by traditional Fourth Amendment jurisprudence; instead of focusing on rights, they argue (to

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<sup>19</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>20</sup> The Roberts Court is actually eleven justices: the current nine justices (Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Breyer, Ginsburg, Alito, Sotomayor, and Kagan), as well as former Justices Souter & Stevens.

paraphrase them bluntly), we should focus on cops.<sup>21</sup> The Roberts Court's employment law decisions counsel for a similar reorientation of perspective: instead of focusing on employment law rights, we should focus on HR professionals. Like cops on the beat, human resources departments can address problems at a grass-roots level. And if we assume their bad faith, we miss the opportunity to enlist them in the fight.

This Article will describe the Supreme Court's focus on human resources and inquire as to how even progressive employment law scholars can engage with this focus in a way that will improve the lives of workers. Part I of the Article provides a background on HR management as a field and explains its role in the workplace today. Part II discusses how the Court has crafted its employment law decisions in the areas of discrimination, retaliation, privacy, and ERISA towards the HR departments that have the front-line responsibilities for administering these laws. Finally, Part III will discuss how the political economy of workplace regulation should be driving all participants—even progressive employment law scholars—to envision how to enlist HR managers and employees to carry out the dictates of employment law in their everyday work.

## I. LAW AND THE RISE OF HUMAN RESOURCES MANAGEMENT

The law is not unfamiliar to the world of the workplace. Prior to the New Deal, agency and contract law dictated the terms of the employment relationship, which changed from primarily year-long contracts during Blackstone's era into the "at-will" rule during the late 19<sup>th</sup> Century.<sup>22</sup> Federal law then imposed its own framework with statutory schemes such as the Fair Labor Standards Act (FLSA),<sup>23</sup> National Labor Relations Act (NLRA),<sup>24</sup> Title VII of the 1964 Civil

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<sup>21</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010).

<sup>22</sup> For a discussion of how the at-will rule developed from an early misapprehension of the actual state of the law, see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

<sup>23</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>24</sup> 29 U.S.C. §§ 151–169. (2006)

Rights Act,<sup>25</sup> the Occupational Safety and Health Act (OSHA),<sup>26</sup> and the Employee Retirement and Income Security Act (ERISA).<sup>27</sup> States have piggy-backed off these regimes in some areas, such as antidiscrimination protections;<sup>28</sup> they have also partnered with the federal government (for unemployment insurance)<sup>29</sup> and have established their own unique protections (such as workers' compensation).<sup>30</sup> Thus, despite the at-will rule (or perhaps because of it),<sup>31</sup> the workplace has become a very legally-intensive environment.

In grappling with the study of the law of work, legal education has generally broken down this subject area into four distinct subsections: labor law, employment discrimination, employee benefits, and employment law.<sup>32</sup> Labor law concerns the regulation of collective employee action, largely manifested through union representation.<sup>33</sup> Employment discrimination focuses on the federal antidiscrimination statutes, while employee benefits centers around the tax and benefits implications of ERISA.<sup>34</sup> Finally, employment law focuses on the employment contract and a grab-bag of other regulatory provisions, including FLSA, OSHA, covenants not to compete, employee privacy, and workers compensation.<sup>35</sup> These subjects are the lenses through which judges, law professors, and attorneys look at the workplace.

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<sup>25</sup> 42 U.S.C. §§ 2000e–2000e-17 (2006).

<sup>26</sup> 29 U.S.C. §§ 651 *et seq.* (2006).

<sup>27</sup> Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

<sup>28</sup> *See* N.Y. EXEC. LAW § 296 (McKinney Supp. 2012) (setting forth unlawful discriminatory practices and protected classes); *id.* §§ 297-98 (reviewing the administrative and judicial processes for discrimination complaints).

<sup>29</sup> *See* Charles C. Kearns, *State Implementation of the SUTA Dumping Prevention Act of 2004*, 11 ST. & LOC. TAX LAW. 105, 107-08 (2006).

<sup>30</sup> *See, e.g.*, JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 279 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978).

<sup>31</sup> *See* Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89, 89-93 (2008) (arguing that the current regime of at-will plus exceptions should be replaced with a uniform and easier-to-administer rule based on just cause).

<sup>32</sup> *See* Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1539 (2006).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



Perhaps not surprisingly, at least three of the four also represent somewhat distinct practice areas. Labor law is the realm of union-side and management-side attorneys, as well as the network of government employees and private arbitrators that work to keep the collective bargaining machinery running. However, with the percentage of union-represented workers continuing to shrink, this field is a much thinner version of its former self.<sup>36</sup> In contrast, the growth in employment discrimination suits has spurred significant growth in the plaintiff and defense bar in this area. Particularly important was the 1991 Civil Rights Act, which amped up the economic incentives for plaintiffs' attorneys to bring discrimination actions.<sup>37</sup> Employee benefits forms an expanding niche within tax departments. Only employment law has failed to catch on as a unique subspecialty. Some aspects of the "employment law" ubercategory, such as workers compensation, are attended to by a special set of lawyers.<sup>38</sup> Others are subsumed into larger categories, such as business litigation or corporate law. Plaintiff-side employment discrimination attorneys have begun to take off some pieces of employment law, such as FLSA wage and hour litigation. Finally, some employment law matters, such as unemployment insurance claims, are largely handled *pro se*.

Given that legal education is designed to educate attorneys, it is no surprise that the legal world has focused on the role of law and, more specifically, attorneys within the workplace. However, as the role of law has expanded beyond its common-law parameters, the task of interacting with the law has too expanded beyond attorneys and litigation. In fact, at the grass-roots level, human resources employees are much more likely to deal with day-to-day workplace legal issues

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<sup>36</sup> See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002) (discussing the gradual but dramatic decrease in private-sector union representation).

<sup>37</sup> See, e.g., Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 279 (noting that "[t]he 1991 amendments to the Civil Rights Act of 1964 attracted to the practice of employment law a new generation of lawyers, who approach employment litigation like personal injury cases").

<sup>38</sup> See, e.g., Marc J. Cairo, *Five Things Every Lawyer Should Know About Workers' Compensation Practice*, CHICAGO BAR J. 50, 51, April 2004 ("Traditionally, practitioners in this area of law have been few and attorneys from both sides of the bar know each other very well. The result is an adversarial but congenial community.").

than are in-house counsels or outside law firms. Human resources, training, and labor relations managers and specialists held about 904,900 jobs in 2008.<sup>39</sup> And the numbers are expected to grow. As the Bureau of Labor Statistics reports:

Employment is expected to grow much faster than the average for all human resources, training, and labor relations managers and specialists occupations. . . . Overall employment is projected to grow by 22 percent between 2008 and 2018, much faster than the average for all occupations. Legislation and court rulings revising standards in various areas—occupational safety and health, equal employment opportunity, wages, healthcare, retirement plans, and family leave, among others—will increase demand for human resources, training, and labor relations experts. Rising healthcare costs and a growing number of healthcare coverage options should continue to spur demand for specialists to develop creative compensation and benefits packages that companies can offer prospective employees. Employment of labor relations staff, including arbitrators and mediators, should grow as companies attempt to resolve potentially costly labor-management disputes out of court. Additional job growth may stem from increasing demand for specialists in international human resources management and human resources information systems.<sup>40</sup>

Thus, there now exists a large cadre of human resources employees who are tasked, in large part, with managing the relationship between the firm and its employees. The Society for Human Resource Management (SHRM) boasts a global membership of over 250,000 and a staff of more than 350.<sup>41</sup>

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<sup>39</sup> BUREAU OF LABOR STATISTICS, HUMAN RESOURCES, TRAINING, AND LABOR RELATIONS MANAGERS AND SPECIALISTS,” OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 ed., at: <http://www.bls.gov/oco/ocos021.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> Mission and History, Society for Human Resource Management, at: <http://www.shrm.org/about/history/Pages/default.aspx>.

Concomitant with this growth in employment opportunities, human resources management has developed into an academic and professional field of endeavor.<sup>42</sup> The beginnings of human resources are frequently associated with the work of Frederick Taylor, who in the late 19<sup>th</sup> Century sought to bring “scientific management” to the industrial workplace.<sup>43</sup> “Taylorism,” as his approach came to be called, involved breaking down workplace tasks into their smallest possible unit, and then creating rigorous protocols for these tasks so as to maximize efficiency. Taylor intended for his system to eliminate conflict between workers and management by applying natural law to determine the “one best way” to address production issues.<sup>44</sup> However, human resources might be better seen as a response to Taylorism—an effort to put the “human factor” back into focus.<sup>45</sup> This focus—often paired with the monikers of “human relations” or “personnel management”—agreed with Taylor’s perspective that poor management practices were ultimately at fault for the rift between management and labor.<sup>46</sup> Thus, it was the responsibility of management to develop programs and practices to address the workers’ needs.<sup>47</sup> In contrast with the “rational actor” in economics, the field of personnel management used psychology to look at workers from a social perspective.<sup>48</sup> The result was an outpouring of books and

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<sup>42</sup> As a recent president of the Society of Human Resource Management (SHRM) said, “Perhaps the greatest human resources accomplishment . . . has been the worldwide recognition that human resources management is, indeed, a profession with a clearly defined body of knowledge.” Michael R. Losey, *Mastering the Competencies of HR Management*, 38 HUMAN RESOURCES MGMT. 99, 99-100 (1999).

<sup>43</sup> Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 983 (1998). See also Frederick Taylor, *A Piece Rate System, Being a Step toward Partial Solution of the Labor Problem*, 16 TRANSACTIONS 856 (1895). Taylor was perhaps the most prominent members of the “systematic management” movement between 1880 and 1920. Jacoby, *supra* note SJ2003, at 148.

<sup>44</sup> BRUCE E. KAUFMAN, THE ORIGINS & EVOLUTION OF THE FIELD OF INDUSTRIAL RELATIONS IN THE UNITED STATES 22 (1993).

<sup>45</sup> *Id.* at 24; see also GORDON S. WATKINS, AN INTRODUCTION TO THE STUDY OF LABOR PROBLEMS 476-77 (1922) (“The old scientific management failed because it was not founded upon a full appreciation of the importance of the human factor. It was left to the new science of personnel management to discover and evaluate the human elements in production and distribution.”).

<sup>46</sup> KAUFMAN, *supra* note BK1993, at 25.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

articles in the 1920s from psychologists and business practitioners about the needs and wants of the modern employee.<sup>49</sup> At the same time, thousands of companies were setting up or expanding their employment management departments to take advantage of these developments.<sup>50</sup> A new field was taking shape.<sup>51</sup>

As the ability of workers to organize collectively reached a crescendo in the 1930s, both through continued union growth and through federal protections such as the Norris-LaGuardia Act<sup>52</sup> and the 1935 Wagner Act,<sup>53</sup> the field of personnel management drew competition from an “institutional labor economics” (ILE) approach.<sup>54</sup> ILE advocates, found within the more general field of industrial relations, argued that collective bargaining was a crucial element to labor relations, and that management practices in and of themselves were not a sufficient solution.<sup>55</sup> This led to what has been described as a “bifurcation” in the field of workplace management.<sup>56</sup> Within academia, economics and, later, industrial relations departments offered courses in “labor problems” that primarily focused on collective bargaining.<sup>57</sup> In contrast, business schools offered courses in personnel management that focused on such managerial tasks as recruitment, promotion, compensation, and training.<sup>58</sup> In the field, labor relations specialists were now joining with existing personnel departments, and attorneys were often called in to negotiate and manage collective bargaining agreements.

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<sup>49</sup> *Id.* Ordway Tead and Henry Metcalf authored the first university textbook devoted to personnel management in 1920. Bruce E. Kaufman, *Evolution and Current Status of University HR Programs*, 38 HUMAN RESOURCES MGMT. 103, 104 (1999).

<sup>50</sup> *Id.* at 103. *See also* Jacoby, *supra* note SJ2003, at 151 (“Between 1915 and 1920, the proportion of firms with more than 250 employees that had personnel departments increased from roughly 5 percent to about 25 percent.”).

<sup>51</sup> *See id.* (noting that the first national conference of personnel managers attracted five hundred attendees in 1917, and close to three thousand came in 1920).

<sup>52</sup> Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (2006)).

<sup>53</sup> Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

<sup>54</sup> Kaufman, *supra* note BK1999, at 104.

<sup>55</sup> John R. Commons has been called the “exemplar” of the ILE approach. *See id.*; JOHN R. COMMONS, *INDUSTRIAL GOODWILL* (1919); JOHN R. COMMONS, *INDUSTRIAL GOVERNMENT* (1921).

<sup>56</sup> Kaufman, *supra* note BK1999, at 104.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

From the post-World War II period up through the 1970s, labor relations and collective bargaining experts overshadowed their personnel management counterparts, particularly in academia.<sup>59</sup> Over two dozen schools developed industrial relations programs or departments, with most of these focused on ILE rather than personnel management.<sup>60</sup> In law, the labor law course was the only workplace-oriented class, and was taught by well-known academics such as Derek Bok, Archibald Cox, and Clyde Summers.<sup>61</sup> Personnel management courses remained in the curriculum of business schools, but they were generally not held in high regard.<sup>62</sup> In particular, critics argued that personnel management had a thin foundation in theory and was almost vocational in its approach to its subject.<sup>63</sup>

At the same time, however, the field of human relations was booming in the workplace. The American Society for Personnel Administration was founded in 1948 with only 28 original members; by 1964, it had grown to over 3,000. The Hawthorne experiments—conducted at a Western Electric plant in the 1930s—were popularized in a 1941 *Reader's Digest* article, and served as the basis for a new approach to the study of human relations.<sup>64</sup> Over time, the field both fueled and was fueled by a relationship with the behavioral sciences, particularly organizational psychology.<sup>65</sup> Academic research led to on-the-job developments such as vertical job loading, sensitivity training, and the managerial grid.<sup>66</sup> By the late 1960s, the academic focus of

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<sup>59</sup> *Id.* at 105.

<sup>60</sup> *Id.*

<sup>61</sup> See Bernard Dunau, Book Review: *Labor Law: Cases, Materials, and Problems*, 71 COLUM. L. REV. 513 (1971) (discussing labor law casebooks, including those by Bok, Cox, and Summers).

<sup>62</sup> Kaufman, *supra* note BK1999, at 105. The 1959 Gordon-Howell report on business schools was particularly scathing: “Next to the course on production, perhaps more educational sins have been committed in the name of personnel management than in any other required course in the business curriculum.” ROBERT A. GORDON & JAMES E. HOWELL, HIGHER EDUCATION FOR BUSINESS 189 (1959).

<sup>63</sup> Fred K. Foulkes, *The Expanding Role of the Personnel Function*, 53 HARV. BUS. REV. 71, April 1975.

