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## Article

# The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination

Jennifer Bennett Shinall<sup>†</sup>

## INTRODUCTION

Title I of the Americans with Disabilities Act (ADA) prohibits labor market discrimination against individuals who have an “impairment that substantially limits one or more major life activities,” who are “regarded as” having a substantial impairment, or who have “a record of” a substantial impairment.<sup>1</sup> A substantial impairment has always been the touchstone of what it means to be disabled for the purposes of federal discrimination law. Never has federal law attempted to distinguish between different types of substantial impairments, or between degrees of substantial impairments, or between different subgroups of substantially impaired individuals.<sup>2</sup> An indi-

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1. 42 U.S.C. § 12102(1) (2012). For simplicity, I will refer only to the ADA, which prohibits discrimination by private-sector employers against qualified disabled workers, throughout this Article. Note, however, that the arguments presented here would apply to other laws that prohibit discrimination against disabled workers, including the Rehabilitation Act of 1973 as well as state-level disability laws. See 29 U.S.C. §§ 701–797(b) (2012) (covering public-sector workplaces).

2. In fact, Congress’s intention when passing the ADA was to find a common-ground definition of disability that would encompass all disabled individuals, despite the diversity of their disabling conditions. See NAT’L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE

vidual who qualifies for coverage may be on a cane or in a wheelchair, hard of hearing or completely deaf, African American or white, male or female. As long as the impairment meets the substantial threshold, it is enough to afford the individual coverage under the ADA, and coverage does not vary with severity of the underlying condition.<sup>3</sup> Nor does the ADA's coverage vary if the substantially impaired individual is a member of another protected class. A substantially impaired white male is entitled to exactly the same remedies under the ADA as a substantially impaired African-American female.<sup>4</sup>

Of course, disabled individuals who are members of other protected classes may have access to additional employment discrimination statutes, such as Title VII of the 1964 Civil Rights Act, which prohibits race, color, national origin, religion, and sex discrimination in employment.<sup>5</sup> Yet such individuals only have access if they have proof of discrimination that specifically relates to their Title VII protected status. For example, a disabled female worker who feels she has been discriminated against by her employer due to her disadvantaged status does not necessarily have a successful claim under either Title VII or the ADA. The worker can bring a successful ADA claim only if she has proof specific to employer discrimination on the basis of disability; she can bring a successful Title VII claim only if she has proof specific to employer discrimination on the basis of sex.<sup>6</sup> If she lacks sufficient evidence for one claim—or more worrisome, if her evidence of sex and disability discrimination

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AMERICANS WITH DISABILITIES ACT 80 (2d ed. 2010), [http://www.ncd.gov/publications/2010/equality\\_of\\_Opportunity\\_The\\_Making\\_of\\_the\\_Americans\\_with\\_Disabilities\\_Act](http://www.ncd.gov/publications/2010/equality_of_Opportunity_The_Making_of_the_Americans_with_Disabilities_Act) ("The challenge, therefore, was to find a definition that was at once inclusive enough to cover diverse disabilities, but not so universal that anyone could claim protection by the ADA.").

3. See *id.* at xviii ("The disability community's abiding commitment to act as one unified voice helped keep the ADA a strong act and prevented the exclusion of specific subgroups of disabilities.").

4. See 42 U.S.C. § 12101(b)(2) (noting Congress's intent to provide a "consistent" remedy for all disabled individuals).

5. See *id.* § 2000e-2(a)(1) (prohibiting employers from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise . . . discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

6. Cf. Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 563 (2001) (describing courts' reluctance to draw an inference of discrimination from "ambiguous or contested evidence" and circumstantial evidence more generally).

is inextricably intertwined<sup>7</sup>—she may only have a remedy under one of the two statutes, or she may completely lack a remedy.

Imagine the female worker is in a wheelchair and regularly referred to by her employer as a “crippled witch,”<sup>8</sup> or imagine instead that the female worker has dyslexia and is regularly referred to by her employer as “a dumb slut.”<sup>9</sup> In both cases, the employer’s name-calling seems inappropriate for the workplace and indicative of animus based on the worker’s disadvantaged status. But it is not clear from the name-calling whether the employer’s animus is derived from the worker’s status as a woman, her status as a disabled person, or both. But if the female worker wants a remedy under Title VII and the ADA, she will have to prove both—and it is not clear that she can from these statements alone.

The dilemma faced by the disabled, female worker described above is an intersectionality problem. Intersectionality problems may arise whenever an individual possesses multiple traditionally disadvantaged identities or minority statuses.<sup>10</sup> Intersectionality implies that employment discrimination is compounded or exacerbated in the presence of multiple protected statuses; in other words, the whole discrimination experienced by a multiple-protected-status individual is more than the sum of its parts.<sup>11</sup> To the extent that intersectionality ex-

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7. Cf. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc) (demonstrating one federal court’s struggle to differentiate between age discrimination and sex discrimination when the plaintiff’s primary evidence was that she had been called “useless old lady” by her supervisors).

8. This example is one used by the United Nations in its disability equality training manual on defeating harmful stereotypes of disabled individuals. See LIZ CARR ET AL., *DISABILITY EQUALITY TRAINING: ACTION FOR CHANGE* 73 (2012), [http://www.un.org/disabilities/documents/egms/2015/Kenji\\_Kuno\\_Change.pdf](http://www.un.org/disabilities/documents/egms/2015/Kenji_Kuno_Change.pdf) (citing the image of a “crippled witch” as one of the ways in which the “word disabled becomes synonymous for impotence, hopelessness and social inadequacy”).

9. This example is one used as an illustrative example of discrimination by the Labor Law Center on its Human Resources Blog. See *Insults in the Workplace*, LABOR LAW CTR.: HUMAN RES. BLOG (Oct. 29, 2011, 11:21 AM), <http://www.humanresourceblog.com/2011/10/29/insults-in-the-workplace>.

10. See generally Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67 (2008) (discussing the meaning of the term “intersectionality”).

11. See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV.

ists, it is inherently problematic under current judicial interpretations of federal discrimination laws, in which judges analyze each type of discrimination separately (e.g., a discrimination claim on the basis of disability is analyzed separately from a discrimination claim on the basis of sex) instead of considering the potential multiplicative effects when more than one type of discrimination is present (e.g., analyzing disability and sex discrimination together).<sup>12</sup> Intersectionality problems may arise for more than just disabled women; they may arise for any individual who is a member of multiple protected classes, including African-American women<sup>13</sup> and older women.<sup>14</sup>

The focus of this Article, however, will be on the intersectional discrimination encountered by disabled women, who have been completely ignored by prior intersectional scholarship. This inattention by previous literature does not derive from the insignificance or rarity of intersectional sex-disability discrimination; rather, it appears to be a complete oversight by prior scholars in both law and economics. Even economists who have studied the employment and wage effects of the ADA have paid little attention to the fact that the Act appears to have improved conditions for disabled men more than disabled women.<sup>15</sup> This Article ends the scholarly disregard for the gendered nature of disability discrimination by using data to demonstrate both the magnitude and the essence of the problem. Relying on confidential data from the Equal Employment Opportunity Commission (EEOC), this Article is the first to expose the sex-based gap in disability discrimination charges filed with the agency.<sup>16</sup> On average, women file an absolutely greater

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1241 (1991) (discussing intersectional discrimination, particularly as it applies to African-American women).

12. See *infra* notes 29–45 and accompanying text.

13. See *infra* notes 32–45 and accompanying text.

14. See *infra* note 53 and accompanying text.

15. See Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 949–50 (2001) (finding that disabled women's employment declined more than disabled men's employment after the ADA).

16. In order to sue an employer for disability (or sex) discrimination in federal court, a worker is first required to exhaust administrative remedies—that is, to file a charge with the EEOC, to allow the agency at least 180 days to investigate the charge, and to request a notice-of-right-to-sue letter from the agency. For an overview of the charge-filing process, see *After You Have Filed a Charge*, EQUAL EMP'T OPPORTUNITY COMM'N (2016), <http://www.eeoc.gov/employees/afterfiling.cfm>. Failure to exhaust administrative remedies is grounds for dismissal of an employment discrimination lawsuit brought under

number of ADA charges with the EEOC than do men, and they file almost 50% more charges per full-time worker than do men.<sup>17</sup> The Article further uses data to consider possible explanations for the gender gap in ADA charge-filing rates, including the possibility that women are more likely to become disabled than are men, and the possibility that women are more likely to raise the issue of their disability with employers.<sup>18</sup>

Ultimately, however, this Article will trace the greater number of ADA charges filed by women to the interaction between disability discrimination and sex discrimination. The Article will demonstrate empirically that ADA charge-filing rates are highest in industries dominated by workers of one sex.<sup>19</sup> Men are more likely to file ADA charges in female-dominated industries, and women are more likely to file ADA charges in male-dominated industries. Because many more industries are male dominated than are female dominated,<sup>20</sup> the result is a greater overall ADA charge-filing rate by women than by men. Moreover, a comparison of men's and women's charge-filing rates under the ADA to their charge-filing rates under other discrimination statutes demonstrates that the charge-filing pattern among members of the minority sex within an industry is unique to the ADA. Sex discrimination, it appears, has a uniquely exacerbating effect on disability discrimination.<sup>21</sup>

The empirical analysis presented here sheds light on prior (but unexplained) results by labor economists, showing that disabled men have fared better in the labor market during the post-ADA regime<sup>22</sup> than have disabled women. Disabled men are more likely to experience only one type of employment discrimination (disability), but disabled women are more likely to experience two types of employment discrimination (disability

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either the ADA or Title VII, although the exhaustion requirement is not jurisdictional. *See Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 856 (6th Cir. 2013); *Vera v. McHugh*, 622 F.3d 17, 29–30 (1st Cir. 2010); *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009).

17. *See infra* Part II.B.

18. *See infra* Parts II.C, II.D.

19. *See infra* Part II.E.

20. *See infra* note 101 and accompanying text.

21. *See infra* Part III.A.

22. *See infra* notes 79–83 and accompanying text. Throughout this Article and supporting data analysis, I focus on the nature of disability discrimination claims prior to the 2008 ADA Amendments Act. The data available for the present study solely allow me to make inferences about the pre-ADA Amendments Act period; as additional data become available, developments after the 2008 ADA Amendments Act present a ripe area for future study.

and sex).<sup>23</sup> As long as courts continue to analyze sex discrimination and disability discrimination separately, the ADA is capable of providing a complete remedy to disabled men, but neither the ADA nor Title VII are capable of providing a complete remedy to disabled women.<sup>24</sup> The real puzzle, then, is finding a legal and feasible way for disabled women to gain a complete remedy for any discrimination they encounter in the labor market.

Some intersectional scholars have suggested amending employment discrimination statutes to provide for intersectional claims explicitly, but this Article argues that such amendments are neither necessary nor practical.<sup>25</sup> The better solution for sex-disability intersectional discrimination plaintiffs is to work within the framework of existing statutes when bringing a compound discrimination claim.<sup>26</sup> Nonetheless, such plaintiffs who seek to prove their cases circumstantially instead of directly—that is, plaintiffs who lack smoking-gun statements from the employer like the “crippled witch” and “dumb slut” examples mentioned above—may face an uphill battle in terms of proof.<sup>27</sup> Judicially developed proof requirements in employment discrimination cases may prove particularly difficult to satisfy, given the unique circumstances faced by disabled women. In fact, disabled women provide a paramount example as to why such judicially developed proof requirements, which have already been the subject of much criticism, are so desperately in need of reform.<sup>28</sup>

In making the case for increased attention to and expanded legal remedies for disabled women who experience labor market discrimination, this Article proceeds as follows: Part I reviews previous work on intersectional discrimination, which,

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23. See *infra* notes 125–26 and accompanying text.