<sup>64</sup> See F.J. Roethlisberger, *The Hawthorne Experiments*, in CLASSICS OF PERSONNEL MANAGEMENT 16, 16-17 (Thomas H. Patten, Jr. ed., 1979).

<sup>65</sup> Jacoby, *supra* note SJ2003, at 158.

<sup>66</sup> *Id.*

human resources studies had moved from economics to psychology, and from a more theoretical focus to a much more applied perspective.<sup>67</sup>

Although collective bargaining remained the dominant workplace paradigm for academia well into the 1970s, the seeds of its downfall had been put in place by then. Union density had begun its long, steady descent. And the clutch of employment laws passed between 1964 and 1974 established the legal framework for an employment law, rather than a labor law, approach to workplace issues.<sup>68</sup> As a result, the center of gravity for most workplace issues became HR departments, rather than the collective bargaining table or private contract. Throughout the 1980s and 1990s, employers took up a variety of new approaches with zest: total quality management and quality of work life programs; participatory management; and diversity programs.<sup>69</sup> At the same time, the shift to a finance and shareholder-primacy focus within the boardroom forced HR departments to defend their positions by showing how good HR policies could increase firm value.<sup>70</sup> The result was the growth of “strategic human resources management,” which seeks to identify ways in which HR can work with other business units to increase the firm’s overall business success.<sup>71</sup>

The new focus on HR strategy explains in part why the field has remained firmly ensconced in business schools and is largely missing from legal academia. Courses on HR or personnel management are now found in nearly every university with some type of business or management program.<sup>72</sup> Despite some efforts to bring HR back into

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<sup>67</sup> Kaufman, *supra* note BK1999, at 106. See also Mitchell Langbert, *Professors, Managers, and Human Resource Education*, 39 HUMAN RESOURCES MGMT. 65, 66 (2000) (“Because HRM is interdisciplinary and practice-based, human resource professors tend to be practice-oriented.”).

<sup>68</sup> Kaufman, *supra* note BK1999, at 107.

<sup>69</sup> *Id.*: Jacoby, *supra* note SJ2003, at 164-67.

<sup>70</sup> *Id.* at 165.

<sup>71</sup> For an overview of strategic human resources management as an academic approach, see Christopher Mabey, Graeme Salaman & John Storey, *Strategic Human Resource Management: The Theory of Practice and the Practice of Theory*, in STRATEGIC HUMAN RESOURCE MANAGEMENT: A READER (Christopher Mabey, Graeme Salaman & John Storey eds., 1998). The core concept of strategic human resources management is that people management can be a “key source of sustained competitive advantage.” *Id.*

<sup>72</sup> Kaufman, *supra* note BK1999, at 107-08.

the more theoretical realm of economics,<sup>73</sup> the field as a whole remains immersed in organization behavior and focused on subfields such as employee recruitment, compensation, and training.<sup>74</sup> As a result, the academic discipline is criticized for its “dearth of intellectually substantive content” in certain areas,<sup>75</sup> as well as “an institutional, and somewhat chatty literature.”<sup>76</sup> On the professional side, human resources employees have struggled to establish themselves as professionals and important firm players. The field does not have the strict accreditation requirements that professions such as law, medicine, or engineering impose.<sup>77</sup> Moreover, while HR professionals often see themselves as part of management, they must often stand apart from management in order to do their role properly. This division—being part of the managerial class and yet also separate from it—has led to the somewhat schizophrenic approach that the field can sometimes display.<sup>78</sup>

Given the overlap between the mandate of HR departments and the extensive network of legal regulations for the workplace, it remains puzzling that law and HR have remained, as professions, somewhat distant cousins. While legal education has classes on the exact same laws with which HR departments must grapple, those classes are

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<sup>73</sup> One example has been the push for “personnel economics,” which applies economics principles (largely from labor economics) to human resources decision. See EDWARD P. LAZEAR, *PERSONNEL ECONOMICS FOR MANAGERS 1* (1998) (“Personnel is now a science that provides detailed and unambiguous answers to the issues that trouble managers today.”).

<sup>74</sup> Kaufman, *supra* note BK1999, at 108.

<sup>75</sup> *Id.*

<sup>76</sup> LAZEAR, *supra* note ED1998, at vii. See also *id.* at 1 (“Until recently, there has been no systematic discipline on which to base human resources decisions.”).

<sup>77</sup> Jacoby, *supra* note SJ2003, at 147 (“[P]ersonnel managers, unlike engineers or accountants, have never really developed an intellectually consistent paradigm for asserting their professional legitimacy.”).

<sup>78</sup> *Id.* at 148 (“[P]ersonnel managers are in an ambiguous social role—between employees and line managers—causing them to be distrusted by both sides.”); see also Richard A. Beaumont, Carlton D. Becker & Sydney R. Robertson, *HR Today and Tomorrow: Organizational Strategies in Global Companies*, in Kaufman, Beaumont & Helfgott, *supra* note KBH2003, at 416 (“HR needs to work out if and when it needs to be an employee advocate, the conscience of the institution, provoker of modified managerial behaviors, a sociological soothsayer predicting the effects of external forces on business, or some combination of these.”). Cf. LAZEAR, *supra* note EF1998, at 1 (“Human resources professional are often treated as if they were the lowest form of managerial life.”).

generally taught from the perspective of litigation, using the case method.<sup>79</sup> HR departments are often conceived as, at best, well-meaning but ineffectual bureaucrats or, at worst, an employer's tool for evading the spirit and/or the letter of the law with the least adverse consequences.<sup>80</sup> On the HR side, the field does not want to conceive of itself as a mere mechanism for legal compliance. Instead, it seeks to generate its own methodological approach, while at the same time tailoring this approach to actual workplace concerns. In fact, HR academics have argued that legal mandates should not be the focus of the field; rather, HR departments should take a more holistic approach that looks at potential legal ramifications as one aspect to be understood and managed.<sup>81</sup>

Both law and human resources share one important professional trait in common with most other professions: they have a commitment to professional ethics within the field.<sup>82</sup> Although HR lacks the equivalent of a bar to enforce rules of professional responsibility, the field is seeking to develop ethical norms and practices that will guide its membership. SHRM has its own code of ethics relating to professional responsibility, professional development, ethical leadership, conflicts of interest, and use of information.<sup>83</sup> Academics have also written on HR ethics, focusing on the role of HR manager within the firm but also as a professional.<sup>84</sup> In fact, some HR scholars have questioned whether the field's focus on the management

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<sup>79</sup> For a discussion of the contrasting pedagogical styles between law and HR classes, see Schwab, *supra* note SJS2002, at 385-88.

<sup>80</sup> Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 964-65 (1999) (discussing how employers and defense lawyers may render an appearance of nondiscrimination even when discrimination is present).

<sup>81</sup> Mark V. Roehling & Patrick M. Wright, *Organizationally Sensible versus Legally-Centric Approaches to Employment Decisions*, 45 HUMAN RESOURCES MGMT. 605, 606 (2006); *see id.* at 608 (defining legal-centric decision making as "decision making that does not involve legal requirements (i.e., a specific course of action is *not* strictly mandated by law) but gives primacy to legal considerations to the extent that other organizationally relevant, nonlegal considerations are essentially ignored." (emphasis in original)).

<sup>82</sup> Losey, *supra* note JL1999, at 100 ("Like other recognized professions, human resources management has its own set of ethical standards.").

<sup>83</sup> Code of Ethics, SHRM, at: <http://www.shrm.org/about/Pages/code-of-ethics.aspx>.

<sup>84</sup> *See, e.g.*, HUMAN RESOURCE MANAGEMENT ETHICS (John R. Deckop ed., 2006); THE ETHICS OF HUMAN RESOURCES AND INDUSTRIAL RELATIONS (John W. Budd & James G. Scoville eds., 2005).



perspective is the proper orientation, given the many stakeholders within the firm.<sup>85</sup> As a relatively young field, HR has the potential for a significant amount of professional growth and development.

## II. EMPLOYMENT LAW DECISIONS UNDER THE ROBERTS COURT

The Roberts Court has had a brief time – roughly five years – to make its mark. Its mark in employment law has already been fairly significant. What follows is a brief discussion of a number of the Roberts Court’s employment law cases in the categories of employment discrimination, retaliation, privacy, and ERISA. In these areas, the Court has shown a proclivity for considering the ramifications of their decisions on human resources employees as well as lawyers and litigants.

### A. *Discrimination*

Federal protections against discrimination have proved to be the most influential of the federal workplace statutory schemes. The primary federal antidiscrimination statutes are Title VII of the Civil Rights Act of 1964, which protects against discrimination based on race, ethnicity, national origin, religion and sex;<sup>86</sup> the Age Discrimination in Employment Act (ADEA), which prohibits discrimination based on age;<sup>87</sup> the Americans with Disabilities Act

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<sup>85</sup> See, e.g., THE HUMAN RESOURCES REVOLUTION: WHY PUTTING PEOPLE FIRST MATTERS (Ronald J. Burke & Cary L. Cooper eds., 2006); Karen Legge, *The Morality of HRM*, in Mabey, Salaman & Storey, *supra* note MSS1998, at 18, 18 (“When reading accounts of HRM practice in the UK and North America, it is noticeable the extent to which the data are (literally) the voice of management.”); Mary E. Graham & Lindsay M. Tarbell, *The Importance of the Employee Perspective in the Competency Development of Human Resource Professionals*, 45 HUMAN RESOURCES MGMT. 337, 338 (2006) (arguing that HR has to recognize its management-oriented focus and consider alternative stakeholder perspectives, particularly the employee perspective).

<sup>86</sup> 42 U.S.C. §§2000e—2000e-17 (2006 & Supp. IV 2011). Section 1981 provides protections in and out of the workplace against racial discrimination. 42 U.S.C. § 1981.

<sup>87</sup> 29 U.S.C. §§ 621—634 (2006).

(ADA), which protects disabled workers;<sup>88</sup> and the Equal Pay Act, which prohibits disparate compensation between employees because of differences in their sexes.<sup>89</sup> In terms of enforcement, all of these statutes focus on private causes of action brought by the victims of discrimination. Section 703 of the Civil Rights Act of 1964, the prototype for antidiscrimination causes of action, supplies the primary definition of conduct rendered unlawful by the Act: “to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>90</sup> In order to pursue a claim based on a § 703 violation, the claimant must file a charge with the Equal Employment Opportunity Commission.<sup>91</sup> This filing process belies the largely private nature of most claims, as the EEOC generally provides “right to sue” letters allowing the claimant to bring a private right of action. The EEOC still litigates a small but significant number of claims which it has deemed to have merit.<sup>92</sup> But for the vast majority of claimants, the EEOC plays no screening function, and they must use their own resources to bring suit.<sup>93</sup>

The world of Title VII litigation was transformed by the 1991 Civil Rights Act.<sup>94</sup> In addition to changing the standards for mixed motives cases and discriminatory impact claims, the 1991 Act provided for juries, compensatory damages, and punitive damages in Title VII cases.<sup>95</sup> These changes dramatically shifted the economics of potential claims. Instead of appearing before a judge to seek only back pay and reinstatement, Title VII plaintiffs could be heard by a jury and were entitled to damages for pain and suffering, emotional distress, and the

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<sup>88</sup> 42 U.S.C. §§ 12101–12213 (2006).

<sup>89</sup> 29 U.S.C. § 206(d) (2006).

<sup>90</sup> 42 U.S.C. § 2000e-2 (2006).

<sup>91</sup> A claimant may instead file a charge with a state civil right agency which has a “work-sharing” agreement with with EEOC under § 706(c) of the Act. 42 U.S.C. § 2000e-5 (2006); *Love v. Pullman Co.*, 404 U.S. 522 (1972); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988).

<sup>92</sup> *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

<sup>93</sup> SAMUEL ESTREICHER & MICHAEL HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 1063 (3d ed. 2008) (“The EEOC plays no screening function.”).

<sup>94</sup> Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of the U.S. Code).

<sup>95</sup> 42 U.S.C. § 1977A(b) (2006) (compensatory and punitive damages), *id.* § 1977A(c) (jury trial).

malice of the defendant. The increase in potential remuneration attracted a new set of attorneys, who could build practices on these more lucrative cases.<sup>96</sup>

Not surprisingly, Supreme Court decisions and scholarly commentary have focused on litigation-oriented concerns when it comes to the enforcement of Title VII. Considerable time and attention has been paid to fleshing out the basics as to who can bring a Title VII claim, what they need to prove to survive motions to dismiss and summary judgment, and what damages they are entitled to receive. The Court's decision in *McDonnell-Douglas v. Green*,<sup>97</sup> which established the requirements for a prima facie case under Title VII, has been cited in over 41,000 cases.<sup>98</sup> Despite the depth of precedent that the Roberts Court inherited when it comes to Title VII litigation, the work continues, even when it comes to basic questions such as the standard of proof.<sup>99</sup>

In the cases of *Burlington Industries, Inc. v. Ellerth*<sup>100</sup> and *Faragher v. City of Boca Raton*,<sup>101</sup> the Rehnquist Court created an affirmative defense for Title VII defendants. That affirmative defense paved the way for a legally-sanctioned approach to internal human-resources policies. In both cases, supervisors had subjected the plaintiffs to hostile work environments, and the Court needed to determine whether the employer was vicariously liable for the actions of its supervisors.<sup>102</sup> The Court found that liability did attach to the employer when the supervisor had immediate (or higher) authority over the employee. At the same time, however, the Court allowed for employers to raise an affirmative defense to such liability. In order to maintain the defense, employers needed to meet two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

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<sup>96</sup> Sturm, *supra* note SS 2002, at 279.

<sup>97</sup> 411 U.S. 792 (1973).

<sup>98</sup> See Westlaw Keycite search for all cases citing *McDonnell-Douglas v. Green* on March 17, 2013.

<sup>99</sup> See, e.g., *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) (holding that a mixed-motives jury instruction is never proper in ADEA case).

<sup>100</sup> 524 U.S. 742 (1998).

<sup>101</sup> 524 U.S. 775 (1998).

<sup>102</sup> *Ellerth*, 524 U.S. at 754.

otherwise.”<sup>103</sup> The Court provided further specifics as to reasonable behavior under these circumstances might mean:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.<sup>104</sup>

*Faragher* and *Ellerth* provided the cornerstone for a new HR-oriented approach to sexual harassment disputes.<sup>105</sup> The Court's *Faragher* opinion specifically justified the new defense as a way of addressing harassment outside of the litigation process:

Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm. As long ago as 1980, the EEOC, charged with the enforcement of Title VII, adopted regulations advising employers to “take all steps necessary to prevent sexual harassment from occurring, such as ... informing employees of their right to raise and how to raise the issue of harassment,” and in 1990 the EEOC issued a policy statement enjoining employers to

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<sup>103</sup> *Id.* at 765; *Faragher*, 524 U.S. at 807.

<sup>104</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

<sup>105</sup> See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 17 (2003) (noting that “[n]ews of the *Faragher* and *Ellerth* decisions spread quickly through the world of human resources” and “human resources consultants found themselves in high demand”).

establish a complaint procedure “designed to encourage victims of harassment to come forward [without requiring] a victim to complain first to the offending supervisor.” It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.<sup>106</sup>

*Faragher* and *Ellerth* thus marked an explicit doctrinal structure tailored toward the human resources machinery existing within many workplaces. By providing guidance on how to manage hostile workplace and harassment complaints internally, the Court set up a system of private enforcement that would precede and shape the litigation process. Employers would have an incentive to create such processes, and employees would benefit from having their claims resolved earlier and with less time and expense.

The Roberts Court has followed the lead of *Faragher* and *Ellerth* in tailoring an approach to discrimination that caters to the HR approach. In *Ricci v. DeStefano*,<sup>107</sup> the Court dealt with an intriguing set of facts, in which one side's faith in fair process is set against the other side's concern with unjust results. It involves firefighters – a profession with a sterling reputation for acting in the public good, but at the same time an ugly history of racial exclusion.<sup>108</sup> Justice Sotomayor – who came up for confirmation right after the decision was handed down – had authored the opinion that the Court overturned.<sup>109</sup> Despite its notoriety, however, the Court's opinion in *Ricci* rests on more moderate premises: namely, the proper process for using race in judging the results of promotional examinations. In its exegesis of the proper process, the Court is careful to respect the process that went

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<sup>106</sup> *Faragher*, 524 U.S. at 805-06 (quotations and citations omitted).

<sup>107</sup> 557 U.S. 557 (2009).

<sup>108</sup> *Id.* at 610 (Ginsburg, J., dissenting) (“Firefighting is a profession in which the legacy of racial discrimination casts an especially long shadow.”).

<sup>109</sup> *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam).

into the test: namely, the creation and administration of the test by human resources professionals.

In *Ricci*, white firefighters and one Hispanic firefighter sued New Haven and its officials, alleging that the city violated Title VII by refusing to certify results of promotional examination. New Haven had commissioned the examination in order to create a pool of potential candidates for the rank of lieutenant and captain.<sup>110</sup> The city paid Industrial/Organizational Solutions, Inc. (IOS), an HR consulting company, \$100,000 to create the test.<sup>111</sup> The Court described the process in some detail. It discussed how IOS had studied the firefighters' jobs by interviewing current lieutenants and captains and by riding along with on-duty officers.<sup>112</sup> It described how IOS developed multiple choice and oral examinations based on an extensive set of training materials as well as job-analysis information.<sup>113</sup> The Court also explained how the tests were evaluated.<sup>114</sup> In its explication of the process, the Court emphasized how the materials were designed to be free from racially discriminatory impact.<sup>115</sup>

The tests were challenged after white and Hispanic candidates, but no African-American candidates, qualified for the next set of available positions.<sup>116</sup> After a series of meetings and testimony from a variety of perspectives, the city's civil service review board voted not to certify the results of the test. The city defended its decision based on its concern about the discriminatory impact of the test results. It

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<sup>110</sup> *Ricci*, 557 U.S. at 564-65.

<sup>111</sup> *Id.* at 564.

<sup>112</sup> *Id.* at 564-65 ("IOS representatives interviewed incumbent captains and lieutenants and their supervisors. They rode with and observed other on-duty officers. Using information from those interviews and ride-alongs, IOS wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department.").

<sup>113</sup> *Id.* at 565 ("For each test, IOS compiled a list of training manuals, Department procedures, and other materials to use as sources for the test questions.").

<sup>114</sup> *Id.* ("IOS assembled a pool of 30 assessors who were superior in rank to the positions being tested. . . . IOS trained the panelists for several hours on the day before it administered the examinations, teaching them how to score the candidates' responses consistently using checklists of desired criteria.").

<sup>115</sup> *Id.* (noting that IOS "oversampled minority firefighters to ensure that the results . . . would not unintentionally favor white candidates" and "sixty-six percent of the [evaluation] panelists were minorities, and each of the nine three-member assessment panels contained two minority members").

<sup>116</sup> *Id.* at 566-67.

argued that had the results been certified, African-American firefighters could have sued the city for violating Title VII's prohibition on hiring decision with a discriminatory impact.<sup>117</sup> However, the white and Hispanic firefighters who had been in line for the promotion based on the test results sued.<sup>118</sup> They argued that the city's refusal to certify the test was discriminatory treatment under Title VII. The Court agreed. It held that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."<sup>119</sup> Finding that New Haven did not have a strong basis, the Court held the city had violated Title VII.

No matter where you come down on the case, New Haven's predicament draws forth some sympathy.<sup>120</sup> Neither option – keeping the test or rejecting it – seems ideal from a moral perspective, and in fact the city seems to have spent gone to significant time and expense to avoid a result like the one the test produced. And facially, at least, the city had a statistical basis for concern that the test had had a discriminatory impact. Arguably, a Court predisposed to human resources discretion would have given the city room to maneuver here. In fact, that is what the Society for Human Resources Management (SHRM) argued in its amicus brief:

SHRM and its members wish to maintain the flexibility in existing law that allows employers and other test users significant discretion in deciding how best to address disparate-impact issues: whether to proceed with a given selection procedure subject to completion of the validation process; whether to modify expected uses so as to ensure that scoring and ranking of scores are valid and fair; or

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<sup>117</sup> 42 U.S.C. § 2000e-2(k) (2006).

<sup>118</sup> *Ricci*, 557 U.S. at 562-63.

<sup>119</sup> *Id.* at 563.

<sup>120</sup> *Id.* at 644 (Ginsburg, J., dissenting) ("This case presents an unfortunate situation . . ."); Luke Appling, *Recent Development*, *Ricci v. DeStefano*, 45 HARV. C.R.-C.L. L. REV. 147, 147 (2010) ("In March 2004, the City of New Haven, Connecticut faced a difficult choice.").

whether to substitute a different selection process with a lesser disparate impact on particular groups.<sup>121</sup>

In order to preserve this flexibility, argued SHRM's brief, the Court needed to find the City's decision to be constitutional.

Instead, the Court held that the City acted unconstitutionally because it lacked a strong basis in evidence to believe that going forward with the test results would violate Title VII's disparate impact provision. In so doing, the Court seems to set up a Scylla-and-Charibdis scenario for future employers. As Justice Ginsburg argued, "The strong-basis-in-evidence standard, however, as barely described in general, and cavalierly applied in this case, makes voluntary compliance a hazardous venture."<sup>122</sup> A court that was simply pro-business or intent on voluntary compliance would not have ruled the way it did in *Ricci*. It would instead have given employers wide berth to conduct their own analyses and make decisions based on those analyses. But, despite the SHRM's argument to the contrary, that does not mean that *Ricci* is an anti-HR opinion. In fact, the *Ricci* decision is most legitimately justified as an effort to protect HR efforts in the areas of promotion and testing.

The Court set up two alternative paths for finding a strong basis in evidence for discriminatory impact liability. First, the employer may have a strong basis in evidence to believe that examinations were not job-related and consistent with business necessity. Or second, the employer may have a strong basis in evidence to believe there existed equally valid, less-discriminatory alternative to the examinations. In a somewhat surprising move, the Court did not remand to the lower courts to determine whether New Haven met this standard; instead, it ruled that the city had failed to do so and thus was in violation.<sup>123</sup> The Court based its determination on its support for the time, resources, and care that had been spent in crafting the examinations in the first place.

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<sup>121</sup> Brief for Amicus Curiae Society for Human Resource Management in Support of Petitioner at 1, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328) [hereinafter SHRM *Ricci* Amicus Brief].

<sup>122</sup> *Id.* at 629 (Ginsburg, J., dissenting); see also *id.* (noting "the discordance of the Court's opinion with the voluntary compliance ideal").

<sup>123</sup> *Id.* at 631 (Ginsburg, J., dissenting) ("When this Court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance.").



The Court first found that there was “no genuine dispute” that the examinations were job-related and consistent with business necessity. The Court noted that the examinations were based on IOS’s “painstaking analyses” of the officer positions as gleaned through source material and direct observation.<sup>124</sup> Although some candidates complained about certain questions, these complaints were reviewed and, in one case, acted upon.<sup>125</sup> The City never requested from IOS the follow-up report analyzing the validity of the results, despite the fact that the report was part of the contract.<sup>126</sup> All of these factors point to the reasonable and good-faith efforts of IOS, the human resources consultants who managed the testing process. To the extent that throwing the test out was an indictment of IOS’s work, the Court found that such an indictment was completely unjustified.

The Court then fended off arguments that a better alternative set of testing instruments were available. Critics of the test argued that the oral portion should have been more heavily weighted; that the city could have interpreted its internal procedures differently; and that an alternative testing method such as an “assessment center process” would have been superior.<sup>127</sup> Essentially, the Court rejects these alternatives as *ex post* efforts to rejigger the results, without proof that they are in fact better testing instruments.<sup>128</sup> The Court is particularly dismissive of the alternative testing method evidence, as it was provided by a direct competitor of IOS.<sup>129</sup> The competitor’s witness admitted that he had not studied the test in detail, and offered praise for the test at points.<sup>130</sup> He also made it clear he was angling for future work; in fact, the competitor ended up getting significant business from the city after it had rejected IOS’s efforts.<sup>131</sup> Such mixed testimony was insufficient, in the Court’s eyes, to create an issue of material fact.

The Court did not say that race could not play a role in the creation of a testing instrument. In fact, it is clear that New Haven

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<sup>124</sup> *Ricci*, 557 U.S. at 588.

<sup>125</sup> *Id.* The Court also noted that an outside advisor “suspect[ed] that some of the criticisms ... [leveled] by candidates were not valid.” *Id.*

<sup>126</sup> *Id.* at 589.

<sup>127</sup> *Id.* at 589-92.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 591-92.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

and IOS were concerned about racial disparity on the test, and that they undertook efforts to redress any racial imbalance at the outset. As the Court states, “Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end.”<sup>132</sup> However, the Court also makes clear that once the test has been taken, the time for second-guessing is over. Only a strong basis to believe that the tests were ill-designed, or that there were better alternatives available, will allow for the test results to be ignored.

Thus, a decision that initially seems to constrict employer flexibility instead is designed to provide for HR certainty. The Court’s opinion front-loads the review process for the examination and thereby creates more certainty in the final results. It protects the reasonable and good-faith efforts of HR professionals from ongoing, after-the-fact debates about the validity of the mechanism. It is a pro-HR decision in that it seeks to insulate HR business judgment from *ex post* scrutiny. Although the Court held New Haven liable in this instance, it perhaps intended *Ricci* to embolden future employers to stick with their tests and thereby give such tests more credibility going forward.

The *Ricci* test does have some flexibility and ambiguity, in that a “strong basis” does not mean certain liability.<sup>133</sup> But in the narrative of the Court’s opinion, the most trustworthy player would seem to be IOS. *Ricci* reasserts the role of HR professionals in managing the hiring and promotion process.<sup>134</sup> And it gives such professionals deference in doing their jobs. By holding New Haven liable for rejecting its test after the fact, the Court sends a signal: in HR we trust, and so should you.

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<sup>132</sup> *Ricci*, 557 U.S. at 585.

<sup>133</sup> *Id.* at 581 (rejecting the rule that “an employer in fact must be in violation of the disparate-impact provision” because such a rule would “bring compliance efforts to a near standstill”).

<sup>134</sup> Interestingly, the SHRM amicus brief does not discuss the development of the test in its Statement of the Case, nor does it ever mention IOS by name. See SHRM *Ricci* Amicus Brief, *supra* note SHRM2009. Instead, it argues that the City should have the right to question the test after the fact, particularly if the City follows the Uniform Guidelines on Employee Selection Procedures promulgated by the EEOC. *Id.* at 13-18.

The majority's decision in *Wal-Mart Stores, Inc. v. Dukes*<sup>135</sup> is the flip side of that trust: namely, distrust in the courts. The *Dukes* case involved a Title VII class action brought by three named plaintiffs on behalf of 1.5 million employees and former employees of Wal-Mart stores across the country.<sup>136</sup> At issue was Wal-Mart's system of supervision, including pay and promotion decisions, which the Court's opinion (and Wal-Mart) describe as highly discretionary at the grass roots level. For pay, lower-level managers have discretion to set pay within certain ranges, while higher-level executives set the ranges for managers and other salaried employees.<sup>137</sup> Promotions are also made at lower levels. Although admission to Wal-Mart's management training system does require that certain objective factors be met, such as above-average performance ratings and a willingness to relocate, managers have significant discretion in selecting candidates for training and for promotions beyond the program.<sup>138</sup> It is this common personnel practice—namely, discretion over pay and promotion at lower levels—that plaintiffs allege as the common factor that created the discrimination against the class.

The *Dukes* Court was unanimous in rejecting the lower court's class action certification as a Rule 23(b)(2) class.<sup>139</sup> However, the four dissenters would have given the plaintiffs leave to replead their action as a Rule 23(b)(3) class action,<sup>140</sup> while the majority also rejected the certification for failing to meet the commonality requirement in Rule 23(a)(2).<sup>141</sup> According to the majority, it was possible that some number—possibly even a large number—of female Wal-Mart employees had individual Title VII claims based on their mistreatment at the hands of a particular supervisor. However, for the claims to be triable as a class action, the plaintiffs had to share a “common contention” that was “of such a nature that it is capable of classwide resolution.”<sup>142</sup> As the majority pointed out, “Here respondents wish to sue about literally millions of employment decisions at once. Without

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<sup>135</sup> 131 S.Ct. 2541 (2011).

<sup>136</sup> *Id.* at 2547.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *See id.* at 2557; *id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

<sup>140</sup> *Id.*

<sup>141</sup> *Dukes*, 131 S.Ct. at 2550-57.

<sup>142</sup> *Id.* at 2551.

some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.”<sup>143</sup> Thus, in order for the class action to proceed, the discretionary system in and of itself had to be the common answer to this question.