24. See *infra* Part IV.

25. See *infra* Part IV.A.

26. See *infra* Part IV.B.

27. See, e.g., *Beauchat v. Mineta*, 257 F. App'x 463, 466 (2d Cir. 2007) (defining direct evidence of discrimination as including “smoking gun” statements); *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 397 (7th Cir. 1997), *overruled by* *Ortiz v. Werner Enters., Inc.*, No. 15-2574, 2016 WL 4411434 (7th Cir. Aug. 19, 2016) (“[S]moking gun’ evidence [is] required for a direct inference of discriminatory intent.”); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996) (“Absent the evidentiary equivalent of a ‘smoking gun,’ the plaintiff must attempt to prove her case by resort to a burden-shifting framework.”).

28. See *infra* Part IV.B.



heretofore, has focused almost exclusively on the experience of African-American women. Part II examines the EEOC data, which details the universe of ADA charges filed with the agency from 2000 to 2009. The EEOC data make clear how men's and women's disability charges differ, and the data also provide a great deal of evidence as to *why* men's and women's disability charges differ. Part III considers alternative hypotheses for the empirical findings in Part II, but ultimately concludes that women file more ADA charges than do men, because disabled women encounter more labor market discrimination than do men. Part IV evaluates the remedies available to disabled women.

### I. THINKING ABOUT INTERSECTIONALITY

The problem of intersectionality is hardly a new topic for employment discrimination scholars. Relatively early in the history of Title VII, legal scholars identified this potential weakness in the prevailing discrimination law framework. One of the first articles to discuss the need for, and potential difficulties with, intersectional claims came from Elaine Shoben in 1981. Shoben referred to discrimination on the basis of two or more protected classes as "compound discrimination."<sup>29</sup> Her conception of intersectional discrimination recognized that members of two or more protected groups might be "disproportionately exclude[d]" from employment, even when members of only one protected group experienced favorable employment outcomes.<sup>30</sup> In other words, multidimensional discrimination might either co-exist with single-dimensional discrimination, or it might exist despite the absence of single-dimensional discrimination. Focusing particularly on the example of African-American women, Shoben acknowledged the difficulties of conceptualizing a compound claim under Title VII's proof framework, yet she argued that compound claims were nonetheless permissible under the Act.<sup>31</sup>

Nearly a decade later, Kimberle Crenshaw built upon Shoben's work in her seminal article on intersectionality, high-

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29. Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793, 793 (1981).

30. *Id.* at 798.

31. *See id.* ("This Article argues that overt discriminatory practices against compound groups have already been recognized as covered by the Act and that absent a showing of business necessity, Title VII also prohibits unintentionally discriminatory practices adversely affecting compound groups.").

lighting the difficulty of attempting to fit the “multidimensionality” of African-American women’s experience into the single-dimensional framework of U.S. discrimination law.<sup>32</sup> Unlike Shoben, Crenshaw was far less optimistic about Title VII’s ability to remedy intersectional discrimination, at least under contemporary conceptions of the meaning of discrimination. This conception, according to Crenshaw, merely viewed “oppression of Blacks [as] significant when based on race, of women when based on gender.”<sup>33</sup> Using three Title VII cases with race-sex intersectional elements as examples, Crenshaw illustrated how this single-dimensional framework had coerced African-American women to “deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.”<sup>34</sup> As long as discrimination policies continued to treat different categories of discrimination as “singular issues,” Crenshaw argued that victims of multidimensional issues would remain marginalized.<sup>35</sup>

Crenshaw’s article arguably generated a new field within discrimination law scholarship, motivating dozens of subsequent works—both supportive and critical<sup>36</sup>—on intersectionality.<sup>37</sup> Yet even the supportive scholarship has largely shared

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32. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139.

33. *Id.* at 166.

34. *Id.* at 150.

35. *Id.* at 167.

36. One of the most famous critiques of intersectionality came three years before Crenshaw’s article from Judge Thomas F. Hogan in *Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986). Here, Judge Hogan noted, “The difficulty with [allowing intersectional claims] is that it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII’s prohibition. Following the [intersectionality] rationale to its extreme, protected subgroups would exist for every possible combination of race, color, sex, national origin and religion.” *Id.*

37. Accord Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 991–92 (2011) (“[Crenshaw’s] work has inspired two decades of research on intersectionality in many fields, including critical race theory, stratification, social psychology, and women’s studies.”); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 713 (2015) (“Title VII was twenty-five years old when Kimberle Crenshaw published her path-breaking article introducing ‘intersectionality’ to critical legal scholarship. By the time the Civil Rights Act of 1964 reached its thirtieth birthday, the intersectionality critique had come of age, generating a sophisticated subfield and producing many articles that remain classics in the field of anti-discrimination law and beyond.”).

Crenshaw's underlying pessimism regarding courts' abilities (or willingness) to accommodate intersectional claims under current discrimination law frameworks. For example, Kathryn Abrams's 1994 work on intersectionality highlighted the increased appearance of multidimensional claims in Title VII jurisprudence, but recognized courts' hitherto inabilities to construct a pathway for incorporating intersectional claims into Title VII proof structures and analysis. According to Abrams,

Many courts have been unwilling to accommodate these understandings within Title VII doctrine, requiring that claimants disaggregate and choose among the elements of their identities; others have awarded relief to complex claimants but failed to give an account of the discrimination they face that would help integrate such claims into the mainstream of Title VII doctrine.<sup>38</sup>

Later work on intersectionality has been equally dismal. Over a decade after Abrams's article, Bradley Areheart again illustrated the need for intersectional claims in employment discrimination law. Similar to previous scholars, Areheart focused on the case of African-American women, primarily since they had served as plaintiffs most often in prior intersectional claim attempts.<sup>39</sup> Yet by 2006, Areheart believed that courts would not recognize intersectional claims on their own, arguing that "an amendment to Title VII that would cohere with its original legislative intent" was needed to remedy the problem of intersectional discrimination.<sup>40</sup> Areheart characterized federal courts as in a state of "confusion" over intersectional claims and, like Abrams, pointed to courts' inability to see intersectional claims as anything but "additive," as opposed to multiplicative or compounding.<sup>41</sup>

Although Crenshaw's, Abrams's, and Areheart's characterization of the intersectional case law was qualitative, based on a close reading of select published cases, subsequent quantitative research has validated their intuitions regarding the trajectory of these claims. Using a sample of federal discrimination cases from 1965 to 1999, a 2011 study by a group of empirical legal scholars found that single-basis discrimination

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38. Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994).

39. See Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R.L.J. 199, 202 (2006) ("[T]his Article primarily examines the situation of black women, largely because they introduced and popularized intersectionality.").

40. *Id.* at 201-02.

41. *Id.* at 228, 234.

plaintiffs were two times more likely to prevail in federal court than intersectional discrimination plaintiffs.<sup>42</sup> With this finding in mind, the authors considered three different theories as to why intersectional plaintiffs might fare so poorly in federal court: "(1) the categorical nature of discrimination law creates doctrinal barriers to intersectional claims, (2) there are evidentiary hurdles to demonstrating intersectional discrimination, and (3) judicial skepticism about intersectional claims may make intersectional plaintiffs less likely to win their cases."<sup>43</sup> Based on their empirical analysis, the authors confirmed Crenshaw's, Abrams's, and Areheart's intuition that "judges tend to believe that intersectional claims can be neatly separated," which in turn harmed the plaintiffs whose claims could not be neatly separated.<sup>44</sup>

Considered together, the legal literature advocating for greater recognition of intersectional discrimination claims has common threads. Scholars in this area seem to agree that until more courts begin to recognize the potential for discrimination to have multiple dimensions, not just a single dimension, certain minority subgroups will continue to be *de facto* (although, perhaps, unintentionally) excluded from the protections of discrimination law. Notably, the certain minority subgroup that has heretofore received the most attention from intersectionality scholars is African-American women. As Areheart pointed out, much of this scholarly attention undoubtedly arises from the relative abundance of intersectional claims made by African-American women, compared to other minority subgroups, in published cases.<sup>45</sup> Still, intersectional discrimination has the potential to affect any individual who is a member of multiple protected classes, not just African-American women. To the extent that some of these other multiple-minority groups have been ignored by legal academics, the realities of the discrimination they encounter, or do not encounter, in the labor market merit further exploration.

One notable exception to the otherwise primary focus on African-American women in the intersectional discrimination literature has arisen within recent legal scholarship on mass incarceration. Well-known, and troubling, are the stark differences between the incarceration rates of African-American men

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42. See Best et al., *supra* note 37.

43. *Id.* at 1018.

44. *Id.*

45. See Areheart, *supra* note 39.

and those of white men: African-American men are six times more likely than white men to spend time in prison,<sup>46</sup> leading some scholars to proclaim this phenomenon as the “New Jim Crow.”<sup>47</sup> Deborah Widiss has argued that mass incarceration may have an intersectional, and illegal, disparate impact<sup>48</sup> on African-American males in employment.<sup>49</sup> Because many employers now use criminal background checks during the hiring process, Widiss demonstrated through the use of a hypothetical—and the actual disparities in race-sex incarceration rates—how such practices might result in multidimensional disparate impact, but not single-dimensional disparate impact:

If [an employer’s criminal background check] policy is evaluated simply on the basis of *race*, the passage rates of men and women must be assessed together: 86% of the black applicants can be considered for the job, and 98% of the white applicants can be considered for the job. This is a real disparity, to be sure, but it falls well short of the EEOC’s rule of thumb for establishing a *prima facie* case of disparate impact. The same disparity results if the policy is considered on the basis of *sex* alone. But if one considers the passage rates in an intersectional manner—assessing the policy’s effects on black men specifically—the resulting disparities are much greater. Only 76% of the black men could be considered, a rate that is far lower than that of any of the other potential groups of comparison (96% of the white men; 96% of the black women; and 100% of the white women).<sup>50</sup>

Besides the extension of intersectional discrimination analysis beyond African-American women to African-American men, perhaps the more important contribution of Widiss’s argument is highlighting a need for intersectional disparate im-

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46. THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 5, 8 (2003) (indicating that in 2001, 5.9% of white men and 32.2% of African-American men were expected to spend time in prison at some point during their lives).

47. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012). *But see* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012) (criticizing this characterization).

48. In order for an employer practice to have an illegal disparate impact under Title VII, the practice must not only disparately (and negatively) affect a protected class, but also the practice must lack job-relation or business necessity. Unlike a disparate treatment claim, the plaintiff need not prove intent to discriminate to succeed on a disparate impact claim. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–32 (1971).

49. Deborah A. Widiss, *Griggs at Midlife*, 113 MICH. L. REV. 993, 1009–16 (2015).

50. *Id.* at 1015–16.

*pact* claims, as opposed to the intersectional disparate treatment claims focused on by most prior scholars.<sup>51</sup>

Even though considerations of intersectionality in the context of mass incarceration reflect a broadening beyond considerations particular to disparate treatment particular to African-American women, the argument nonetheless confines intersectionality claims to individuals who experience overlapping race and sex discrimination. Yet if discrimination on the basis of race and sex is multiplicative, instead of additive, then so might be discrimination on the basis of other characteristics traditionally considered immutable under the law—whether such characteristics are protected by Title VII or by a different discrimination statute.<sup>52</sup> Indeed, empirical economics scholarship has hinted that intersectional discrimination may span multiple discrimination statutes, raising inter-statutory concerns, not just intra-statutory ones. Empirical work by Joanne Song McLaughlin, for instance, found that the Age Discrimination in Employment Act had more beneficial employment effects for older men than for older women.<sup>53</sup> From her results, the author concluded that the traditional model of considering age discrimination and sex discrimination separately might not sufficiently protect older women in the labor market. Another recent resume-audit study drew similar conclusions,<sup>54</sup> suggesting that age discrimination laws seemed to protect older men adequately, but not older women, in hiring situations.<sup>55</sup>

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51. *Id.* at 1007 (“While later cases have occasionally recognized the possibility of bringing intersectional disparate *treatment* claims, intersectional disparate *impact* doctrine has been very little developed.”).