The dissent seemed comfortable with the notion that a policy of great discretion on the part of lower-level supervisors could itself be the root cause of discrimination. That discretion was allegedly warped in part by the fact that most managers were men, and thus would be more likely to choose men for promotion and higher pay, as well as in part by a corporate culture that was suffused with sexism.<sup>144</sup> The dissent summarized its position in this way: “Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes.”<sup>145</sup> However, the majority rejected the dissent's approach as giving the plaintiff's case too much credence. The majority opinion found the plaintiff's anecdotal evidence to be far too thin to support a class-based inference of discrimination.<sup>146</sup> It rejected the statistical evidence as insufficient to prove discrimination against the members of the class.<sup>147</sup> And it rejected plaintiffs' sociological evidence that Wal-Mart had a “strong corporate culture” that rendered it “vulnerable” to gender bias.<sup>148</sup> According to the majority, it could “safely disregard” this testimony once the sociologist conceded that he did not have any way to quantify the impact of this culture on actual employment decisions.<sup>149</sup>

If it seems like this is getting into the merits of plaintiffs' case, then perhaps it is. The dissenters argued that the majority was in fact labeling its concerns as “commonality” issues when they were actually issues for consideration under Rule 23(b)(3).<sup>150</sup> In either case, the

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<sup>143</sup> *Id.* at 2552 (emphasis in original).

<sup>144</sup> *Id.* at 2562-63 (Ginsburg, J., concurring in part and dissenting in part).

<sup>145</sup> *Id.* at 2567.

<sup>146</sup> *Dukes*, 131 S.Ct. at 2556.

<sup>147</sup> *Id.* at 2555-56.

<sup>148</sup> *Id.* at 2553-54.

<sup>149</sup> *Id.* at 2554.

<sup>150</sup> *Id.* at 2565-66 (Ginsburg, J., concurring in part and dissenting in part).

plaintiffs seem to facially have the makings of a certifiable class action: common employee management system plus significantly lopsided statistics equal Title VII class action. The majority could not gainsay the fact that a purely discretionary system may in fact be a vehicle for discrimination. But it can, however, require the plaintiffs to show just exactly how that discretion was warped in a particular case. The Court stated:

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since an employer’s undisciplined system of subjective decisionmaking can have precisely the same effects as a system pervaded by impermissible intentional discrimination. . . . But the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. . . . And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.<sup>151</sup>

This passage hits at the crux of the Court’s theory of the case. Discretion itself cannot be enough; there must be some discriminatory inference strong enough to extend across the individual actions at issue or (as in this case) a class of plaintiffs. And that’s because,

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<sup>151</sup> *Id.* at 2554.

according to the majority, “left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”<sup>152</sup> And yet in *Dukes*, there was a disparity: although women filled 70 percent of the hourly jobs in Wal-Mart stores, they made up only 33 percent of management employees.<sup>153</sup> The Court consigns this disparity to the realm of individual actions.

The Court’s defense of discretion, even in the face of disparity and some limited but noxious anecdotal evidence, has larger ramifications. By protecting the role of discretion in personnel decisionmaking, the Court preserved a certain approach to HR management against class-action attack. This position echoes the SHRM amicus brief, which argued that individualized decisionmaking programs reflected sound HR practices.<sup>154</sup> More importantly, the Court affirmed the notion that, even in the face of anecdotal and statistical evidence to the contrary, the bad faith of individual managers cannot be presumed. Instead, the opinion assumes that discretion will be used appropriately until proven otherwise. It keeps courts out of the business of mandating changes to discretionary personnel practices, and instead keeps them focused on the rotten actors who use discretion improperly.<sup>155</sup> As such, they work with HR professionals to police a personnel system, rather than mandating that such professionals use a system that creates a nondiscriminatory result. In the short term, this may result in more complete justice for

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

<sup>154</sup> Brief for Amici Curiae Society for Human Resource Management and HR Policy Association in Support of Petitioner at 8, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) (No. 10-277) [hereinafter SHRM *Dukes* Amicus Brief]. SHRM also noted that “certifying a massive class without even considering the impact of Wal-Mart’s diversity policies on its culture and decision-making” would “underestimate[] the value of such programs and weaken[] the incentives to create or maintain voluntary diversity programs.” *Id.*

<sup>155</sup> See also Matt Bodie, *Workplace Rules*, Room for Debate, NYTIMES.COM, at: <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/leaving-it-to-the-workplace> (“Allowing these claims to go forward as a class would transfer a huge chunk of employee management from private human resources professionals to the courts. And that does not interest the Roberts Court in the least.”).

those plaintiffs who were severely harmed. But it does reflect the Court's faith in the good faith of Wal-Mart managers.

If *Dukes* is the Roberts Court's most famous employment law case, *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*<sup>156</sup> is its most notorious. Its crabbed and parsimonious reading of Title VII's statute of limitations was roundly rejected by Congress,<sup>157</sup> and the plaintiff has become something of a celebrity in the aftermath.<sup>158</sup> The Court's holding – that plaintiffs are responsible for determining if their pay is discriminatory, even if they have no idea about the discrimination – seems to reflect a tin-eared approach to the underlying problem. There is such an obvious objection to the impracticality of the Court's holding that even legal laity had grounds to object. Why would the Court put itself in such a controversial position? The decision was decidedly pro-employer, conservative, and anti-litigation. And perhaps these labels tell the entire story. But once again, I would argue that the Court is looking at the case not through the eyes of Lilly Ledbetter, but through the eyes of HR departments. And the case looks less objectionable through those lenses.

Ledbetter worked at Goodyear for almost twenty years. Over time, her pay fell off in comparison with her cohort of managers, who were all men. At the end of her employ, Ledbetter was making roughly \$3700 a month, compared with a range of \$4200 to \$5200 for her colleagues.<sup>159</sup> Ledbetter had no sense of this disparity, however, until she took early retirement. The average person can sympathize (or perhaps empathize) with Ledbetter's anger and sense of betrayal at finding out about the large difference in pay. Moreover, it is easy to understand why she didn't know about it. As Justice Ginsburg related, in dissent:

Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a

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<sup>156</sup> 550 U.S. 618 (2007).

<sup>157</sup> Lily Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000(e)(5) (2009).

<sup>158</sup> Gail Collins, *Lily's Big Day*, N.Y. TIMES, Jan. 28, 2009, at A27.

<sup>159</sup> *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 643 (Ginsburg, J., dissenting).

federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.<sup>160</sup>

The Court decision, written by Justice Alito, spends very little time on the facts.<sup>161</sup> The Court is fairly narrow and doctrinal in its holding, pointing to the concept of “discrete discriminatory acts” as triggering time limit for filing an EEOC charge.<sup>162</sup> In justifying the decision on policy grounds, the Court points to the usual justifications for statutes of limitations: the need for prompt resolution of disputes, the staleness of evidence over time, and the desire for finality.<sup>163</sup> As the Court notes, the 180-day EEOC charging deadline is “short by any measure,” and it reflects an intention to “encourage the prompt processing of all charges of employment discrimination.”<sup>164</sup> The Court also notes that the deadline “reflects Congress’ strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.”<sup>165</sup> The Court spends a more significant amount of time, however, analyzing the problem of reconstructing intent many years after the fact. As the Court states:

For example, in a case such as this in which the plaintiff’s claim concerns the denial of raises, the employer’s challenged acts (the decisions not to increase the employee’s pay at the times in question) will almost always be documented and will typically not even be in

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<sup>160</sup> *Id.* at 645 (Ginsburg, J., dissenting).

<sup>161</sup> This is the Court’s only description:

Petitioner Lilly Ledbetter (Ledbetter) worked for respondent Goodyear Tire and Rubber Company (Goodyear) at its Gadsden, Alabama, plant from 1979 until 1998. During much of this time, salaried employees at the plant were given or denied raises based on their supervisors’ evaluation of their performance. In March 1998, Ledbetter submitted a questionnaire to the EEOC alleging certain acts of sex discrimination, and in July of that year she filed a formal EEOC charge.

*Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 621 (2007).

<sup>162</sup> *Id.* at 628 (“The EEOC charging period is triggered when a discrete unlawful practice takes place.”).

<sup>163</sup> *Id.* at 629-32.

<sup>164</sup> *Id.* at 630.

<sup>165</sup> *Id.* at 630-31.



dispute. By contrast, the employer's intent is almost always disputed, and evidence relating to intent may fade quickly with time. In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial. Thus, the critical issue in a case involving a long-past performance evaluation will often be whether the evaluation was so far off the mark that a sufficient inference of discriminatory intent can be drawn. This can be a subtle determination, and the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened.<sup>166</sup>

This is a concern that would resonate with human resources. Following the *Faragher* and *Ellerth* roadmap, HR departments look to take the lead on internal investigations. If the department doesn't know about the problem, they cannot investigate it. Instead, they are left to deal with the problem well after the fact. It is much harder to demonstrate the good faith of an employment decision years later, when evidence that would have been available contemporaneously with the decision no longer exists.<sup>167</sup>

Moreover, compensation procedures are particularly thorny. Because of the range of possibilities when it comes to compensation, both in amount and type, the human resources literature has spent extensive amounts of time on establishing best practices in the area.<sup>168</sup> Of course, the problem of pay disparity is a continuing and insidious problem. In my view, the Court's decision reflected an overly legalistic

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<sup>166</sup> Ledbetter, 550 U.S. at 631-32 (citations omitted).

<sup>167</sup> SHRM and the Equal Employment Advisory Council make this point in their brief, arguing that finding for Ledbetter would essentially eliminate the statute of limitation and would impose an "undue burden" on the employer to defend against stale claims. Brief for Amici Curiae Equal Employment Advisory Council and Society for Human Resource Management in Support of Petitioner at 5-6, Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007) (No. 5-1074) [hereinafter SHRM Ledbetter Amicus Brief].

<sup>168</sup> See, e.g., Barry Gerhart et al., *Employee Compensation: Theory, Practice, and Evidence*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 528 (Gerald R. Ferris et al. eds. 1995); Stephen E. Condrey et al., *Compensation: Choosing and Using the Best System for Your Organization*, in HUMAN RESOURCES MANAGEMENT: CONTEMPORARY ISSUES, CHALLENGES, AND OPPORTUNITIES 421 (Ronald R. Sims ed. 2007)

and HR-oriented response to a difficult problem. But it becomes more understandable when viewed through the eyes of those whose job it is to manage compensation policies—especially when we do not assume bad faith.

### *B. Retaliation*

Those looking to apply a purely “conservative” or “pro-business” meme to the Roberts Court’s labor and employment law cases must contend with the Court’s work in the area of retaliation. The Court’s decision in *Burlington Northern and Santa Fe Ry. Co. v. White*,<sup>169</sup> one of its first decisions as a court, considered the scope of Title VII protections afforded against retaliation. The Court rejected lower courts’ narrower interpretations and instead concluded that the antiretaliation provisions were not confined to those that are related to employment or that occur at the workplace.<sup>170</sup> The Court also held that an employer’s actions could be considered retaliation if “they could well dissuade a reasonable worker from making or supporting a charge of discrimination.”<sup>171</sup> Although Justice Alito concurred in judgment, proposing a narrower standard,<sup>172</sup> the other eight Justices all agreed to the expansive interpretation. The retaliation at issue in the case could have been viewed as *de minimis*, as the plaintiff had been reassigned with loss in pay or benefits, and the employer retracted her 37-day suspension after the fact, giving her backpay.<sup>173</sup> Nevertheless, the Court unanimously affirmed the jury’s award of \$43,500.<sup>174</sup>

The Court arguably expanded its definition of retaliation in *Thompson v. North American Stainless, LP*.<sup>175</sup> *Thompson* concerned an employer’s alleged decision to fire the fiancé of an employee in retaliation for the employee’s decision to file a sex discrimination claim with the EEOC.<sup>176</sup> The Court had “little trouble” concluding that the alleged facts constituted a violation of Title VII’s antiretaliation

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<sup>169</sup> 548 U.S. 53 (2006).

<sup>170</sup> *Burlington*, 548 U.S. at 57.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 75 (Alito, J., concurring in the judgment).

<sup>173</sup> *Burlington*, 548 U.S. at 58.

<sup>174</sup> *Id.* at 58, 70-73.

<sup>175</sup> 131 S. Ct. 863 (2011).

<sup>176</sup> *Id.* at 867.

provisions.<sup>177</sup> Relying on the *Burlington* standard, the Court said: “We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired.”<sup>178</sup> The Court was not troubled by the lack of bright-line rule as to the type of relationships covered.<sup>179</sup> Flexibility was necessary to accommodate “the broad statutory text and the variety of workplace contexts in which retaliation may occur.”<sup>180</sup> Even though the fired employee was not the target of the retaliatory motive, the Court found he still had standing to sue because he fell within the “zone of interests” protected by the statute.<sup>181</sup> Because hurting the plaintiff was the employer’s chosen and unlawful means for retaliating against his fiancée, he was “well within the zone of interests sought to be protected by Title VII.”<sup>182</sup>

The results of these cases may not seem particularly friendly to human resources departments. In fact, SHRM (in conjunction with the National Federation of Independent Businesses) filed an amicus brief in support of the employer in *Burlington*.<sup>183</sup> The brief argued that retaliation should be limited to ultimate tangible employment actions, such as firing or failure to promote, because otherwise the employer’s hands would be tied in its day-to-day employee management.<sup>184</sup> According to the amici, allowing retaliation claims on these lower-order offenses would provide a “temptation” for employees and their attorneys to opt out of the internal grievance system and file suit.<sup>185</sup> However, two points should be noted. First, in both cases, an employee had already stepped outside of the employer’s internal HR process and filed an antidiscrimination claim. Thus, the claim that employers needed to be free of government interference is belied to an extent by

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 868.

<sup>179</sup> *Id.* (“We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.”).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 870.

<sup>182</sup> *Id.*

<sup>183</sup> Brief for Amici Curiae Society for Human Resource Management and National Federation of Independent Business Legal Foundation in Support of Petitioner, *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (No. 05-259) [hereinafter SHRM *Burlington* Amicus Brief].

<sup>184</sup> *Id.* at 4, 16-21.

<sup>185</sup> *Id.* at 14.

the preexisting claim, which had already brought the government into the picture. Second, the recognition of claims based on smaller-bore offenses actually helps well-intentioned HR departments do their jobs in correcting improper conduct. HR must stand as a bulwark against the decisions by other firm participants that violate the law or public policy. The amici recognized this in their brief:

[R]etaliatio[n] claims often concern conduct arising from an emotional response that simply reflects human nature: a supervisor wrongfully accused of discrimination may, without intending impermissible retaliation, get caught up in the heat of the moment. The employer's internal mechanisms, implemented through a human resource professional or upper level management, who act as goalkeepers, fulfill the employer's responsibility to ensure that human nature is not permitted to eviscerate statutory rights. Missteps of human nature should be permitted to be investigated and potentially cured by internal review.<sup>186</sup>

What the brief misses, however, is that the incentive for other members of the firm to go along with HR's internal review is (at least in part) the fear that the firm will suffer government sanctions if it fails to obey HR. Thus, the HR department would be rendered relatively toothless in fighting against retaliation if employers could carry out their attacks below the radar without fear of being called to account. And if lower-level retaliation goes unchecked, then future potential claimants will be chilled in their decisions about filing a claim—at least, if they still hope to stay with the company. Thus, poor antiretaliation enforcement could cause the entire edifice of internal dispute resolution to come crumbling down. As the Court recognized in *Burlington*, “An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.”<sup>187</sup>

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<sup>186</sup> *Id.* at 17.

<sup>187</sup> *Burlington*, 548 U.S. at 63-64 (citations omitted; emphasis in original).

The ramifications of strong antiretaliation protection within a HR-oriented framework became clear in *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee*.<sup>188</sup> In *Crawford*, the employer had received complaints about inappropriate sexual behavior by the newly-hired employee relations director for the school district.<sup>189</sup> The matter was routed through the human resources department,<sup>190</sup> and the assistant HR director contacted employees in the director's department pursuant to her investigation. One of those employees, Vicky Crawford, reported to the assistant HR director that the employee relations director had sexually harassed her and her fellow employees.<sup>191</sup> To this point, however, Crawford has brought no formal complaint either internally, with the EEOC, or with a state civil rights agency. After the investigation, the employer concluded that Hughes had engaged in inappropriate behavior but did not take any disciplinary investigation against him. All three employees who had testified in the HR investigation, however, were terminated.<sup>192</sup> Crawford was fired for alleged embezzlement and drug use – charges she claimed were later proven to be untrue.<sup>193</sup> She brought suit claiming that she was protected by Title VII's antiretaliation provisions.

The lower courts had dismissed Crawford's claim, finding that her claim did not meet the requirements for Title VII's protection under either the "participation" clause or the "opposition" clause.

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<sup>188</sup> 555 U.S. 271 (2009).

<sup>189</sup> The discussion of facts was taken from *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee*, 211 F. App'x. 373, 374-375 (6th Cir. 2006), which has a more extensive narrative of the events in question.

<sup>190</sup> The employee relations director would normally have been responsible for investigating such complaints. *Id.* at 374.

<sup>191</sup> *Id.* at 375.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* On remand from the Supreme Court's decision, the district court denied the employer's motion for summary judgment. *Crawford v. Metropolitan Government of Nashville and Davidson County Tennessee*, 2009 WL 3348233 (M.D. Tenn. Oct. 15, 2009). The case went to trial, and Crawford was awarded \$1.56 million in damages. E. Thomas Wood, *Crawford Lawsuit Costs Metro Another \$333,000*, NASHVILLE POST, April 13, 2010, at: [http://www.nashvillepost.com/news/2010/4/13/crawford\\_lawsuit\\_costs\\_metro\\_another\\_333000](http://www.nashvillepost.com/news/2010/4/13/crawford_lawsuit_costs_metro_another_333000). The employee relations director resigned in 2003 after acknowledging that he had falsely claimed to be a lawyer, as Navy SEAL, and a professional football player. *Id.*

Section 704 of the 1964 Civil Rights Act prohibits employers from discriminating against an individual “because he has opposed any practice made an unlawful employment practice by this subchapter,” known as the opposition clause, or “because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter,” known as the participation clause.<sup>194</sup> The Court did not reach the participation-clause issue, but it held in favor of Crawford under the opposition clause.<sup>195</sup> Finding that “Crawford’s description of the louche goings-on would certainly qualify in the minds of reasonable jurors as resistant or antagonistic to Hughes’s treatment,”<sup>196</sup> the Court held that opposition clause protection “extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation.”<sup>197</sup>

The employer in *Crawford* argued that lowering the bar for retaliation claims would discourage employers from investigating claims in the first place. The Court expressed skepticism on this point, as it noted “the incentive to enquire that follows from our decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*.”<sup>198</sup> Discussing the requirements of the affirmative defense, the Court stated that “[e]mployers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.”<sup>199</sup> Indeed, the Court pooh-poohed the employer’s fears, stating: “The possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation does

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<sup>194</sup> 42 U.S.C.A. § 2000e-3 (2006).

<sup>195</sup> The participation clause might seem to be a natural fit, since Crawford was participating in an investigation of sexual harassment. But the statutory text poses problems, as it limits coverage to filing a charge or to “participat[ing] . . . in an investigation, proceeding, or hearing *under this subchapter*.” *Id.* (emphasis added). The employer’s investigation in *Crawford* may not be considered an investigation under Title VII, as it is not a governmental investigation conducted pursuant to Title VII authority and guidelines.

<sup>196</sup> *Crawford v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 555 U.S. 271, 276 (2009) (citations and quotations omitted).

<sup>197</sup> *Id.* at 273.

<sup>198</sup> *Id.* at 278.

<sup>199</sup> *Id.*

not strike us as likely to diminish the attraction of an *Ellerth-Faragher* affirmative defense.”<sup>200</sup>

More importantly, however, the Court did find it likely that a contrary holding would considerably weaken the affirmative defense, as it would undercut the mutual incentives that provide for its operation. As the Court described:

If it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that “[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.” Brake, Retaliation, 90 Minn. L.Rev. 18, 20 (2005); see also *id.*, at 37, and n. 58 (compiling studies). The appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of ... preventive or corrective opportunities provided by the employer.” *Ellerth, supra*, at 765, 118 S.Ct. 2257. Nothing in the statute's text or our precedent supports this catch-22.<sup>201</sup>

Ultimately, the *Crawford* Court – unanimous in result, with only Justices Alito and Scalia concurring in judgment – was moved by concerns about its *Ellerth-Faragher* affirmative defense. A strict textual reading of the statute is more equivocal than the Court allows, as an employee testifying about her boss's behavior is not necessarily

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<sup>200</sup> *Id.* at 279.

<sup>201</sup> *Id.*

“opposing” it. In *Crawford*, the plaintiff had told her story at the request of a human resources official as part of an official investigation. Her report about the director’s behavior was arguably part of her work duties; it was not an individual effort on her part to vindicate the wrongs that she and others had suffered. The Court dismisses the possibility that testimony about discrimination or harassment could be supportive of such behavior as “eccentric cases.”<sup>202</sup> But it does not consider the possibility that such testimony could be neither supportive nor opposed, but neutral. The fact that the employee has not complained about such behavior, either to the employer or the government, is further evidence of neutrality. It is something of a stretch to say that invited testimony about a coworker’s behavior in the context of an employer’s investigation means that the employee “has opposed [a] practice made an unlawful employment practice” under Title VII.<sup>203</sup>

The weakness of the textual argument, in my view, heightens the importance of the Court’s policy arguments. And those policy arguments rest on the protection of the *Faragher-Ellerth* defense. As the Court notes in its opinion, “*Ellerth* and *Faragher* have prompted many employers to adopt or strengthen procedures for investigating, preventing, and correcting discriminatory conduct.”<sup>204</sup> If internal investigations were not protected, then “knowledgeable” employees—including those already represented by counsel—would logically (and reasonably) refuse to participate in such investigations. In order to protect human resources departments in conducting their jobs with propriety and dispatch, the Court protected individuals who work with HR departments. *Crawford*—who had not complained nor filed a charge, yet provided unblinking testimony to HR personnel when called upon to do so—was in this respect an ideal employee. It should not be surprising that the Court insured that she and those like her would not be left out of the new antidiscrimination regulatory structure.

### C. Privacy

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<sup>202</sup> *Id.* at 276-77.

<sup>203</sup> Moreover, the Court does not determine whether the director’s conduct was actually a violation of Title VII.

<sup>204</sup> *Id.* at 278-79.



The Supreme Court has only limited jurisdiction over workplace privacy concerns. The primary employee privacy protections are found within state law.<sup>205</sup> However, public sector employees have federal constitutional privacy protections. The Rehnquist Court attempted to establish the standard for these protections in *O'Connor v. Ortega*.<sup>206</sup> In that case, a state hospital conducted a search of the office and files of an employee who had been accused of workplace wrongdoing.<sup>207</sup> The employee sued the state, claiming a violation of his Fourth Amendment right against unreasonable searches.<sup>208</sup> In a vote split between a four-member plurality and one-member concurrence in the judgment, the Court rejected the government's claim that the Fourth Amendment did not apply, but it also held that neither a warrant nor probable cause were necessary to protect employees' privacy interests against routine, work-related searches.<sup>209</sup> Instead, the Court found that employees were entitled to privacy protections, but the protections were limited in scope. In order to make a claim, the plurality required that the employee first have a reasonable expectation of privacy as to the location,<sup>210</sup> and then that the employee's expectations were violated by a search that failed the standard of reasonableness as to its inception or its scope.<sup>211</sup> Implying a fairly nonrestrictive standard, the plurality noted: "Ordinarily, a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file."<sup>212</sup> In his concurrence, Justice Scalia argued

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<sup>205</sup> Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 279 (2012) ("Without federal constitutional protections, private sector employees must instead rely on either the common law of torts . . . or on various other federal and state legislative enactments, for their workplace privacy rights.").

<sup>206</sup> 480 U.S. 709 (1987).

<sup>207</sup> *Id.* at 712-14 (O'Connor, J.) (plurality opinion). The employee was the chief of professional education for psychiatry residents at the hospital. *Id.* at 712.

<sup>208</sup> *Id.* at 714.

<sup>209</sup> *Id.* at 717, 722; *id.* at 731-32 (Scalia, J., concurring in the judgment). Specifically, the four-member plurality limited itself to the Fourth Amendment standard for "a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance." *Id.* at 723 (plurality opinion).

<sup>210</sup> *Id.* at 717-18.

<sup>211</sup> *Id.* at 725-26.

<sup>212</sup> *Id.* at 726.

that employees always had an expectation of privacy in their workplaces and personal effects therein.<sup>213</sup> Thus, he advocated for the adoption of a simple reasonableness test, and noted that common workplace government searches would meet the test.<sup>214</sup>

Although the plurality and concurrence disagreed as to the mechanics of the standard, both appeared to agree on basic principles. The ultimate question is whether a search is reasonable within its parameters. And the government acting as an employer is subject to different standards of reasonableness than the government acting as law enforcement.<sup>215</sup> Thus, under either standard there is no need for a warrant or probable cause, even if the search is designed to locate evidence of suspected work-related employee misfeasance.<sup>216</sup> The public employer needs the discretion to act as private employers do in conducting their business.<sup>217</sup> This determination is not without critics, starting with the four dissenters in the case.<sup>218</sup> It shows that the Court focused its mindset more on the milieu of the everyday workplace, rather than the government's power to search and seize.

The Roberts Court has continued to analyze public employee privacy protections using *Ortega's* flexible standards. The question in *City of Ontario v. Quon*,<sup>219</sup> as it was in *Ortega*, is whether the public employer had violated its employee's Fourth Amendment right against

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<sup>213</sup> *Id.* at 731 (Scalia, J., concurring in the judgment) (“I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter.”).

<sup>214</sup> *See also id.* at 732 (Scalia, J., concurring in the judgment) (“The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.”).

<sup>215</sup> *Id.* at 717 (plurality opinion) (“The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.”); *id.* at 732 (Scalia, J., concurring in the judgment) (concluding that “the government's status as employer, and the employment-related character of the search, become relevant” when considering the reasonableness of the search). *See also* *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591, 598 (2008) (making this point).

<sup>216</sup> *Id.* at 723 (plurality opinion).

<sup>217</sup> *Id.* at 723-25 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment).

<sup>218</sup> *Id.* at 741-42 (Blackmun, J., dissenting) (arguing that there is no special need to dispense with the warrant and probable cause requirements of reasonableness).

<sup>219</sup> 130 S.Ct. 2619 (2010).

unreasonable searches. However, *Quon* involved a “location” with more uncertain privacy protections: an employer’s text messaging system. The system in question was run by the City of Ontario’s police department to allow its officers to communicate with one another.<sup>220</sup> The department provided the officers with pagers, and the messages were transmitted over a private company’s wireless service pursuant to a contract between the company and the city. The City’s privacy policy reserved to the City the right to monitor the system, but a supervisor within the department also indicated that the texts would not be audited if employees paid for any additional expense incurred if the employee went over the character amount.<sup>221</sup> After a set of employees consistently went over the character limits over several months, the chief of police decided to conduct an audit to determine whether the limits were too low for work-related purposes. The audit determined that in fact the employees were using the messaging system primarily for personal purposes, and that some of the texts were sexually explicit. As a result of the audit, the plaintiff-employee was allegedly disciplined.<sup>222</sup>

The Court had a number of complicated issues to address in *Quon*. The immediate concern is how to frame the proper standard: would it use the *Ortega* plurality’s two-step approach, Justice Scalia’s reasonableness approach, or a newly created approach? Within these tests, further intricacies lurked. What sort of privacy expectations do employees have in this new electronic environment? On one level, the interest of employees in their personal electronic communications resonates with most users of these burgeoning technologies.<sup>223</sup> On the other hand, the interest of the public in accessing police records also appears fairly strong.<sup>224</sup> The Court’s opinion would need to address these concerns.

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<sup>220</sup> *Id.* at 2625 (“The City issued pagers to [plaintiff] and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.”).

<sup>221</sup> *Id.* The written privacy policy applied to the City’s email system but was applied to the text messaging system orally at a staff meeting.

<sup>222</sup> *Id.* at 2626.

<sup>223</sup> *Id.* at 2630 (“Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.”).

<sup>224</sup> For a discussion of these ramifications, see Brief of Amici Curiae Los Angeles Times Communications LLC, The Press-Enterprise Company, The Associated Press,

Although the *Quon* majority does address these concerns, it largely avoided answering them. Instead, it skipped all the way to the end to determine that the search was reasonable and therefore constitutional. In getting to this end point, the Court decided not to choose the proper standard to use<sup>225</sup> or to determine whether the police officers had a reasonable expectation of privacy.<sup>226</sup> Such diversions were not necessary, because ultimately the search itself was justified in its inception and reasonable in its scope. The Court found that the Department had a reasonable basis for examining the text messages—namely, its desire to know whether the text messaging character limit was sufficient for the officers’ needs—and found the two-month scope of the search to be reasonable as well.<sup>227</sup> Because the department acted reasonably in conducting the search, said the Court, the search was constitutional.

In jumping ahead to the final doctrinal hurdle to resolve the case, the Court arguably chose the weakest link upon which to rest its case. The department had told the officers that it would allow them to reimburse it for any text-messaging overages and, if they did so, there would be no need to audit the messages themselves.<sup>228</sup> The department leadership apparently changed its mind, because they had become “tired of being bill collectors” and because they were worried that the existing character limits were too low.<sup>229</sup> Neither of these is really a good reason to conduct a search of the contents of the messages without notifying the officers ahead of time. Had the department been worried about malfeasance or even misfeasance of some kind, the search might have made more sense. But the two justifications provided seem fairly weak, especially when the department could have

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The E.W. Scripps Co., The California Newspapers Publishers Association, The Reporters Committee for Freedom of the Press, The First Amendment Coalition and Californians Aware in Support of Petitioners , *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010) (No. 08-1332).