52. For a critique of the immutability considerations present throughout employment discrimination law, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015).

53. See Joanne Song McLaughlin, *Falling Between the Cracks: Discrimination Laws and Older Women* (Oct. 2015) (University at Buffalo, Working Paper), [https://hq.ssrn.com/Conference/Reports/Conf\\_PreliminaryProgReport.cfm?conflink=CELS-2015](https://hq.ssrn.com/Conference/Reports/Conf_PreliminaryProgReport.cfm?conflink=CELS-2015) (scroll down to “10/30/2015 – 10:15 AM, Location: Room 309, Labor and Employment I”; then follow “Article” hyperlink under article title and author name).

54. A typical resume audit study sends out fictitious resumes as applications to posted job openings. For a well-known example of a correspondence study, see Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (describing how sending out fictitious resumes that are identical, except for having names highly associated with either white or African-American individuals, results in differential treatment of applicants, seemingly based on race).

55. See David Neumark, Ian Burn & Patrick Button, *Is It Harder for Old-*

Although economists have of late been interested in the intersection between age and sex discrimination, absent from the economics scholarship (and the legal scholarship) is any exploration of the intersection between disability and sex discrimination. Nonetheless, a close reading of empirical literature on the labor market effects of disability discrimination laws should give scholars a reason to suspect a compounding, or multidimensional, effect. A series of empirical studies on the wage and employment effects of disability laws, both state and federal, all indicate that these laws have resulted in unintended consequences—causing, at worst, a decline in or, at best, no improvement in labor market outcomes of the disabled.<sup>56</sup> The au-

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*er Workers To Find Jobs? New and Improved Evidence from a Field Experiment* (Nat'l Bureau of Econ. Research, Working Paper No. 21669, 2015), <http://www.nber.org/papers/w21669>. The above study found evidence suggestive of intersectional age and sex discrimination. *Id.* at 59. However, a separate study (with the same lead author) did not find evidence suggestive of intersectional age and disability discrimination. See David Neumark, Joanne Song & Patrick Button, *Does Protecting Older Workers from Discrimination Make It Harder To Get Hired? Evidence from Disability Discrimination Laws* (Nat'l Bureau Econ. Research Working Paper No. 21379, 2015), <http://www.nber.org/papers/w21379> ("This evidence suggests that stronger state disability discrimination laws do not lower the hiring of non-disabled older workers, using either of two definitions of disability.").

56. For instance, the earliest economics scholarship studying the effects of Title I of the ADA, which prohibits disability discrimination in employment, found a decline in labor market outcomes of the disabled as a result of the law. See, e.g., Acemoglu & Angrist, *supra* note 15, at 948–50 (suggesting that the ADA “likely” caused a decrease in the rate of employment of people with disabilities aged twenty-one to thirty-nine); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 711 (2000) (suggesting that passage of the ADA caused a decrease in the relative employment of disabled workers). Later studies, which revisit the early results, have argued that the negative estimates may be due to difficulties in identifying disabled individuals within commonly used datasets and declining labor market participation by the disabled after the ADA. See, e.g., John Bound & Timothy Waidmann, *Accounting for Recent Declines in Employment Rates Among Working-Aged Men and Women with Disabilities*, J. HUM. RESOURCES 231, 245 (2002) (analyzing data from the 1990s regarding the movement of male and female workers with poor health out of the workforce and onto disability); Julie L. Hotchkiss, *A Closer Look at the Employment Impact of the Americans with Disabilities Act*, 39 J. HUM. RESOURCES 887, 907–09 (2004) (discussing the employment outcomes of people with disabilities); Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31, 31–33 (2003) (urging caution with regard to findings on the employment effects of the ADA considering the issues in identifying who the ADA actually covers). Even so, these later studies, at best, find no improvement in labor market outcomes of the disabled after the ADA. See, e.g., Bound & Waidmann, *supra*, at 244–45 (“Once the rise in the fraction of individuals receiving DI benefits has been accounted for, however, there is little

thors have explained their results by suggesting the costs that disability laws impose on employers more than offset any incentives the laws create to employ disabled workers.<sup>57</sup>

Although the wage and employment consequences of disability laws have been well considered by economists, few authors have questioned a subtler aspect of their results: differential findings for women and men. For example, according to the baseline results of one leading study, disabled women ages twenty-one to thirty-nine worked between 2.37 and 4.57 fewer weeks in the years following the implementation of the ADA; in contrast, disabled men ages twenty-one to thirty-nine worked between 0 and 3.11 fewer weeks.<sup>58</sup> In another well-known study examining the labor market effects of state disability laws, the authors concluded that disabled women's earnings declined by 4.9% after passage, but disabled men's earnings declined by only 1.5%.<sup>59</sup> In spite of finding consistently worse labor market outcomes for disabled women than for disabled men, economics scholars—and legal scholars reading the economics scholarship—have ignored the sex differential, with one exception. The lone economists to make note of the sex differential, Daron Acemoglu and Joshua Angrist, suggested that the marginal benefits of the ADA might have been less for women since women were already protected against sex discrimination by Title VII.<sup>60</sup> But this explanation conflates sex discrimination with disability discrimination without any clear reason for doing so; it also fails to recognize that Title VII protects both men and women against sex discrimination.

A more satisfying explanation for these differential results may instead lie in the theory of intersectionality. Perhaps disabled women are less aided by disability discrimination laws because, for them, workplace discrimination is multidimensional,

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evidence of any effect of the ADA.”); Hotchkiss, *supra*, at 909 (“It is found that the unconditional employment probability among disabled people, relative to among nondisabled people, did not change significantly after implementation of the ADA.”); Kruse & Schur, *supra*, at 62 (“These results do not permit a clear overall answer to the question of whether the ADA has helped or hurt the employment of people with disabilities, since both positive and negative signs can be found.”). For a study finding a decline in labor market outcomes after the passage of state disability laws, see Kathleen Beegle & Wendy A. Stock, *The Labor Market Effects of Disability Discrimination Laws*, 38 J. HUM. RESOURCES 806 (2003).

57. See, e.g., Acemoglu & Angrist, *supra* note 15, at 915–57.

58. See *id.*

59. See Beegle & Stock, *supra* note 56, at 806–59.

60. See, e.g., Acemoglu & Angrist, *supra* note 15.



on the basis of disability *and* sex compounded. For disabled men, in contrast, discrimination is simply single-dimensional. When sex discrimination and disability discrimination intersect, discrimination laws—as currently enforced by courts—would be less capable of protection for precisely the same, well-explored reasons that discrimination laws are less capable of protection when race discrimination and sex discrimination intersect. Courts, as noted by prior intersectional scholars, are predisposed to disaggregation of discrimination claims, requiring independent proof of each type of discrimination alleged.<sup>61</sup> In the context of sex and disability, such requirements might be particularly problematic for plaintiffs if an employer treats disabled females poorly, but not disabled males or non-disabled females. Moreover, such requirements would be problematic whenever disability discrimination exacerbates already existent sex discrimination (or vice versa). These issues will be explored empirically in the next Part.

## II. DISABILITY AND SEX BY THE NUMBERS

This Part represents the principal contribution of this Article, investigating the nature of the relationship, if any, between sex discrimination and disability discrimination. Section A considers potential data sources for conducting such a study empirically, and Section B details the summary statistics of the data used in this Article. Sections C, D, and E consider possible explanations for the relationship between disability discrimination and sex documented in Section B, ultimately arguing that intersectionality is the driving force behind the empirical results.

### A. WHY STUDY EEOC CHARGE DATA?

To examine the intersectionality of sex and disability discrimination empirically requires a data source, yet such a data source is not readily apparent. Most prior intersectionality studies, as discussed in the previous Section, have been qualitative or anecdotal in nature, highlighting a handful of federal cases that the authors have argued are representative of a

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61. See, e.g., Abrams, *supra* note 38 (“Many courts have been unwilling to accommodate these understandings within Title VII doctrine, requiring that claimants disaggregate and choose among the elements of their identities; others have awarded relief to complex claimants but failed to give an account of the discrimination they face that would help integrate such claims into the mainstream of Title VII doctrine.”).

larger sample.<sup>62</sup> The one existing empirical study on intersectionality also relies on a sample of federal cases, suggesting that federal case records may be the appropriate, if not the only available, data source for empirical work on sex-disability intersectionality.<sup>63</sup> Nonetheless, two problems render federal court records not ideal for the present study.

First, the sample of reported federal sex-disability cases is small, and it is difficult to discern a clear takeaway from them. In *Lowe v. Angelo's Italian Foods, Inc.*, for example, the Tenth Circuit considered a Title VII-ADA wrongful termination case brought by a female employee with multiple sclerosis.<sup>64</sup> The plaintiff brought forth evidence that her supervisor had subjected her to different dress code restrictions than her male coworkers, referred to her as "girlie," had a history of using racially and sexually derogatory language towards employees, and fired her immediately after the plaintiff presented a doctor's note prescribing lifting restrictions.<sup>65</sup> With this evidence, the court allowed the plaintiff's ADA claim, but not her Title VII claim, to go forward.<sup>66</sup>

Contrast *Joseph v. HDMJ Restaurant, Inc.*, a case from the Eastern District of New York, in which a female plaintiff with a knee injury sued for wrongful termination and hostile work environment. The plaintiff's supervisors had repeatedly demanded oral sex from her, called her racially and sexually derogatory names, and had physically dragged her down the stairs to verbally abuse her, which exacerbated the injury in her knee.<sup>67</sup> Even under these outrageous facts, the court allowed the plaintiff's Title VII claim, but not her ADA claim, to go forward.<sup>68</sup> In the background of these two cases, in which female plaintiffs with disabilities have been partially successful, is a list of cases

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62. See, e.g., *id.*; Areheart, *supra* note 39; Crenshaw, *supra* note 32.

63. Best et al., *supra* note 37.

64. 87 F.3d 1170 (10th Cir. 1996).