<sup>225</sup> *Quon*, 130 S.Ct. at 2628-29 (“It is not necessary to resolve [which test is correct.] The two *O’Connor* [*v. Ortega*] approaches—the plurality’s and Justice Scalia’s—therefore lead to the same result here.”).

<sup>226</sup> *Id.* at 2630 (assuming *arguendo* that *Quon* had a reasonable expectation of privacy).

<sup>227</sup> *Id.* at 2631.

<sup>228</sup> *Id.* at 2625.

<sup>229</sup> *Id.* at 2626.

simply changed its policy going forward.<sup>230</sup> There was no need for exigency. Despite the existence of less intrusive means of searching, with seemingly no loss in effectiveness, the Court still found the search to be reasonable. The Court responded to this concern by noting that the government need not use the least intrusive methods possible in order for the search to be reasonable.<sup>231</sup> Instead, the Court gave the department wide berth in determining how to conduct its review of the text-messaging system. The Court held: “[A] reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used.”<sup>232</sup> Notice what the Court is saying: an employee should be reasonable enough to think in terms of “sound management principles.”

Paul Secunda has argued that the *Quon* opinion continues the trend toward the “privatization” of public employee privacy.<sup>233</sup> In his view, the Court has looked to the private sector in determining the proper levels of privacy protections afforded to public employees.<sup>234</sup> Such an approach would be in line with a Court that took a human-resources perspective. Employee privacy is a critical workplace issue, and much remains uncertain about the extent to which employees can fence out employer intrusions within the workplace. The Supreme Court, put into the role of HR manager thanks to the constitutionalization of public-employee privacy, opts for a doctrine that looks to follow reasonable HR practices. One can understand why the Court would blanch at warrant or probable cause requirements, as suggested by commentators like Secunda for certain circumstances.<sup>235</sup> Such requirements would dramatically depart from the *modus operandi* of the modern workplace.

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<sup>230</sup> This approach was suggested by the Court of Appeals below. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 909 (9th Cir. 2008) (finding that there were “a host of simple ways to verify the efficacy of the 25,000 character limit . . . without intruding on Appellants’ Fourth Amendment rights”).

<sup>231</sup> *Quon*, 130 S.Ct at 2632.

<sup>232</sup> *Id.* at 2631.

<sup>233</sup> Secunda, *supra* note PS2012, at 281.

<sup>234</sup> *Id.* (“But rather than elevating private-sector privacy rights to the public-sector level, *Quon* suggests that public employee workplace privacy rights should be ‘privatized’ and reduced to the level of employees in the private sector.”).

<sup>235</sup> *Id.* at 312-15 (arguing for such requirements for investigatory searches).

The Court's HR-oriented approach to public-employee privacy is even more apparent in *National Aeronautics and Space Administration v. Nelson*.<sup>236</sup> In that case, contract employees at NASA's Jet Propulsion Laboratory were required to go through background checks due to a change in regulatory procedure.<sup>237</sup> These employees were given a questionnaire to complete, and additional questionnaires were sent to the employees' references and past landlords.<sup>238</sup> Employees subject to this background check process brought suit, arguing that the process infringed upon their rights to informational privacy.<sup>239</sup> The Ninth Circuit agreed, highlighting two aspects of the investigations that were problematic.<sup>240</sup> First, the employee questionnaire asked, as a follow-up to an initial question about drug use, whether the employee had had any treatment or counseling for drug use in the last year.<sup>241</sup> Second, the questionnaire sent to references asked a series of open-ended questions pertaining to the employees' honesty, financial integrity, drug use, and overall "suitability" for government employment.<sup>242</sup> The circuit court enjoined these aspects of the investigation.<sup>243</sup>

As in *Quon*, the Supreme Court had serious doctrinal issues to tackle in resolving *Nelson*. The most important question was whether a right to information privacy even existed. The Court had alluded to an interest in "avoiding disclosure of personal matters" in *Whalen v. Roe*<sup>244</sup> and *Nixon v. Administrator of General Services*,<sup>245</sup> but had never established whether a constitutional right existed. As in *Quon*, however, the Court once again skipped through the preliminaries to find that the questionnaires were in fact reasonable. The Court assumed, without deciding, that the constitutional right to information

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<sup>236</sup> 131 S.Ct. 746 (2011).

<sup>237</sup> *Id.* at 752. The change was accomplished through a presidential directive. See Homeland Security Presidential Directive/HSPD -12—Policy for a Common Identification Standard for Federal Employees and Contractors, Public Papers of the President, George W. Bush, Vol. 2, Aug. 27, 2007, at 1765, App. 127.

<sup>238</sup> *Id.* at 752-53.

<sup>239</sup> *Id.* at 754.

<sup>240</sup> *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 878-81 (9th Cir. 2008).

<sup>241</sup> *Nelson*, 131 S.Ct. at 759.

<sup>242</sup> *Id.* at 761.

<sup>243</sup> *Nelson*, 530 F.3d at 878-81.

<sup>244</sup> 429 U.S. 589, 599-600 (1977).

<sup>245</sup> 433 U.S. 425, 457 (1977).

privacy existed.<sup>246</sup> Instead, the Court examined whether the government's questions would violate such a right, and it concluded that they would not.<sup>247</sup> In conducting its review, the Court compared the questions at issue to employment practices used in businesses across the country.<sup>248</sup> In the Court's view, these questions were "part of a standard employment background check of the sort used by millions of private employers."<sup>249</sup> Discussing the drug-related inquiries, the Court contended that "[l]ike any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will efficiently and effectively discharge their duties."<sup>250</sup> Even if the phrasing of the question was potentially more intrusive than necessary, the Court rejected any constitutional requirement to choose the least restrictive means.<sup>251</sup> As for the open-ended questions for references, the Court looked to both public and private HR practices in determining their reasonableness:

The reasonableness of such open-ended questions is illustrated by their pervasiveness in the public and private sectors. Form 42 alone is sent out by the Government over 1.8 million times annually. *Ibid.* In addition, the use of open-ended questions in employment background checks appears to be equally commonplace in the private sector. See, e.g., S. Bock et al., Mandated Benefits 2008 Compliance Guide, Exh. 20.1, A Sample Policy on Reference Checks on Job Applicants ("Following are the guidelines for conducting a telephone reference check: ... Ask open-ended questions, then wait for the respondent to answer"); M. Zweig, Human Resources Management 87 (1991) ("Also ask, 'Is there anything else I need to know about [candidate's name]?' This kind of

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<sup>246</sup> *Nelson*, 131 S.Ct. at 751.

<sup>247</sup> The judgment was unanimous; Justices Scalia and Thomas filed opinions concurring in the judgment in which they found no constitutional right to information privacy. See *id.* at 764 (Scalia, J., concurring in the judgment); *id.* at 769 (Thomas, J., concurring in the judgment).

<sup>248</sup> *Nelson*, 131 S.Ct. at 758 (arguing that the government "could not function" if every employment decision became a constitutional matter).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 759-60 (citations and quotations omitted).

<sup>251</sup> *Id.* at 760.

open-ended question may turn up all kinds of information you wouldn't have gotten any other way"). The use of similar open-ended questions by the Government is reasonable and furthers its interests in managing its operations.<sup>252</sup>

In both *Quon* and *Nelson*, the Supreme Court confronted weighty constitutional questions about the scope of the Fourth Amendment's protections as well as the existence of a right to information privacy. But it moved past both these questions on to more comfortable terrain—namely, whether the HR policies and practices in question had been reasonable. Looking to private businesses for comparison, the Court found that the public employers had acted properly. These cases provide another set of examples as to how the Court addresses employment issues most comfortably from the human resources perspective.

#### D. ERISA

ERISA and HR go hand-in-hand. Human resources departments generally have the responsibility of managing the pension and welfare benefits that are governed by ERISA's protections. ERISA's complexity arguably instigated the growth of HR departments, as professional training aids in the understanding of the financial, accounting, and legal requirements necessary to provide these benefits. The tax ramifications are sufficiently beneficial to induce the creation of health care, pension, and other benefit plans. But, as the Court is keen to remind in its opinions, nothing requires employers to have these plans.

ERISA has a unique and somewhat paradoxical structure. On the one hand, employers generally have complete freedom in setting up their plan, as well as in modifying a plan's contributions or benefits across the board. Once established, however, the plan must be administered for the ultimate good of the beneficiaries. The employer—switching hats, as in trust law, from settler to trustee—must shift from negotiating with its employees to managing the plan in their interest. It is not always clear when the roles change, or what we expect from employers in playing these roles.

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<sup>252</sup> *Id.* at 761.



Although most of us would likely look at an ERISA case through the eyes of the beneficiary, the Roberts Court has evinced a sympathy for the human resources side of the equation. As the Court makes clear, there are doctrinal and instrumental reasons for doing so. But the Roberts Court seems to get the melody of HR, as well as the basic notes, and it shows. Its decisions in this area may have some elements of a conservative, pro-business, and/or anti-litigation approach. However, once again I believe the most consistent theme is that of protection for and empathy towards human resources departments. The Court believes that businesses must govern themselves in the area, and it wants to provide HR departments with the means and independence to do so.

The foundational Rehnquist Court case for the Roberts Court's ERISA jurisprudence is *Firestone Tire & Rubber Co. v. Bruch*.<sup>253</sup> The plaintiffs in *Firestone* had been working for Firestone until their workplaces were sold to Occidental Petroleum.<sup>254</sup> Plaintiffs believed they were entitled to termination pay under the Firestone termination pay plan.<sup>255</sup> Firestone disagreed and refused to pay out any benefits. Plaintiffs brought suit challenging the denial of benefits under ERISA § 1132(a)(1).<sup>256</sup> The Court, in a unanimous ruling, held that Firestone's denial had to be reviewed under a *de novo* standard.<sup>257</sup> The Court's opinion reads as a pro-plaintiff opinion, or at least not a pro-defendant one. The Court emphasizes the importance of viewing ERISA plans as trusts, and thus employees as beneficiaries.<sup>258</sup> It rejects Firestone's argument for an arbitrary and capricious standard of review, finding that such a "reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted."<sup>259</sup> However, the Court's holding ultimately paved the way

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<sup>253</sup> 489 U.S. 101 (1989).

<sup>254</sup> *Id.* at 105.

<sup>255</sup> This plan, unbeknownst to Firestone at the time, was an ERISA-covered plan. *Id.*

<sup>256</sup> 29 U.S.C. § 1132 (2006).

<sup>257</sup> *Id.* at 115.

<sup>258</sup> *Id.* at 110 ("ERISA's legislative history confirms that the Act's fiduciary responsibility provisions codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.") (citations omitted); *id.* at 111 ("In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law.")

<sup>259</sup> *Id.* at 113-14.

for employers to do exactly that. The Court stated: “we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”<sup>260</sup> That “unless,” of course, was fairly easy for employers to add to their plans. As a result, arbitrary and capricious review is available to any employer that wants it.

The Court’s opinion in *Firestone* is somewhat mixed about the need to protect employers from judicial oversight. In the following passage, the Court discusses this concern:

Firestone and its *amici* also assert that a *de novo* standard would contravene the spirit of ERISA because it would impose much higher administrative and litigation costs and therefore discourage employers from creating benefit plans. Because even under the arbitrary and capricious standard an employer’s denial of benefits could be subject to judicial review, the assumption seems to be that a *de novo* standard would encourage more litigation by employees, participants, and beneficiaries who wish to assert their right to benefits. Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. Moreover, as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard that we have already explained.<sup>261</sup>

The Roberts Court has no such ambivalence. As discussed below, the Court has consistently found in favor of greater HR discretion and authority. Sometimes that means cutting back on beneficiaries’ litigation rights. But sometimes, as in the *Crawford* case, it means providing for more relief in order to solidify the private administrative structure that the Court is endeavoring to maintain.

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<sup>260</sup> *Id.* at 115.

<sup>261</sup> *Id.* at 114-15.

*Metropolitan Life Ins. Co. v. Glenn*<sup>262</sup> follows in the tradition of *Firestone* as an opinion that looked more pro-plaintiff at the time it was written. At issue in the case is whether there is a conflict of interest when an plan administrator is also the payer of benefits and, if so, what effect that conflict has. The majority opinion, written by Justice Breyer, found that the roles of decider and payer do, in fact, create a conflict of interest in either an employer or an insurance company.<sup>263</sup> The Court also decided that this conflict of interest is to be taken into account as a factor in determining whether to uphold the denial of benefits. However, the Court also left the “arbitrary and capricious” standard of review in place, so that the conflict is only a factor as to whether the plan administrator abused its discretion.<sup>264</sup> As a result, the case has become more important for its retention of the abuse of discretion standard in the face of a conflict of interest, rather than for the fact that it takes that conflict into account in some way.

The facts in *Metropolitan Life* engender a fair amount of sympathy. After being diagnosed with a severe heart condition, plaintiff sought to avail herself of disability protections afforded by the employer as well as the government.<sup>265</sup> The insurance company that administered plaintiff’s employer’s plan gave her benefits for the initial 24 months after she was rendered unable to work.<sup>266</sup> It also encouraged her to seek social security benefits.<sup>267</sup> After she obtained those benefits, the insurance company claimed the award as a setoff for their plan expenses.<sup>268</sup> But it then denied her claim for long-term disability benefits, even though the standard was close to the social security standard.<sup>269</sup>

Given the insurance company’s duplicitous behavior, as well as the inconsistencies in its defense of its decision, the case seems ripe for an abuse of discretion finding. And ultimately, that judgment was upheld by the Court. The larger question, however, is whether the responsibility for paying out benefits creates a conflict of interest when that party also decides whether to grant benefits. The Court, in dicta,

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<sup>262</sup> 554 U.S. 105 (2008).

<sup>263</sup> *Id.* at 108.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 109.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

found a “clear” conflict of interest “where it is the employer that both funds the plan and evaluates the claims.”<sup>270</sup> Noting that reputational concerns might push a private insurance company into better behavior, the Court nevertheless found the defendant to have had a conflict of interest. And it held that such a conflict should be taken into account when reviewing the decision pursuant to a ERISA claim.

The Court’s decision was a favorable one to ERISA plaintiffs in some respects, as the concurrence by Chief Justice Roberts and the dissent by Justice Scalia make clear. These jurists would have opted for a more limited role for the conflict: Chief Justice Roberts “would instead consider the conflict of interest on review only where there is evidence that the benefits denial was motivated or affected by the administrator’s conflict,”<sup>271</sup> and Justice Scalia would have held that “a fiduciary with a conflict does not abuse its discretion unless the conflict *actually* and *improperly motivates* the decision.”<sup>272</sup> However, the decision is still favorable to ERISA administrators in that it maintains the abuse of discretion standard. Changing the standard of review would result in “adopting a rule that in practice could bring about near universal review by judges *de novo*—*i.e.*, without deference—of the lion’s share of ERISA plan claims denials.”<sup>273</sup> Ultimately, the standard would be more important than whether an ambiguous conflict-of-interest “factor” was made part of the abuse of discretion test.

The majority opinion is also aware of its effect on HR decisionmaking, and it offers a set of suggestions by which ERISA plan administrators can reduce the importance of the conflict of interest factor. The Court states:

The conflict of interest at issue here, for example, should prove more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision, including, but not limited to, cases where an insurance company administrator has a history of biased claims administration. . . . It should

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<sup>270</sup> *Id.* at 112. This conclusion drew a harsh critique from Justice Scalia in dissent, who argued that “I would not resolve this question until it has been presented and argued.” *Id.* at 127 (Scalia, J., dissenting).

<sup>271</sup> *Id.* at 120 (Roberts, C.J., concurring in part and concurring in the judgment).

<sup>272</sup> *Id.* at 127-28 (Scalia, J., dissenting).

<sup>273</sup> *Metropolitan Life*, 554 U.S. at 116.

prove less important (perhaps to the vanishing point) where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decisionmaking irrespective of whom the inaccuracy benefits.<sup>274</sup>

These guidelines are not quite a safe harbor, but the “vanishing point” language is suggestive of that. Ultimately, the Court wants ERISA plan administrators to manage their conflicts privately. Firewalls and internal controls are likely to insulate future administrators from concerns about their conflicts of interest. Like the *Faragher/Ellerth* affirmative defense, these suggestions provide a roadmap for employers and HR professionals in carrying out their compliance responsibilities.

*Conkright v. Frommert*<sup>275</sup> continues the development of the law regarding the review of ERISA benefit determinations. This is no small matter: an estimated 1.9 million beneficiaries have claims denied each year.<sup>276</sup> It is in *Conkright* that the ramifications of *Firestone* and *Metropolitan Life* become clear. The “abuse of discretion” standard, which *Firestone* made available and *Metropolitan Life* kept in place, becomes the centerpiece of the Court’s deference toward plan administrators.<sup>277</sup> That deference is to be kept in place even when the administrator has already demonstrated a flawed understanding of the plan and has used that understanding to harm beneficiaries.

The facts of *Conkright* are “exceedingly complicated,” according to the Court, “[a]s in many ERISA matters.”<sup>278</sup> The plaintiffs were Xerox employees who left the company in the 1980’s, received lump-sum distributions of retirement benefits, and were later rehired. The dispute involved how the pension plan accounted for that lump sum

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<sup>274</sup> *Id.* at 117 (citations omitted).

<sup>275</sup> 130 S.Ct. 1640 (2010).

<sup>276</sup> *Metropolitan Life*, 554 U.S. at 116 (citing C. GRESENZ ET AL., A FLOOD OF LITIGATION? 8 (1999), at: [http://www.rand.org/pubs/issue\\_papers/2006/IP184.pdf](http://www.rand.org/pubs/issue_papers/2006/IP184.pdf))).

<sup>277</sup> *Conkright*, 130 S.Ct. at 1646 (“We expanded *Firestone’s* approach in *Metropolitan Life Ins. Co. v. Glenn* . . . . We held that, when the terms of a plan grant discretionary authority to the plan administrator, a deferential standard of review remains appropriate even in the face of a conflict.

<sup>278</sup> *Conkright*, 130 S.Ct. at 1644.

distribution in calculating the plaintiffs' benefits after they were rehired. The plan administrator created "phantom accounts" whereby it calculated the hypothetical growth that the lump-sum distributions would have experienced if they had stayed in the plans. The plaintiffs' pension benefits were then reduced by that amount.<sup>279</sup> Plaintiffs challenged this method of calculation, and the Court of Appeals ultimately found the method to be unreasonable. On remand, the plan administrator submitted an affidavit with another method of calculating the benefits. The district court did not give this suggestion any deference, and it instead developed its own method of calculating the impact of the lump-sum distributions on future benefits.

The complexity of the facts obscures the equities of the case. In the majority's telling, the plan administrator appears to be a good faith actor, coming up with legitimate approaches that are ultimately ignored by the district court. And not only does the district court fashion its own approach, but its approach did not account for the time-value of money, instead reducing the plans by the nominal amount of the distributions.<sup>280</sup> However, the dissent paints the "phantom account" approach as much more unreasonable. In an appendix to the opinion, the dissent explains how workers subject to the phantom account make significantly less than if they had simply been treated as new hires upon their return to Xerox.<sup>281</sup> Perhaps more damningly, the plan administrator never notified employees about the phantom account method, other than vague language mentioning an "offset" to their pensions.<sup>282</sup> Given the complexity of the decisions being made, this lack of notification is not reassuring as to the administrator's competence or good faith.

The majority opinion does not spend as much time on the facts as the dissent, nor does it mention the administrator's failure to notify beneficiaries about the phantom account method. Instead, it focuses on the need for deference to plan administrators, even in light of error. In fact, the majority is remarkably empathetic to the administrators, as the opening of the opinion makes clear:

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<sup>279</sup> *Id.* at 1645.

<sup>280</sup> *Id.* at 1645.

<sup>281</sup> *Id.* at 1661-62 (Breyer, J., dissenting) (appendix) (explaining how a hypothetical employee would get \$690 per year upon his return to Xerox using the phantom account method, while a new employee would get at least \$3,500 annually).

<sup>282</sup> *Id.* at 1653-54 (Breyer, J., dissenting).

People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is an enormously complex and detailed statute, and the plans that administrators must construe can be lengthy and complicated. (The one at issue here runs to 81 pages, with 139 sections.) We held in *Firestone Tire & Rubber Co. v. Bruch* that an ERISA plan administrator with discretionary authority to interpret a plan is entitled to deference in exercising that discretion. The question here is whether a single honest mistake in plan interpretation justifies stripping the administrator of that deference for subsequent related interpretations of the plan. We hold that it does not.<sup>283</sup>

The focus on “mistake” here is critical: it is not as if the administrator intentionally tried to misread the plan and deny benefits to employees. A “single honest mistake,” the Court reasons, seems fairly excusable and understandable.

The Court is setting up a picture of plan administrators as neutral arbiters who act in good faith and have the interests of beneficiaries at heart. And before we dismiss such a view as naïve or even disingenuous, it is worthwhile to linger on the Court’s vision. As the Court points out, “Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place.”<sup>284</sup> Enforcement of employees’ rights must be balanced against “the encouragement of the creation of such plans.”<sup>285</sup> Part of the encouragement, it would seem, is a great deal of deference to the administrator in interpreting the plan. ERISA plans are not interpreted like contracts, in which the intent of the parties is parsed through the written and oral manifestations of their agreement. Instead, one side is given deference in its interpretation of the contract. To counterbalance this deference, the administrator is expected to act like a trustee, rather than a party to a contract.

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<sup>283</sup> *Conkright*, 130 S.Ct. at 1644 (citations and quotations omitted).

<sup>284</sup> *Id.* at 1648.

<sup>285</sup> *Id.* at 1649.

This second part of the equation has always seemed a bit untenable, or at least unnatural, and the Court evinces some desire to move beyond it. The majority and the dissent spar over how trust law should shape the level of deference afforded to the administrator after an erroneous interpretation of the plan. The majority claims that trust law is “unclear” on the issue, but cites to a set of fairly aged cases to support the possibility of deference.<sup>286</sup> The dissent, on the other hand, claims the law clearly does not require deference after an abuse of discretion, and it cites to the Restatement of Trusts and two treatises for support and then deconstructs the majority’s cases.<sup>287</sup> The majority seems to acknowledge the flaws in its doctrinal argument by stating: “While we are guided by principles of trust law in ERISA cases, we have recognized before that trust law does not tell the entire story. Here trust law does not resolve the specific issue before us, but the guiding principles we have identified underlying ERISA do.”<sup>288</sup> And it is in its description of the “guiding principles . . . underlying ERISA” that the Court’s attachment to human resources comes through.

The Court cites to the values of efficiency, predictability, and uniformity as the core principles in its exegesis of ERISA. Deference to the administrator’s interpretation promotes efficiency “by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation.”<sup>289</sup> Such deference also provides predictability, as “an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review.”<sup>290</sup> Finally, deference encourages uniformity by “helping to avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions—a result that would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting

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<sup>286</sup> *Id.* at 1647-48 (citing to *Hanford v. Clancy*, 87 N.H. 458, 461, 183 A. 271, 272-273 (1936); *In re Sullivan's Will*, 144 Neb. 36, 40-41, 12 N.W.2d 148, 150-151 (1943); *Eaton v. Eaton*, 82 N.H. 216, 218-219, 132 A. 10, 11 (1926); *In re Marre's Estate*, 18 Cal.2d 184, 190, 114 P.2d 586, 590-591 (1941); and *Finch v. Wachovia Bank & Trust Co.*, 156 N.C.App. 343, 348, 577 S.E.2d 306, 310 (2003)).

<sup>287</sup> *Id.* at 1655-59 (Breyer, J., dissenting).

<sup>288</sup> *Conkright*, 130 S. Ct. at 1648.

<sup>289</sup> *Id.* at 1649.

<sup>290</sup> *Id.*



them.”<sup>291</sup> The Court pointed to the district court’s ruling in *Conkright* as an example of what could happen if deference were not afforded. The lower court settled on an interpretation that did not account for the time value of money, was different than other interpretations of the same plan in other circuits, and fomented continued litigation.<sup>292</sup> Deference, on the other hand, would leave the plan’s reins in the hands of the administrator, absent bad faith or severe incompetence.<sup>293</sup>

*Conkright* illuminates the Court’s core premise that runs, somewhat hidden, through *Firestone* and *Metropolitan Life*: namely, administrators must be given deference. This deference could be characterized as conservative, pro-business, and anti-litigation. But it can also be characterized as pro-human resources. That is ultimately where the Court’s concern seems to reside.

Finally, both *Hardt v. Reliance Standard Life Ins. Co.*<sup>294</sup> and *LaRue v. DeWolff, Boberg & Associates, Inc.*<sup>295</sup> are minor cases, unanimous in their judgment, in which the Court attended to the edges of ERISA’s regulatory scheme. In *Hardt*, the plaintiff brought an ERISA action against her plan administrator for the administrator’s long-term disability benefits. The district court dismissed both sides’ motions for summary judgment, but the court also indicated that it was “inclined to rule” in favor of the plaintiff and gave the administrator thirty days to reconsider its decision.<sup>296</sup> After the administrator changed its decision, plaintiff petitioned the court for attorney’s fees. The Supreme Court held that under ERISA’s attorneys fees provision, the fee claimant need not be prevailing party to be eligible for attorney fees under ERISA’s general fee-shifting statute. Instead, the claimant must show some degree of success on merits before court may award attorney fees under ERISA’s general fee-shifting statute. In *LaRue*, an employee had sued his former employer alleging that it had not properly followed his instructions as to his § 401(k) retirement savings plan.<sup>297</sup> The lower courts dismissed the

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1649-51.

<sup>293</sup> *Id.* at 1651 (“Multiple erroneous interpretations of the same plan provision, even if issued in good faith, might well support a finding that a plan administrator is too incompetent to exercise his discretion fairly . . .”).

<sup>294</sup> 130 S.Ct. 2149 (2010).

<sup>295</sup> 552 U.S. 248 (2008).

<sup>296</sup> *Hardt*, 130 S.Ct. at 2154.

<sup>297</sup> *LaRue*, 552 U.S. at 251.

claim, asserting that beneficiaries are only entitled to sue for damages as to the “entire plan.” The Court reversed, holding that a § 401(k) account should be treated as an “entire plan” and therefore the plaintiff was entitled to damages.

We should not make too much of these cases. But in both situations, the Court overturned a court of appeals’ decision and ruled in favor of the plaintiff. To that extent, they represent counterexamples to the arguments that the Roberts Court is simply conservative, pro-business, or anti-litigation. More importantly, they represent human resources values as well. *Hardt* reflects the desire to award parties who succeed, without requiring the technicality of a formal judgment (and thus further litigation). *LaRue* shows that the Court understands the new dynamics of pension plans, which favor defined contribution plans over defined benefit plans. By attending to minor ERISA issues with care and a concern for the underlying process, the Court demonstrates its care and concern for ERISA and the activities that it regulates.

### III. THE ROBERTS COURT AND THE HUMAN RESOURCES REVOLUTION

In *The Political Constitution of Criminal Justice*,<sup>298</sup> William Stuntz blamed the constitutionalization of criminal procedure for our dysfunctional criminal law. According to Stuntz, “[c]urrent constitutional law makes the politics of criminal justice worse: more punitive, more racist, and less protective of individual liberty.”<sup>299</sup> This counterintuitive result, claimed Stuntz, stemmed from the political economy of the criminal justice system. Legislators and agencies only want to spend in areas where they can also exercise control. While the Court has extensively regulated policing and the trial process through constitutional interpretation, it has left substantive criminal law and sentencing largely free from oversight.<sup>300</sup> As a result, legislators have

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<sup>298</sup> Stuntz, *supra* note WJS2006.

<sup>299</sup> *Id.* at 785. *See also id.* at 784 (“There is no way to run a test, but it seems likely that because of the constitutional rules that govern policing and trial procedure, criminal law is broader, sentencing rules are harsher, key criminal justice institutions are more underfunded, and the population of arrestees and defendants is more racially skewed than would otherwise be the case.”)

<sup>300</sup> *Id.* at 782. Stuntz acknowledged that regulation of sentencing has increased in the last few years. *Id.*

focused their attention and spending in defining new crimes and meting out punishment. In order to remedy this state of affairs, Stuntz argued, the Court should roll back its criminal procedure regulation in order to let states take more control.<sup>301</sup> It should instead focus on limited areas of constitutional concern that are likely to fester, and allow states to experiment with different solutions in all areas of the criminal justice system.<sup>302</sup> Speaking more directly to progressive criminal law scholars, Eric Miller has also called for a reconsideration of the Warren Court's criminal cases.<sup>303</sup> According to Miller, the traditional interpretation of the Court's criminal procedure jurisprudence has focused too much on rights, and not enough on the regulation of police that such jurisprudence entailed.<sup>304</sup> Instead of focusing on rights, progressives needed to focus on the regulation of law enforcement officers. Reconceiving the constitutional oversight of justice as an endeavor in republican governance, rather than a right-based scheme, would help reorient our perception to what really matters in everyday criminal justice: namely, the cops.<sup>305</sup>

Just as the political economy of criminal law has focused on constitutional rights, the political economy of employment law has focused almost exclusively on employee legal rights and the litigation that enforces them. The action in the employment law arena centers around statutory rights that are enforced by private rights of action. The gravamen behind these rights is the concern about employer abuses of power, whether it be discriminating against certain kinds of employees, paying low wages, failing to provide for promised benefits, or preventing employees from taking sick or parental leave. However, the relationship between employer and employee is not solely oppositional; we need employers to employ us. In this way, just as we need governments to provide us with security against crime, we need employers to provide us with work and wages. In order to carry out their responsibilities, both governments and employers need power, authority, and flexibility. But we worry about them abusing their power. As a result, we have constructed rights-based regimes to protect those who suffer from abuses of power. In the criminal context,

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<sup>301</sup> *Id.* at 832-33.