65. See *id.* at 1172.

66. *Id.*

67. See *Joseph v. HDMJ Rest., Inc.*, 970 F. Supp. 2d 131, 139–41 (E.D.N.Y. 2013).

68. *Id.* Indeed, it is difficult to find a gender-disability discrimination case in which a female disabled plaintiff has been wholly successful. *Accord* *Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1086–87 (7th Cir. 2014) (dismissing employer's appeal after district court granted its motion for summary judgment on employee's ADA claim, but not her Title VII claim); *Querry v. Messar*, 14 F. Supp. 2d 437, 441 (S.D.N.Y. 1998) (allowing a female police officer to go forward on sex discrimination, but not disability discrimination, claims).

in which female plaintiffs with disabilities have been wholly unsuccessful.<sup>69</sup> Thus, a review of the sex-disability discrimination case law, at best, appears to confirm the conclusions of the prior empirical study on intersectionality more generally, which found that single-basis discrimination plaintiffs are twice as likely to prevail in federal court than multiple-basis discrimination plaintiffs.<sup>70</sup>

Second, and relatedly, studying discrimination through the lens of reported federal cases raises serious concerns about sample selection bias.<sup>71</sup> Here, the concern is that a non-representative sample of sex-disability cases gets to federal court (let alone results in a reported decision); thus, any inferences drawn from reported federal cases would not be valid for the universe of sex-disability discrimination occurrences in the workplace. For instance, 234,925 Title VII charges and 67,147 ADA charges were filed with the EEOC between 1998 and 2001,<sup>72</sup> but during that same period, only 47,249 Title VII cases

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69. See, e.g., *Johnson v. Weld Cty.*, 594 F.3d 1202, 1206 (10th Cir. 2010) (affirming grant of summary judgment to employer on Title VII and ADA claims brought by a former female employee with multiple sclerosis); *Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 561 (7th Cir. 2009) (affirming grant of summary judgment to employer on female firefighter's Title VII and ADA claims); *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1287–88 (11th Cir. 2002) (granting judgment as a matter of law to employer on Title VII and ADA claims after female disabled employee had won a jury verdict); *Dechberry v. N.Y.C. Fire Dep't*, 124 F. Supp. 3d 131, 135 (E.D.N.Y. 2015) (dismissing ADA and Title VII hostile work environment and adverse employment action claims brought by female emergency medical technician); *Henderson v. Enter. Leasing of Detroit, LLC*, No. 13-14892, 2014 WL 1515828, at \*1 (E.D. Mich. Apr. 18, 2014) (dismissing ADA and Title VII hostile work environment claims brought by female rental car agent); *Aratari v. Genesee Cty. Sheriff's Office*, No. 00-CV-0163E(M), 2000 WL 1047701, at \*1 (W.D.N.Y. July 25, 2000) (dismissing ADA and Title VII wrongful termination claims brought by female deputy sheriff).

70. Best et al., *supra* note 37.

71. Sample selection bias occurs whenever a sample is drawn non-randomly from the population intended to be studied. For a discussion of the biases that result from sample selection bias, and an econometric correction for such bias, see James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 *ECONOMETRICA* 153 (1979).

72. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 CHARGES FY 1997 – FY 2015 (2016), <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm> (adding together yearly data from the row labeled "Receipts"); U.S. EQUAL EMP. OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES FY 1997 – FY 2015 (2016), <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (adding together yearly data from the row labeled "RECEIPTS").

and 7001 ADA cases were filed in federal court.<sup>73</sup> As these statistics illuminate, very few discrimination charges result in a federal lawsuit, which raises concerns regarding representativeness of the charges that do result in a federal lawsuit. Selection of employment discrimination plaintiffs into filing a federal lawsuit might cut in either direction. On one hand, employers have a financial incentive to settle the most egregious discrimination claims before a lawsuit is filed since such claims can result in high damages at trial and, through negative publicity, can also damage the company's bottom line.<sup>74</sup> On the other hand, discrimination victims and the EEOC may have opposing incentives when the potential for damages is high. Victims may wish to settle and end the matter quickly; still, the agency may wish to pursue litigation in order to make an example out of the employer. Nowhere can the agency's potentially conflicting interests better be seen than in the case considered by the Supreme Court last term, *Mach Mining, LLC v. EEOC*, in which the employer-defendant accused the EEOC of failing to engage in the charge conciliation process before filing a public interest suit.<sup>75</sup> In sum, the farther along in the claim resolution process a case sample is drawn, the more claims that will have necessarily dropped out—whether due to settlement or lack of merit—giving rise to greater concern regarding selection, representativeness, and inferences drawn from the sample.

As a result, the most representative sample of cases should come from the *outset* of the claim resolution process, not the end of the process.<sup>76</sup> Since all Title VII and ADA discrimination lawsuits filed in federal court must first exhaust administrative remedies—that is, file a charge with the EEOC (or a state fair employment practices agency) and undergo the agency's admin-

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73. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 434 (2004).

74. See Joni Hersch, *Equal Employment Opportunity Law and Firm Profitability*, 26 J. HUM. RESOURCES 139, 139–53 (1991) (finding statistically significant declines in firm valuations after the announcement of a discrimination lawsuit, decision, or settlement).

75. See *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1648 (2015) (allowing federal courts to narrowly review whether the EEOC satisfied its statutory obligation to conciliate a discrimination charge with accused employers).

76. Indeed, as pathbreaking as the 2011 Best et al. empirical study was, it could only make inferences with regard to intersectionality cases *that resulted in a judicial opinion*, not intersectionality cases generally. See Best et al., *supra* note 37.

istrative process—the moment of filing a discrimination charge serves as the necessary starting point for the federal claim resolution process.<sup>77</sup> Charge-filing data, therefore, should provide the fullest and most representative picture of the types of discrimination going on in the workplace, and specifically here, the incidence of sex-disability intersectional discrimination in the workplace. Understanding sex-disability intersectional discrimination from agency charge-filing behavior requires more than just aggregate numbers of total charges filed, however; it requires at least some details regarding the characteristics of charge-filing parties, the nature of the allegations, and the meritoriousness of the claims. Yet for privacy reasons, the EEOC makes only the annual number of ADA and Title VII charges filed publicly available.

In the absence of useful publicly available data, this study instead uses confidential data obtained from the EEOC through a Freedom of Information Act request. The data include at least some information on each charge filed with the agency between 2000 and 2009, although the data vary year-by-year on the amount of information provided about each charge.<sup>78</sup> The data also include the full universe of discrimination charges filed with the agency, including charges filed under the statutes at issue here (Title VII and the ADA), as well as charges filed under statutes not at issue here (such as the Age Discrimination in Employment Act (ADEA) and the Genetic Information Non-discrimination Act (GINA)). The charges filed between 2000 and 2006, inclusive, contain the most complete information, with details regarding the characteristics of the alleged discrimination (including the alleged adverse employment actions and other anti-discrimination statutes at issue), the characteristics of the employer (including the employer's size, industry, and location), and the characteristics of the charging party (including the party's race, sex, and national origin).<sup>79</sup> Hence, the

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77. See *supra* note 16 (describing the nuances of the EEOC filing procedure).

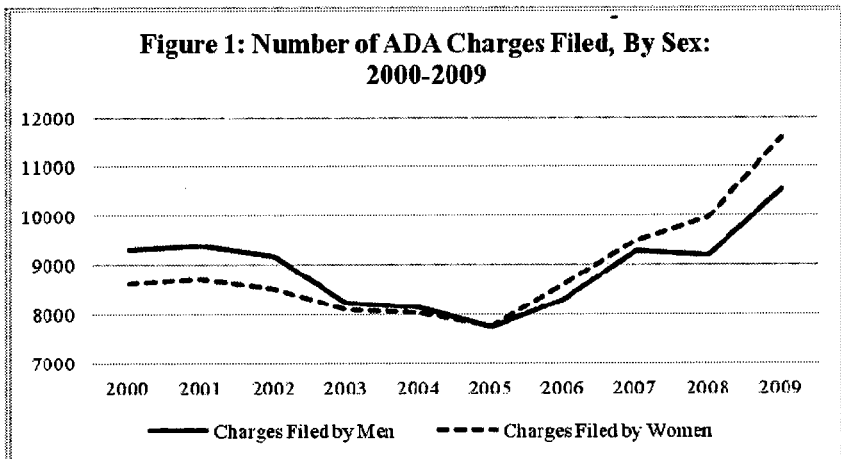
78. The confidential EEOC data presented here were first obtained and used by Joni Hersch and are used by the author with permission. Hersch has previously used the data in an article on sexual harassment. See Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV.: PAPERS & PROC. 630 (2011) (providing evidence of the relationship between the risk of sexual harassment and wages).

79. As described in Joni Hersch's 2011 article using the same data, see *id.*, the data on employer industry become highly problematic after 2006. Because the EEOC changed how charge intake officers input employer industry into

complete range of data from 2000 to 2009 will be examined whenever possible, but most of the empirical results presented below will focus on the 2000 to 2006 time period.

#### B. ARE THERE DIFFERENCES IN ADA CHARGES BY SEX?

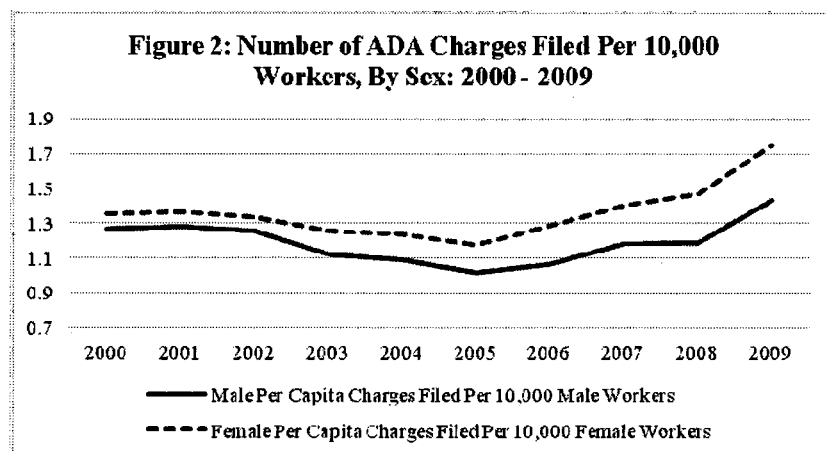
As noted in Part II, economists have consistently found the wage and employment effects of disability discrimination laws more harmful for disabled women than for disabled men, so a natural starting point for the present inquiry is to view any intersection between sex and disability discrimination through the lens of ADA charges. Figure 1 graphs the number of ADA charges filed annually, by sex, between 2000 and 2009 and reveals that for the second half of the sample period (2005 to 2009), women filed, in absolute terms, a greater number of ADA charges than did men. When the time period is considered as a whole, women on average filed a greater number of ADA charges per year, filing approximately 8935 charges annually (compared to the approximately 8923 ADA charges filed by men annually).<sup>80</sup>



the agency's computer system, a substantial number of post-2006 charges (in some years, more than half of all charges) are missing information on industry. *See id.* at 631. For this reason, this Article limits much of the empirical analysis to the most complete, least problematic charge data, which occurs between the years 2000 and 2006, inclusive.

80. *See supra* note 78 (introducing Hersch's confidential dataset used by the author).

These findings are surprising given that some disabilities undoubtedly arise on the job, and yet women, in general, work in less risky jobs than do men.<sup>81</sup> Moreover, comparing the absolute number of charges filed by sex may not be the right metric. Considering the gap in labor force participation between men and women—in 2003, for example, there were 14% fewer female workers in the labor market<sup>82</sup>—and the fact that EEOC complaints can only be filed by individuals in the labor market, arguably a more correct metric is comparing the number of per-worker charges filed by sex. Figure 2 makes precisely this comparison for the 2000 to 2009 period, illustrating that the number of ADA charges filed per female worker are consistently higher than the number of ADA charges filed per male worker.

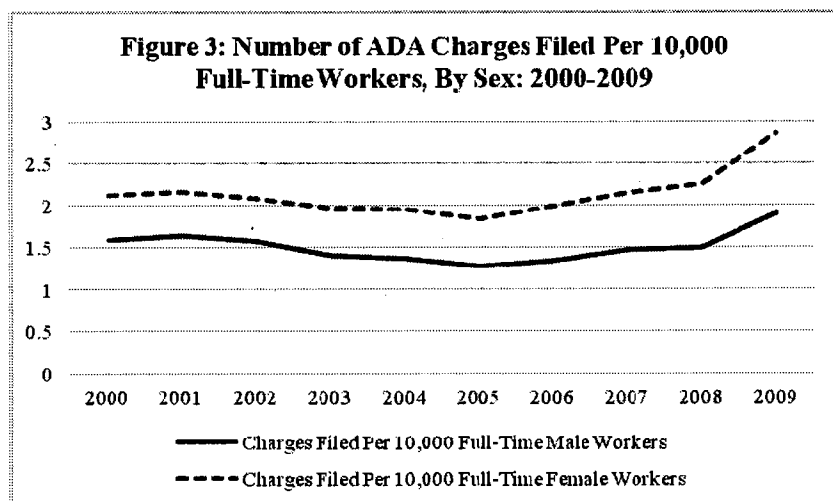


This gender gap only widens after taking into consideration the substantial differential between men's and women's *full-time* employment rates. In 2003, for instance, there were

81. See Joni Hersch, *Compensating Differentials for Gender-Specific Job Injury Risks*, 80 AM. ECON. REV. 598, 598 (1998) (demonstrating that women face a job injury risk that is 71% of men's job injury risk). If the same share of men and women injured on the job file ADA complaints, then more men than women should file ADA charges (since more men have on-the-job injuries).

82. Information on the annual number of male and female employees in the United States comes from *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STATS., <http://www.bls.gov/cps/tables.htm#charemp> (scroll down to find "EMPLOYMENT STATUS"; select either "HTML," "PDF," or "XLSX" file format of "2. Employment status of the civilian noninstitutional population 16 years and over by sex, 1970s to date") (last visited Nov. 29, 2016) (utilizing data from the years 2000 to 2009 and referencing a 73.5% labor participation rate for men and a 59.5% labor participation rate for women).

approximately 44% fewer full-time female workers in the labor market.<sup>83</sup> Taking these differences in full-time employment numbers into account, Figure 3 demonstrates how significantly the gap between men's and women's charges widens once the metric is the number of ADA charges filed per full-time worker by sex. As displayed graphically in Figure 3, women's annual ADA charge-filing rate per 10,000 full-time female workers has remained, on average, 42% higher than men's annual ADA charge-filing rate per 10,000 full-time male workers. In fact, in the most recent years of the data, women's ADA charge-filing rate per 10,000 full-time workers has persisted at a level more than 50% higher than the corresponding men's rate. As all three figures make clear, the gap between men's and women's ADA charge-filing rates is considerable and enduring, which is consistent with—although certainly not determinative of—an intersectionality between sex and disability discrimination.



Indeed, after viewing this sizable, yet previously undocumented, difference between men's and women's charge-filing rates, one question looms large—*why* are disabled women filing more ADA charges per worker? The remaining Sections in Part II will address three potential explanations for the sex differen-

83. See *id.* (scroll down to find "CHARACTERISTICS OF THE EMPLOYED"; select either "HTML," "PDF," or "XLSX" file format of "12. Employed persons by sex, occupation, class of worker, full- or part-time status, and race").



tial. The first two hypotheses explore the possibility that the sex differential is *not* driven by intersectionality of sex and disability discrimination; in other words, these hypotheses do not consider whether disability discrimination is exacerbated by sex discrimination (or vice versa). The first hypothesis behind the differential examines whether women may be more likely to be incapacitated by a disability. Even if women are not more likely to be incapacitated by a disability, the second hypothesis considers whether women may be more likely to complain about a disability than men, or whether women may be more likely to report incidences of disability discrimination than are men. Finally, the third hypothesis explicitly considers the role of intersectionality, asking whether disabled women experience more frequent discrimination in the labor market than do disabled men. After using the available data to evaluate each hypothesis, the remaining text of this Part will argue that the third hypothesis of intersectionality must prevail, given the interconnectedness of sex and disability discrimination charge-filing rates.

### C. ARE WOMEN MORE LIKELY TO BE DISABLED?

To evaluate the validity of the first hypothesis—that women are more likely to become disabled than are men—requires identifying conditions that solely or disproportionately affect women. The most obvious reason why women may become disabled at higher rates than men is pregnancy, yet exploring the relationship between disability and pregnancy requires a more careful examination of the EEOC charge data. Although the EEOC charge data do not generally report the charge-filing party's underlying disabling condition, the data do include whether the disability charge is maternity-related and whether the disability charge was simultaneously filed with a Title VII pregnancy discrimination charge. Table 1 relays the summary statistics for the EEOC data on ADA charges filed during the period of most complete charge information, from 2000 to 2006.<sup>84</sup> Table 1 does not suggest any strong connection between pregnancy and women's higher rate of disability charge filing: less than 1% of women's ADA claims involve maternity, and on-

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84. See *supra* note 79 (detailing why the most complete EEOC charge data run from 2000 to 2006, which is why most are limited to this time period).

ly 1.5% of women filing an ADA claim simultaneously file a Title VII pregnancy discrimination claim.<sup>85</sup>

**Table 1: Summary Statistics of ADA Charges and Charge-Filing Parties, 2000–2006**

	Percent of Men's Charges	Percent of Women's Charges
Demographics:		
Nonwhite	34.9	37.8***
Foreign National Origin	11.1	9.4***
Over 40	67.9	65.4***
Large Employer (501+)	41.8	43.2***
ADA Issues Raised:		
Termination	56.9	56.1
Accommodation	26.8	32.5***
Hiring	9.3	6.4***
Maternity	0.002	0.2***
Statutes Raised in Charge:		
ADA Only	61.4	57.5***
ADA + ADEA	21.8	17.7***
ADA + Title VII	24.6	33.4***
+ Title VII (Sex)	5.7	16.3***
+ Title VII (Pregnancy)	0.03	1.5***
+ Title VII (Race, Black)	9.2	9.7***
N	41,356	39,473

Difference by sex significant at \*10% level, \*\*5% level, \*\*\*1% level

Of course, other medical conditions besides pregnancy may incapacitate women at higher rates than men. Women, for example, report higher rates of rheumatoid arthritis,<sup>86</sup> although arthritis does not always limit an individual's ability to work. While the EEOC data do not report the charge-filing party's

85. Given the Supreme Court's recent decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1355–56 (2015) (holding that a plaintiff seeking protection under the Pregnancy Discrimination Act may prove a prima facie case using the *McDonnell Douglas* framework), rates of maternity-related ADA claims will undoubtedly increase in the near future. Nonetheless, the data presented here record high rates of disability charges filed by women many years before *Young* arose.

86. Men, on the other hand, report higher rates of heart-related disabilities. See Ctr. for Research on Women with Disabilities, *Demographics*, BAYLOR COLL. OF MED., <https://www.bcm.edu/research/centers/research-on-women-with-disabilities/general-info/demographics> (last visited Nov. 29, 2016).

underlying disabling condition, data from the 2009–2014 Current Population Survey (CPS), a publicly available dataset administered by the Bureau of Labor Statistics, can provide greater insight into the relative rates of functional limitations in women and men nationwide. Since 2009, respondents to the CPS March Annual Demographic Supplement have reported whether they experience difficulty in seeing, hearing, walking, dressing, remembering, or running errands.<sup>87</sup> According to the CPS data, summarized below in Table 2, men and women self-report functional limitations at very similar rates.<sup>88</sup> A slightly larger percentage of men report hearing difficulties, while a slightly larger percentage of women report difficulties walking and running errands. Still, the proportion of all men and women reporting at least one of the above functional limitations is identical at 7.5%. In fact, the percentage of men with work experience reporting at least one functional limitation is slightly higher than the percentage of women with work experience reporting one. Consequently, the CPS data indicate that women are no more likely to be functionally limited by a disability than are men.

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87. The CPS March Annual Demographic Supplement is available in a user-friendly format from the *NBER CPS Supplements*, NAT'L BUREAU OF ECON. RES., <http://www.nber.org/data/current-population-survey-data.html> (last visited Nov. 29, 2016).

88. See *supra* note 86 (introducing NBER CPS Supplements data).

**Table 2: Percent of Population with Self-Reported Functional Limitations, by Sex and Work History, 2009–2014**

Reported Functional Limitation	Men		Women	
	All Men	Men with Work Experience	All Women	Women with Work Experience
Seeing	1.0	5.4	1.1	0.6
Hearing	1.9	1.3	1.1	0.8
Walking	3.8	1.3	4.5	1.7
Dressing	1.1	0.3	1.2	0.3
Remembering	2.7	1.0	2.7	1.0
Running Errands	2.1	0.5	2.5	0.6
One or More Limitations	7.5	3.7	7.5	3.6
N	341,804	281,097	370,564	263,770

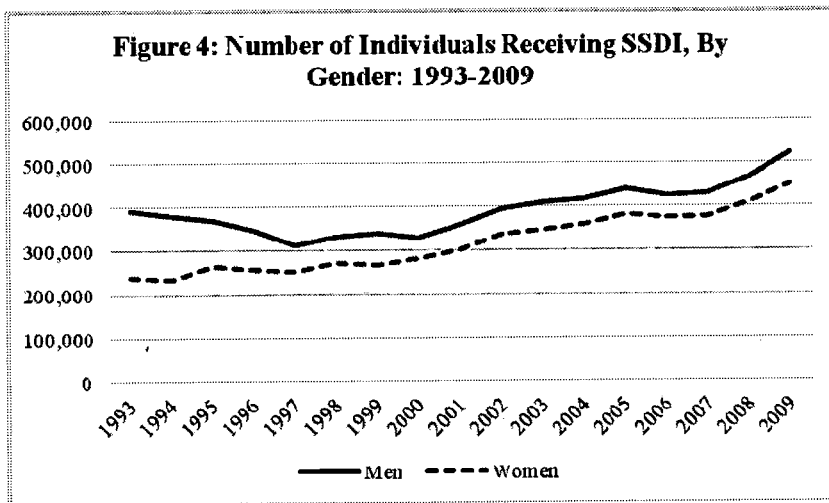
*Note:* Estimates calculated from the 2009–2014 CPS Annual Demographic Supplement for adults ages 18 to 65, inclusive.

The CPS data indicate that women are no more likely to develop a functional limitation than are men, but perhaps it is the case that when women *do* develop such a limitation, it has a greater impact on their ability to work. For instance, if the types of functional limitations experienced by women have a more direct impact on common job tasks than the limitations experienced by men, then the issue of disability might arise more frequently for women in the workplace, which in turn, could lead to their filing disability discrimination charges against employers at higher rates than men. Yet if the average disabled woman is more functionally limited for the purposes of the workplace than the average disabled man, we might also expect to see a parallel trend in rates of Social Security Disability Insurance (SSDI) enrollment by sex—that is, we might expect to see more women collecting SSDI.<sup>89</sup> In fact, as seen below in Figure 4,<sup>90</sup> the opposite pattern is apparent in SSDI receipt by sex, with men consistently collecting disability payments at

89. An interesting comparison might also arise from the total number of SSDI applications filed by sex. Unfortunately, the sex-differentiated data are not publicly available. See OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2014, at 145–59 (2015), [https://www.ssa.gov/policy/docs/statcomps/di\\_asr/2014/di\\_asr14.pdf](https://www.ssa.gov/policy/docs/statcomps/di_asr/2014/di_asr14.pdf) (providing data on the outcomes of applications for disability benefits).