<sup>302</sup> *Id.* at 831-50.

<sup>303</sup> Miller, *supra* note EJM2010, at 3-5.

<sup>304</sup> *Id.* at 5-6.

<sup>305</sup> *Id.* at 76-80.

we have constitutional rights that protect individuals against abuses such as unreasonable searches and seizures. In the employment context, we have statutory rights as to hiring, firing, and other employment actions that protect individuals against abuses such as discriminatory terminations. These rights provide the oversight of the powerful institutions in question, and they provide remedies if an individual suffers abuse.

In both contexts, however, legal academia's focus on rights has arguably obscured the bigger picture. As Stuntz and Miller argue, the focus on constitutional rights has constricted legislative and executive efforts to improve the overall functioning of the system.<sup>306</sup> It has frozen certain aspects of criminal procedure in constitutional amber, and has left legislators to run amuck in other areas unfettered. We need to take a step back and look at the larger picture, they argue, particularly when it comes to the regulation of police. Miller contended that the Warren Court's "rights revolution" was actually all about regulation, and that a focus on rights has missed the real point of the Court's criminal procedure jurisprudence.<sup>307</sup> Rather than creating rights, the Court was instead introducing a (federal) regulatory regime into the realm of (state and local) policing. This regulatory regime has been overlooked by commentators in their focus on the contours of individual rights. Miller argued:

The central problem with left-liberal theories of policing is that they are too negative, providing no real account of good policing practices. Left-liberals are no more than minimally interested in the process of criminal investigation, because police investigation undermines immunity from state coercion. Instead, left-liberals focus on tightly restricting police discretion, which is usually characterized as, at most, one step away from race or class discrimination. Lacking a positive theory of policing, left-liberals surrender the discussion of police practices to centrists and conservatives. Left-liberals are left on the fringes seeking to reduce policing as a means of combating state repression.<sup>308</sup>

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<sup>306</sup> Stuntz, *supra* note WJS2006, at 832; Miller, *supra* note EJM2010, at 3-5.

<sup>307</sup> *Id.* at 4-5.

<sup>308</sup> *Id.* at 76-77.

Stuntz makes a similar claim. He argues that cops have been woefully underappreciated by legal academics in their efforts to improve the criminal justice system. He points to President Clinton's "100,000 cops on the street" legislation as the one truly successful recent criminal justice initiative,<sup>309</sup> and he rues the lack of a federal "No Cop Left Behind" program.<sup>310</sup> Stuntz's prescription is radical: "the best thing to do with the massive body of Fourth Amendment privacy regulation, together with the equally massive body of law on the scope and limits of the exclusionary rule, is to wipe it off the books."<sup>311</sup> In exchange, the federal government should continue along the "100,000 cops" path to reinvigorate its relationship with local law enforcement.<sup>312</sup> In other words: it's about the cops, stupid.

Who are the cops when it comes to the workplace? Human resources.<sup>313</sup> Human resources departments implement the employer's policies when it comes to hiring, firing, promotion, compensation, benefits, and work environment. Just as the police wield the authority in the criminal procedure context at the grass roots level, human resources employees wield workplace authority on the shop floor. They make the particularized decisions—millions every day—that can lead to abuse and discrimination. And like the police, they can be demonized based on those abuses. But concern about that abuse overshadows their importance to the functioning of business and industry. More importantly, it neglects an opportunity. HR departments are there, at least in part, to make sure that the employer complies with labor and employment law. They are natural allies in the effort to fight workplace abuse and discrimination. Rather than seeing them as part of the problem, it is time to consider how they can be part of the solution.

Of course, human resources professionals, like police officers, can engage in both misfeasance and malfeasance on behalf of their organizations. Critics of a compliance-based approach to employment

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<sup>309</sup> Stuntz, *supra* note WJS2006, at 810-11, 846 (noting it was combined with the enactment of 42 U.S.C. § 14141, which provides for broad injunctive relief against police departments if a pattern of constitutional violations are established).

<sup>310</sup> *Id.* at 808-09.

<sup>311</sup> *Id.* at 832.

<sup>312</sup> *Id.* at 846.

<sup>313</sup> LAZEAR, *supra* note ED1998, at 1 ("[Human resources professionals] are viewed as company police whose role is to create hassles for others in the firm.").

law argue that HR departments are often deployed as managerial tools, rather than independent monitors.<sup>314</sup> A common thread of these critiques is that HR programs may only serve as window dressing, or may even hide existing discrimination behind particularly thick curtains.<sup>315</sup> Under such circumstances, HR departments are part of the problem, rather than part of the solution, as they allow employers (and courts) to appear as if they are addressing workplace injustices, when in fact the problems are only submerged beneath a more palatable exterior. HR may also make it harder for the employee to sue successfully, either by delaying the claim or creating a plausible paper trail for an innocent explanation.<sup>316</sup>

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<sup>314</sup> See, e.g., Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1, 5-7 (1999) (discussing employer compliance programs as, at least in part, "litigation prevention strategies"); Grossman, *supra* note JLG2003, at 3-5 (expressing the concern that compliance regimes could ultimately leave the level of workplace sexual harassment unaffected).

<sup>315</sup> See Bisom-Rapp, *supra* note SBRFSU, at 964 (describing "how certain compliance mechanisms, specifically those recommended by defense attorneys, may obscure conditions of inequality"); Grossman, *supra* note JLG2003, at 3 (criticizing the *Faragher/ Ellerth* approach for "a misguided culture of compliance, one in which liability is measured not by whether employers successfully prevent harassment, but instead whether they comply with judicially created prophylactic rules").

<sup>316</sup> For example, Brake and Grossman argue:

The past decade's surge of employer policies and procedures for resolving discrimination complaints internally plays an important role in contributing to the problems we identify. The channeling of discrimination complaints into internal employer processes intersects with both ends of the doctrine: the timely filing rules and the retaliation protections. By failing to toll the limitations period on formal remedies, participation in internal grievance processes can run out the clock on an unsuspecting employee's formal assertion of rights. In addition, because employer nondiscrimination policies shape employees' beliefs about the scope of discrimination law, and because participation in such processes falls under Title VII's opposition clause instead of its more generous participation clause, employees who participate in such processes may find themselves without protection from retaliation if their perception of unlawful discrimination turns out to be false. Supporters of an expanded role for such internal processes have failed to consider the full costs of such measures, at least under existing doctrine. In the current Title VII rights-claiming framework, such measures risk supplanting, not merely supplementing, Title VII's formal mechanisms for protecting substantive rights.

Suspicion of HR departments is natural and likely healthy. However, dismissal of such departments is a luxury that reformers cannot afford. The potential to exercise rights and obtain relief is critical to a toothy system of workplace justice. But given the low numbers of workers who formally exercise those rights within the judicial system,<sup>317</sup> it makes sense to consider ways to protect employees through internal means. A recent trend in the theory of workplace regulation is self-governance or “new” governance.<sup>318</sup> New governance argues for greater cooperation between government officials, employer, and (sometimes) watchdog groups in seeking to leverage enforcement resources across a broader range of activity. These efforts, in a variety of fields, offer new methods for making sure that employers are following the law. It is puzzling that in the midst of the new governance discussions, human resources professionals have been largely neglected.

Although HR may be dismissed as simply an arm of management, the field has an independent tradition as a profession and an academic field of study. Scholarship on human resources has established large bodies of research on diversity programs,<sup>319</sup> testing procedures,<sup>320</sup> compensation mechanisms,<sup>321</sup> and employee participation.<sup>322</sup> The history of human resources has many instances

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Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII As A Rights-Claiming System*, 86 N.C. L. REV. 859, 934 (2008).

<sup>317</sup> See Grossman, *supra* note JLG2003, at 51-52 (discussing why employees often forego filing a formal complaint against workplace harassment).

<sup>318</sup> ESTLUND, *supra* note CE2010; Lobel, *supra* note OL2004.

<sup>319</sup> See, e.g., Valerie E. Sessa et al., *Work Force Diversity: The Good, the Bad, and the Reality*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 263 (Gerald R. Ferris et al. eds. 1995).

<sup>320</sup> See, e.g., H. John Bernardin et al., *Performance Appraisal Design, Development, and Implementation*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 462 (Gerald R. Ferris et al. eds. 1995).

<sup>321</sup> See, e.g., Barry Gerhart et al., *Employee Compensation: Theory, Practice, and Evidence*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 528 (Gerald R. Ferris et al. eds. 1995); Stephen E. Condrey et al., *Compensation: Choosing and Using the Best System for Your Organization*, in HUMAN RESOURCES MANAGEMENT: CONTEMPORARY ISSUES, CHALLENGES, AND OPPORTUNITIES 421 (Ronald R. Sims ed. 2007).

<sup>322</sup> See, e.g., Robert C. Liden & Thomas Tewksbury, *Empowerment and Work Teams*, in HANDBOOK OF HUMAN RESOURCE MANAGEMENT 386 (Gerald R. Ferris et al. eds. 1995); Michael P. Leiter, *Engagement at Work: Issues for Measurement and*

in which HR professionals sought to improve the company's treatment of its workers and sought to adapt their businesses to changes in laws and social norms.<sup>323</sup> By working on the front lines, HR professionals have the most direct impact on the day-to-day compliance of the corporation.<sup>324</sup> Even skeptics recognize that HR can deliver important changes to workplace policies and culture—changes that may prevent wrongs from happening in the first place.<sup>325</sup>

How do we reconcile the potential benefits from HR with the potential hazards? To some extent, we cannot. HR must work with management to make the company profitable, but at the same time must be able to restrain management in order to secure legal compliance and promote investments in human capital.<sup>326</sup> These polar attractions—the pull of management on one side, and legal and professional obligations on the other—are often found in the professions.<sup>327</sup> There are particularly exacerbated in a youthful, less traditional profession such as human resources.

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*Intervention*, in THE HUMAN RESOURCES REVOLUTION: WHY PUTTING PEOPLE FIRST MATTERS 213 (Ronald J. Burke & Cary L. Cooper eds., 2006).

<sup>323</sup> See Jacoby, *supra* note SJ2003, at 147 (arguing that human resources have found themselves “in relatively powerful positions” when outside forces such as labor shortages or new laws create uncertainty in the external environment); Bisom-Rapp, *supra* note SBREREP, at 9-10 (“Responding opportunistically to the changing legal landscape, human resources managers began arguing in the 1970s that employers must upgrade personnel procedures.”).

<sup>324</sup> See CHERRINGTON, *supra* note DJC1995, at 8-11 (discussing the relationship between human resources and line management); *id.* at 11-15 (reviewing the primary HR functions).

<sup>325</sup> See Bisom-Rapp, *supra* note SBREREP, at 11 (discussing research that the formal promotion mechanisms improved managerial perspectives on disadvantaged groups); Grossman, *supra* note JLG, at 49 (discussing antiharassment training as “a worthwhile subject of study and probably a worthwhile pursuit for employers”).

<sup>326</sup> See Jacoby, *supra* note SJ2003, at 148 (discussing the “ambiguous role” played by HR within a company).

<sup>327</sup> Many commentators raised serious concerns over the roles of professional gatekeepers in the wake of the Enron collapse. See, e.g., John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. Rev. 301, 302 (2004) (“Securities markets have long employed “gatekeepers”—independent professionals who pledge their reputational capital—to protect the interests of dispersed investors who cannot easily take collective action. . . . But during the late 1990s, these protections seemingly failed, and a unique concentration of financial scandals followed, all involving the common denominator of accounting irregularities.”).



The Supreme Court's opinions in this area, as we have explored, display a solicitousness toward the human resources perspective on these workplace issues. Like HR more generally, this perspective is aligned with management. However, the Court has also recognized that for HR to be a viable entity within the firm, it must have its own center of gravity. Thus, the Court has been particularly protective of retaliation claims, since such claims strike at the root of the HR process. Similarly, in *Ricci*, the Court pushed for the HR professionals to stick to their guns, even when management wanted the flexibility to depart from the test.<sup>328</sup> The Supreme Court has thus shown a willingness to promote HR ideals, rather than just managerial interests. This aspect of the Court's employment law jurisprudence is underappreciated.

Just as Miller has argued that progressive criminal law scholars need a positive theory of policing,<sup>329</sup> I would argue that progressive employment law academics and litigators need a positive theory of human resources. Such a theory would seek to mobilize a workforce almost a million strong to ensure not only that employers are following the law, but that workers are empowered to achieve their fullest potential. Fortunately, we need not start from scratch. Many human resources academics have attempted to push the field more in the direction of employees<sup>330</sup> or more in the direction of a ethics-based practice.<sup>331</sup> The ultimate question for the field of human resources will be: does it have a primary commitment to management control and discretion over personnel matters, or does it have a primary commitment to the profession and its ethics? Legal scholars and practitioners will continue to play an important role in this debate.

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<sup>328</sup> See Part II.A *supra*.

<sup>329</sup> Miller, *supra* note EM1, at 76-77.

<sup>330</sup> See, e.g., Graham & Tarbell, *supra* note GT2006 (advocating for a more employee-oriented approach to human resources).

<sup>331</sup> The Society for Human Resources Management has a Code of Ethics that recognizes "As human resource professionals, we are ethically responsible for promoting and fostering fairness and justice for all employees and their organizations." However, the Code also states: "As HR professionals, we are responsible for adding value to the organizations we serve and contributing to the ethical success of those organizations." See SHRM Code of Ethics, at: <http://www.shrm.org/about/Pages/code-of-ethics.aspx>.

## CONCLUSION

The Roberts Court is only seven years old, but if past history is any guide, its impact on the law has only just begun. In the area of employment law, the Court has evinced an interest in and sympathy towards those workers who toil in the fields of human relations. Rather than writing off this effort as simply conservative or pro-business or anti-litigation, commentators and advocates should reconsider the place of human resources departments in the ecosystem of the workplace. The opportunity is there to engage with these employees and harness their industry and efficiency for positive purposes. We should join the Court in these efforts.