90. The data in Figure 4 comes from *id.*

higher rates than women. Part of this differential, of course, is driven by the underlying difference in labor market participation by sex, since only individuals with a work history are eligible to collect.<sup>91</sup> Still, even after accounting for men's higher labor market participation rate, men still collect SSDI at higher rates than do women. Between 1993 (the year Title I of the ADA went into effect) and 2009, approximately fifty-four men out of every 10,000 male workers collected SSDI annually, but only fifty women out of every 10,000 female workers collected SSDI.<sup>92</sup>



In sum, nothing in the data supports the idea that women are more likely to be disabled than are men. As a group, women do not experience higher rates of functional limitations than do men, nor do they experience higher rates of work-related functional limitations than do men. Thus, if higher rates of disability are not driving the higher rates of disability discrimination charge filing among women, something else must be responsible for the sex differential. The next Section considers a second

91. See *Benefits Planner: Social Security Credits*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/credits.html#&a0=2> (last visited Nov. 29, 2016) (describing the Social Security credit structure of eligibility).

92. These estimates were calculated using the numbers in Figure 4 (obtained from the Social Security Administration), see *supra* note 89, and dividing them by the estimates of total workers, by gender, from the CPS, see *supra* note 82.

possible driver: the idea that women are more willing to raise the issue of a disability in the workplace.

#### D. ARE WOMEN MORE LIKELY TO COMPLAIN ABOUT A DISABILITY?

Another possible explanation for women's higher ADA charge-filing rates may be that women are more willing to raise the issue of their disability with their employer. The stereotype that women complain more than men is not borne out by the psychology literature, which instead concludes that men and women complain equally, but about different topics.<sup>93</sup> Still, disability in the workplace may be one of the topics about which women are more willing to complain to an employer. Suppose, for instance, that women do not feel as stigmatized by their disabilities as do men; they may be more willing to speak to their employer about their disability and to ask for an accommodation as a result. If true, a greater willingness to raise the issue of disability may translate into differences in the types of disability claims brought by men and women—women, for example, may raise the issue early on, at the hiring stage or as soon as their disability poses a problem for their workplace productivity, while men might wait to raise the issue until their disability becomes unbearably problematic.

A closer examination of the characteristics of men's and women's disability discrimination charges should provide insight regarding the timing of women versus men making their disabilities known to employers. Looking back at Table 1, the clear majority of both men's and women's ADA charges allege

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93. See, e.g., COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 166 (Feb. 2015) ("Among dual-earning couples, the likelihood of reporting work-family conflict has become especially pronounced among fathers."); Joanna Wolfe & Elizabeth Powell, *Gender and Expressions of Dissatisfaction: A Study of Complaining in Mixed-Gendered Student Work Groups*, 29 WOMEN & LANGUAGE 13, 13 (2006) ("Women were more likely than men to use complaints as an indirect request for action, while men were more likely to use complaints to excuse behavior or to make themselves seem superior."); Yinlong Zhang et al., *How Males and Females Differ in Their Likelihood of Transmitting Negative Word of Mouth*, 40 J. CONSUMER RES. 1097 (2014) (finding difference in men's and women's willingness to complain to friends versus strangers); see also Mark Fahey et al., *Men Work Longer, Women Complain More: Survey*, CNBC (June 29, 2015), <http://www.cnbc.com/2015/06/29/women-feel-more-burned-out-at-work-survey.html> (discussing a recent survey conducted by the Staples Corporation finding that women are more likely to complain about long work hours than are men, but men's and women's primary concerns in the workplace are quite different).

wrongful termination. Even though a slightly greater percentage (5.7) of women's ADA charges involve a failure to reasonably accommodate, more men file ADA claims that allege hiring discrimination. These numbers suggest that female workers are not, as a group, bringing up the issue of disability with employers earlier than male workers, since at least some men (and perhaps more men than women) speak to employers about their disabilities as early as the hiring stage.<sup>94</sup>

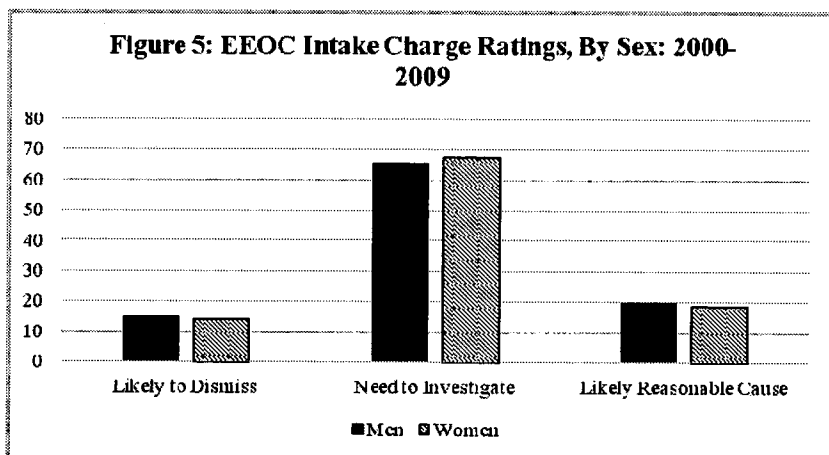
Furthermore, if it were true that women complain more about their disabilities to employers, then it should translate into real differences in the outcomes of women's and men's disability discrimination charges. A greater willingness to complain about disability (and about disability discrimination) in the workplace by one sex should also render workers of that sex more willing to file discrimination charges in less meritorious cases. The idea here is that if men are more hesitant than women to raise the issues of disability and disability discrimination with their employers, then they will only raise such issues (and, if necessary, file a discrimination charge) under the most egregious of circumstances. The result would be that men's disability discrimination charges, on average, would be more meritorious than women's disability discrimination charges, and in turn, more successful in obtaining relief than women's charges. But in fact, examining the actual EEOC charge data reveal no systematic differences in the outcomes of men's and women's disability discrimination charges. For each disability discrimination charge in the 2000 through 2009 EEOC data, the agency intake officer assigned an initial rating.<sup>95</sup> After briefly reviewing the facts of the alleged discrimina-

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94. Table 1 may suggest that more men than women are raising the issue of their disability at the hiring stage, since more men than women ultimately file hiring discrimination charges based on disability. Nonetheless, caution must be taken in reading too much into the numbers in Table 1 since they represent only men and women who raised the issue of disability with employers *and subsequently experienced an adverse employment action*. Suppose more women actually raise the issue of disability at the hiring stage, but employers are more likely to accommodate and hire women than men who raise the issue of disability at hiring. If true, the numbers in Table 1 could result, with more men claiming hiring discrimination on the basis of disability, even though more women raise the issue of disability at the hiring stage.

95. Discrimination charges are typically filed in person during an intake appointment at the EEOC. They may, however, be filed by mail. Regardless of how a worker chooses to file a discrimination charge, each charge is initially assigned to and assessed by an agency intake officer. For a description of the charge filing process, see *How To File a Charge of Employment Discrimina-*

tory incident during the charge intake appointment, the officer designated the discrimination charge as one of the following: “A: Likely reasonable cause,” “B: Need to investigate,” or “C: Likely to dismiss for no reasonable cause.” The breakdown of intake charge ratings, by sex, is shown below in Figure 5.



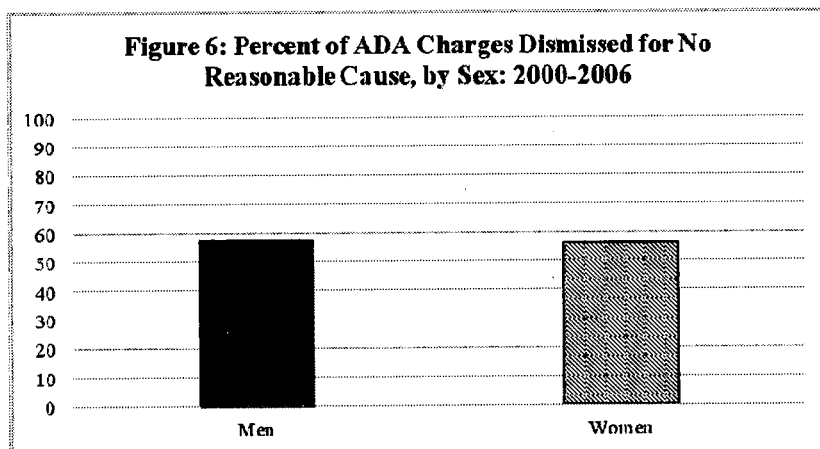
As Figure 5 makes clear, men’s and women’s charge intake ratings are quite similar. The majority of charges are B-rated, regardless of sex of the charge-filing party. Moreover, a slightly greater percentage of men’s disability charges are C-rated. As long as EEOC intake officers’ assessments of discrimination charge merit are generally accurate, Figure 5 appears to refute any notion that men’s disability charges, on the whole, are more meritorious than women’s charges. Further supporting this conclusion is evidence from a smaller subset of the EEOC charge data. Each charge in the 2000 through 2006 EEOC data contains information on the agency’s final determination of charge merit at the end of its investigation process.<sup>96</sup> Figure 6,

tion, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/employees/howtofile.cfm> (last visited Nov. 29, 2016).

96. According to the EEOC, “How we investigate a charge depends on the facts of the case and the kinds of information we need to gather. In some cases, we visit the employer to hold interviews and gather documents. In other instances, we interview witnesses and ask for documents. After we finish our investigation, we will let you and the employer know the result.” *See What You Can Expect After You File a Charge*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/employees/process.cfm> (last visited Nov. 29, 2016). The agency claims on its website that charges, on average, take approximately ten months to investigate. *See id.* However, the average charge investigation period can vary dramatically by field office (that is, how sufficiently a field office is



below, compares the final agency determination of disability discrimination charges by sex. More than half of all ADA charges are dismissed after investigation by the EEOC for no reasonable cause, although the dismissal rate is higher for men than for women.<sup>97</sup> 57.62% of men's disability charges result in dismissal, compared to 55.92% of women's disability charges; furthermore, this 1.70 percentage point difference in dismissal rates by sex is statistically significant at the 1% level.



Together, Figures 5 and 6 indicate that men's lower disability charge-filing rates are not the result of men's willingness to file charges only for the most egregious of discriminatory incidents. Men's and women's disability discrimination charges, on average, are equally meritorious. The fact that men's and women's disability charges are equally meritorious when considered as a whole—but women are filing more disability discrimination charges than are men—gives rise to a third, and final, explanation for women's higher charge-filing rates: disa-

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staffed and funded). Telephone Interview with Katharine Kores, Dist. Dir. of Memphis Office, U.S. Equal Emp't Opportunity Comm'n (Jan. 9, 2012) (estimating that charges in her office, on average, take approximately one year to investigate).

97. Of course, charge dismissal for no reasonable cause by the EEOC does not prevent the charge filer from suing the employer. The charge filer may still request a notice-of-right-to-sue letter from the EEOC, even if his or her charge has been dismissed by the agency for no reasonable cause. *See Filing a Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Nov. 29, 2016).

bled women encounter greater discrimination in the labor market than do disabled men.

E. ARE WOMEN MORE LIKELY TO BE DISCRIMINATED AGAINST BECAUSE OF A DISABILITY?

Without strong empirical evidence to support either the hypothesis that women are more likely to become disabled or the hypothesis that women are more likely to complain or leave work because of a disability, a final question arises: Do disabled women experience greater discrimination in the labor market than disabled men? The idea is not completely without precedent. Using data from the 1980s, economists Marjorie Baldwin and William Johnson demonstrated that disabled men earned higher wages than did disabled women—even after taking into account other observables such as education, occupation, and experience—leading the authors to conclude that disabled women might face a “double burden of discrimination” in the labor market.<sup>98</sup> Although Baldwin and Johnson’s study was groundbreaking, unclear from their results was whether sex discrimination and disability discrimination were additive or compounding in nature. If additive, then the current legal treatment of sex discrimination and disability discrimination separately would be appropriate; compounding discrimination, on the other hand, would lead to precisely the same types of issues discussed throughout the legal scholarship on intersectionality.<sup>99</sup>

Figure 7 takes a significant step towards resolving the nature of the relationship between sex discrimination and disability discrimination. Using the 2000 through 2006 EEOC charge data—the subset of the data that contains the industry of the charge-filing party<sup>100</sup>—Figure 7 graphs the number of charges filed per 10,000 workers, by sex and industry. The industries in Figure 7 are ordered quite intentionally: beginning with the most female-dominated industry, health care (where females

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98. See Marjorie L. Baldwin & William G. Johnson, *Labor Market Discrimination Against Women with Disabilities*, 34 INDUS. REL. 555, 575 (1995).

99. Although Baldwin and Johnson concluded that gender discrimination was no worse for disabled women than it was for non-disabled women, the authors suspected that gender and disability discrimination had a compounding effect, not an additive effect. See *id.* (“[E]fforts to reduce discrimination against women with disabilities will not be effective if they are based on the idea that gender is irrelevant.”).

100. See *supra* note 78 (introducing Hersch’s confidential dataset used by the author).

comprised 79.4% of the workforce in 2003), and ending with the most male-dominated industry, construction (where females comprised only 9.6% of the workforce in 2003).<sup>101</sup> The underlying reasoning behind this ordering is to test whether reported instances of disability discrimination increase as the likelihood of sex discrimination increases. A wealth of empirical scholarship indicates that sex discrimination is most pervasive for women working in male-dominated arenas and least pervasive for women working in female-dominated arenas.<sup>102</sup>

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101. The percent of men in each industry is as follows: health care (21%), educational services (31%), finance and insurance (41%), accommodation (47%), other services (49%), retail trade (51%), real estate (53%), public administration (54%), arts (55%), professional services (55%), information (57%), management (60%), manufacturing (69%), wholesale trade (70%), agriculture (75%), transportation (75%), utilities (77%), mining (86%), and construction (90%). Data on the gender makeup of each major industry comes from the midpoint year, 2003, of the CPS. *Labor Force Statistics: Employed Persons by Industry, Sex, Race, and Occupation*, BUREAU LAB. STATS., <http://www.bls.gov/cps/lfcharacteristics.htm#emp> (last visited Nov. 29, 2016).

102. See, e.g., Hersch, *supra*, note 78, at 633 (finding that sexual harassment charge-filing rates are highest for women in male-dominated industries). See generally Peter Glick et al., *What Mediates Sex Discrimination in Hiring Decisions?*, 55 J. PERSONALITY & SOC. PSYCHOL. 178, 184–86 (1988) (concluding that sex stereotyping is mediated when the sex of the applicant matches perceptions of the appropriate sex for the job); Jennifer Steele et al., *Learning in a Man's World: Examining the Perceptions of Undergraduate Women in Male-Dominated Academic Areas*, 26 PSYCHOL. WOMEN Q. 46, 49–50 (2002) (reporting that female undergraduates in male-dominated majors report higher rates of discrimination and stereotyping).

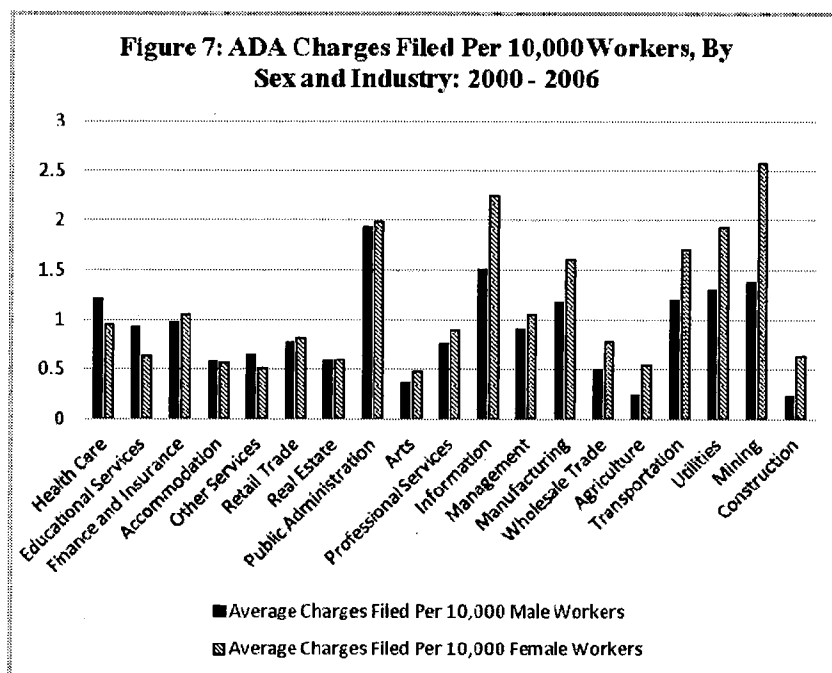


Figure 7 is highly suggestive that sex discrimination and disability discrimination have a compounding, not an additive, effect. For men working in health care and education, where women comprise more than two-thirds of the workforce, men file 27.5% and 45.6% more charges per worker than women, respectively. In industries where men and women make up similar percentages of the workforce, men and women file almost identical numbers of ADA charges per worker. On the other hand, women working in industries where they are severely underrepresented—such as agriculture, mining, and construction—file 118.9%, 84.8%, and 176.4% more ADA charges per worker, respectively. Since perceived riskiness of jobs in the education industry may be low, while perceived riskiness of jobs in the construction and mining industries may be high,<sup>103</sup> one potential alternative reading of this pattern in charge-filing rates is that women's disability charge-filing rates are positive-

103. Of course, perceived job riskiness may not match actual job riskiness. See W. Kip Viscusi, *The Value of Life: Estimates with Risks by Occupation and Industry*, 42 *ECON. INQUIRY* 29, 29–30 (2004) (contrasting the value of statistical life studies that use objective job risk measures versus subjective job risk measures).

ly correlated with job risk, and men's disability charge-filing rates are inversely correlated with job risk.

Yet this alternative explanation loses its footing once the actual riskiness of jobs, by industry, is explored.<sup>104</sup> The current "gold standard" of actual job risk data by industry comes from the Bureau of Labor Statistics (BLS).<sup>105</sup> The BLS collects annual data on both nonfatal workplace injuries (through the Survey of Occupational Illnesses and Industries (SOII) data) and fatal workplace injuries (through the Census of Fatal Occupational Injuries (CFOI) data).<sup>106</sup> According to the 2003 SOII data, the female-dominated health care industry has one of the highest rates of nonfatal workplace injuries, with 650 nonfatal injuries per 10,000 workers, just behind construction (680 injuries), mining (680 injuries), and transportation and warehousing (780 injuries).<sup>107</sup> Similarly, the 2003 CFOI data reveal that the male-dominated information (56.5% male) and manufacturing (69.4% male) industries have some of the lowest fatality rates of any industry, with rates of 0.18 and 0.25 fatalities per 10,000 workers, respectively.<sup>108</sup> For comparison, the female-dominated health care and education industries have rates of 0.07 and 0.12 fatalities per 10,000 workers, respectively.<sup>109</sup> And yet, Figure 7 reveals many more women than men file disability discrimination charges in the information and manufacturing industries.

Instead of tracking underlying job risk, the pattern of disability charge-filing rates by sex most closely tracks the probability of encountering sex discrimination on the job. Figure 7 reveals that the pattern is not only apparent for women, but also for men. Men file more disability charges per worker in the two industries where they are most severely underrepresented,

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104. Accord Hersch, *supra* note 81, at 606 (concluding that women face much greater risks in the workplace than previously believed and that "their injury experience is considerable").

105. For a description of the different types of occupational risk data available, see W. Kip Viscusi, *Policy Challenges of the Heterogeneity of the Value of Statistical Life*, 6 FOUND. & TRENDS MICROECONOMICS 99, 138–48 (2011).

106. Summary statistics from both annual datasets are available from the BLS website. See *Injuries, Illnesses, and Fatalities (2016)*, BUREAU LAB. STATS., <http://www.bls.gov/iif> (last visited Nov. 29, 2016).

107. See *Industry Injury and Illness Data (2003)*, BUREAU LAB. STATS., <http://www.bls.gov/iif/oshsum.htm> (last visited Nov. 29, 2016).

108. See *Census of Fatal Occupational Injuries (CFOI) – Current and Revised Data (2003)*, BUREAU LAB. STATS., <http://www.bls.gov/iif/oshcfoi1.htm> (last visited Nov. 29, 2016).

109. See *id.*

education and health care. The reason that, on average, women file more disability discrimination charges per worker than do men (as seen previously in Figures 1, 2, and 3) is because there are more industries in which women are the minority. This idea that disability discrimination serves to exacerbate underlying sex discrimination in the workplace is further driven home in Figure 8. Figure 8 graphs the percentage of ADA charges filed with the EEOC from 2000 to 2006 that simultaneously include a Title VII sex discrimination charge, by industry and sex. Again, the industries are ordered from the most female-dominated industry to the most male-dominated industry.

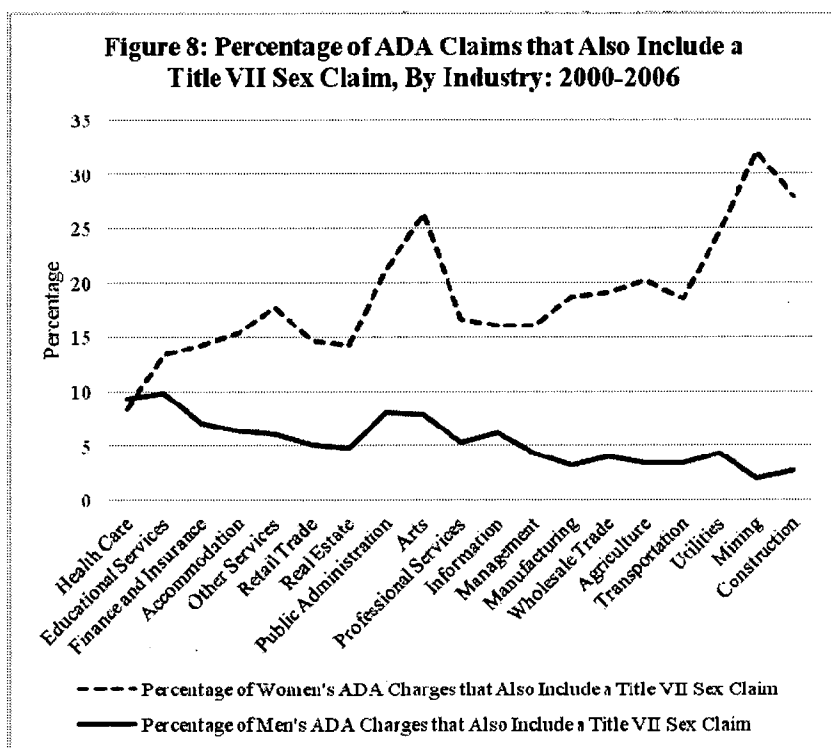


Figure 8 indicates a similar inverse relationship between the likelihood of filing a Title VII sex charge (in addition to the ADA charge) and representation of a disabled individual's sex in the industry. Thus, in the health care industry, where nearly four out of five employees are female, a slightly greater percentage of men file a Title VII sex charge in addition to an ADA

charge.<sup>110</sup> As the percentage of male employees in the industry increases, men filing an ADA charge are less likely to file a simultaneous Title VII sex charge, and women filing an ADA charge are more likely to file a simultaneous Title VII sex charge. The gap between male and female charges that allege both disability and sex discrimination is widest in the industries that are strongly male-dominated, such as mining and construction.

Furthermore, this relationship between filing an ADA charge and a Title VII sex discrimination charge holds even after accounting for the effects of other, potentially correlated, observables. Table 3 reports the results of a linear probability estimate<sup>111</sup> of the likelihood of filing a Title VII sex discrimination charge in addition to an ADA charge, using the 2000 to 2006 EEOC charge data. After controlling for differences in race, age, national origin, employer characteristics (government employer, large employer, or employer region), and the year of charge filing, women in industries that are 50 to 66% male ("male-majority industries" in Table 3) are 11.5 percentage points more likely than men in these industries to file a Title VII sex discrimination charge in addition to their ADA charge. Women in industries that are more than 66% male ("male-dominated industries" in Table 3) are 18.8 percentage points more likely than men in these industries to file a Title VII sex discrimination charge in addition to their ADA charge.<sup>112</sup> Although caution must be exercised in interpreting these results causally, these linear probability estimates are nonetheless enlightening, because they show that the compounding relationship between disability discrimination and minority gender status in an industry persists even after accounting for additional, potentially correlated characteristics of ADA charge-filing parties.

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110. See *supra* note 101 and accompanying text.

111. A linear probability model estimates the relationship between a variable of interest (here being a woman in a male-dominated industry) on the probability of an outcome of interest (here filing a Title VII sex charge in addition to an ADA charge) using ordinary least squares estimation. For more information on linear probability models, see WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* 665–727 (7th ed. 2012) (comparing the linear probability model to probit and logit models, which are also used to estimate probabilities).

112. Estimates are constructed to examine the probability of a woman filing a Title VII sex charge (in addition to an ADA charge), relative to a man filing a Title VII sex charge, since women are the minority in more industries than are men. The estimates could easily be reversed, however, to estimate instead the probability of filing a Title VII sex charge (in addition to an ADA charge) among men in female-dominated industries.

**Table 3: Linear Probability Estimate of Filing a Title VII Sex Discrimination Charge Among Individuals Who File an ADA Charge, 2000–2006**

	Dependent Variable: File Title VII Sex Charge
Female	0.081*** (0.003)
Nonwhite	-0.006** (0.003)
Over 40	-0.006** (0.003)
Male-Majority Industry	-0.001 (0.003)
Male-Dominated Industry	-0.022*** (0.003)
Female*Male-Majority Industry	0.034*** (0.005)
Female*Male-Dominated Industry	0.107*** (0.009)
N	63,048
R <sup>2</sup>	0.035
Coefficient significant at *10% level, **5% level, ***1% level	

*Notes:* Estimates include controls for foreign national origin, large employer (501+), government employer, region of employer, and year filed. Male-majority industries are 50 to 66% male. Male-dominated industries are more than 66% male.

Taken together, the empirical findings presented in this Section strongly suggest that sex and disability discrimination intersect much in the same, well-documented way that race and sex discrimination intersect. The unfortunate results of this intersection for disabled female workers, and particularly disabled female workers in male-dominated industries, are discriminatory wage and employment effects that far surpass their disabled male peers. In light of the data presented here, the next Part steps back and considers alternative explanations for the sex-disability discrimination connection, but ultimately concludes that it is intersectionality that renders the effects of labor market discrimination particularly harsh for disabled women.



### III. CONSIDERING ALTERNATIVE EXPLANATIONS FOR THE SEX-DISABILITY CONNECTION

Skeptics of the intersectionality theory might view the data presented in the previous Part and remain unconvinced that sex discrimination exacerbates disability discrimination in the workplace. Alternative explanations, such skeptics might argue, could easily explain the relationship between likelihood of filing a disability discrimination charge and the sex ratio in a worker's industry. This Part considers two of the most compelling alternative explanations for the gendered nature of disability discrimination: (1) the propensity of sex discrimination charge filers to file a discrimination charge on as many grounds as possible; and (2) the role of the built environment in the workplace. Nonetheless, even after thorough consideration, these alternative explanations fail to fully explain the relationship between sex and disability discrimination documented in Part II.

#### A. THE ROLE OF EVERYTHING BUT THE KITCHEN SINK

Perhaps the most obvious alternative explanation for the sex-disability discrimination charge-filing connection presented in Part II is one that relies on both women's relative propensity to file a discrimination charge *of any type* against their employers and the behavior of charge filers during the intake process. This alternative explanation proceeds in the following manner: workers, whether male or female, who believe they have been discriminated against in the workplace seek retribution against offending employers. As a result, when these workers file a discrimination charge with the EEOC, they are motivated to ensure that the employer is found liable for at least some type of wrongdoing. With seemingly nothing to lose by claiming multiple grounds of discrimination,<sup>113</sup> workers are motivated to check every box on the charge intake form—alleging everything but the kitchen sink—and claim that the offending employer engaged in every type of prohibited discrimination. Although all charge-filers engage in this kitchen-sinking behavior, regardless of sex, there are more female charge filers since sex dis-

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113. One questionable aspect of this hypothesis is that charge filers have nothing to lose by checking every box on the EEOC's charge intake form. If charge filers claim all types of discrimination—including types of discrimination that they did not actually experience—it may cause the agency to take the charge less seriously.

crimination is more common against women than against men.<sup>114</sup> The end result is that more women file disability discrimination charges against employers simply because they file more discrimination charges in general. Moreover, according to this alternative explanation, the relationship between industry sex ratio and disability charge-filing rates should not be surprising since women experience more sex discrimination in male-dominated industries, and women's higher rates of sex discrimination charge filing are driving the entire mechanism.

Evaluating the validity of this hypothesis requires first determining the ratio of female to male discrimination charge-filers. It is true that the strong majority of Title VII sex discrimination charges are filed by women; between 2000 and 2009, the EEOC received 246,367 charges that raised a Title VII sex discrimination claim.<sup>115</sup> Of the filings for which the party's sex is reported (sex is not reported for 5406, or 2.19% of the sex discrimination charges), 50,382 charges were filed by men (20.91% of charges) and 190,579 charges were filed by women (79.09% of charges). However, when the data are analyzed across all relevant statutes—including other types of Title VII claims, the ADA, the ADEA, and GINA—it is *not* true that women file disproportionately more charges than men. Between 2000 and 2009, the EEOC received charges from 886,383 unique charge filers under all statutes that it administers.<sup>116</sup> Of the charges in which the filing party's sex is reported (sex is not reported for 27,296, or 3.08%, of all 886,383 unique charge filers), 471,563 of all charge filers were female (53.20%), and 387,524 of all charge filers were male (46.80%). Already, the close to fifty-fifty split of male-to-female charge filers calls this alternative hypothesis into question.

Nonetheless, the next step in evaluating this alternative hypothesis is determining whether charge-filers kitchen sink their claims and whether such behavior differs meaningfully by sex. According to the 2000 through 2009 data for which sex is reported,<sup>117</sup> men's EEOC charges, on average, raise 1.18 unique

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114. Sex discrimination is in fact more common against women than men, but it is nonetheless an issue for men in many workplaces—over 20% of all Title VII sex discrimination charge filers are men.

115. See *Charge Statistics: FY 1997 Through FY 2015*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 29, 2016).

116. See *id.*

117. Sex is reported in 96.92% of the 2000 through 2009 EEOC data.

statutes; women's EEOC charges, by contrast, raise an average of 1.20 unique statutes. Although this difference is statistically different at the 5% level, the magnitude of the difference is undoubtedly quite small. Moreover, these summary statistics do not provide very compelling evidence of systematic, kitchen-sinking behavior by charge filers of either sex. Nor is there strong evidence of kitchen sinking at the ends of the charge-filer distribution. The median charge-filer, whether male or female, raises only one statute in his or her charge. Similarly, charge filers in both the twenty-fifth and seventy-fifth percentiles of the distribution raise just one statute, regardless of their sex. Considered together, these figures indicate that kitchen-sinking behavior is the exception, not the rule, in EEOC charge filing.

A final method of assessing this alternative hypothesis is to examine EEOC charge-filing behavior by sex with respect to other employment discrimination statutes. The kitchen-sinking hypothesis claims that women file more disability charges per worker than do men because women encounter more sex discrimination in the workplace than do men. Instead of simply filing a sex discrimination charge with the EEOC, these women allegedly kitchen sink their charges, which, in turn, leads to higher rates of disability claims among women. But if this hypothesis is true, not only should higher rates of disability discrimination charges result among women, but also higher rates of *other types of discrimination charges*. Thus, a fair comparison will be to examine how age discrimination charge-filing rates differ by sex,<sup>118</sup> as compared to how disability discrimination charge-filing rates differ by sex. From 2000 to 2009, men filed an average of 10,595 ADEA charges per year, but women filed only an average of 8933 ADEA charges per year. For comparison, during the same time period, men filed an average of 8923 ADA charges per year, and women filed an average of 8935 ADA charges per year.<sup>119</sup> Thus, while women filed more ADA charges than men during this time period, men filed far more ADEA charges than women during this period.

Even when these absolute numbers are normalized to account for the fewer number of women in the labor market, the opposite trends remain in the ADEA and ADA data. From 2000

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118. Recall that the sex-age connection has already received scholarly attention. See Clarke, *supra* note 52; McLaughlin, *supra* note 53 and accompanying text; Widiss, *supra* note 49.

119. See *supra* Figure 2.

to 2009, men filed 1.42 ADEA charges per 10,000 male workers, and women filed 1.36 ADEA charges per 10,000 female workers. In contrast, men filed 1.19 ADA charges per 10,000 male workers, but women filed 1.36 ADA charges per 10,000 female workers. Together, these figures refute the notion that women's higher ADA charge-filing rates are simply a byproduct of their higher sex discrimination charge-filing rates, combined with kitchen-sinking behavior. Instead, these figures point towards a unique intersectionality between sex and disability that is disparately affecting disabled women in the labor market.

## B. THE ROLE OF THE BUILT ENVIRONMENT

A second alternative explanation for the higher disability charge-filing rates by gender minorities is the built environment within the industry. Here, the term "built environment" signifies the physical features of the workplace.<sup>120</sup> At least one legal scholar has argued that American workplace environments have been built with men in mind,<sup>121</sup> and likely that assertion is true for the many industries in which men comprise the majority of workers. The argument may not be true, however, for industries like education and health, in which women comprise a strong majority of the workers. Instead, the environment within a workplace dominated by one sex has likely been built with that particular sex in mind. For instance, the expected height of desks and chairs and the availability of women's restrooms is probably quite different in workplaces

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120. The term is frequently used by health researchers to refer to: spatial distribution of human activities[,] . . . the physical infrastructure and services that provide the spatial links or connectivity among activities[, and] . . . the aesthetic, physical, and functional qualities of the built work environment, such as the design of buildings and streetscapes, and relates to both land use patterns and the transportation system.

CTRS. FOR DISEASE CONTROL AND PREVENTION, *Workplace Health Promotion: Environmental Assessment*, <http://www.cdc.gov/workplacehealthpromotion/model/assessment/environmental.html> (last visited Nov. 29, 2016); see also Alva O. Ferdinand et al., *The Relationship Between Built Environments and Physical Activity: A Systematic Review*, 102 AM. J. PUB. HEALTH, Oct. 2012, at e7, e7–e13. See generally Richard J. Jackson, *The Impact of the Built Environment on Health: An Emerging Field*, 93 AM. J. PUB. HEALTH 1382 (2003) (detailing the role of the "built environment" in the public health field).

121. See Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1314–15 (2008) (discussing how work environments have been traditionally built for men, and considering the ramifications of the traditionally built environment on accommodating disabled women in the workplace).

within the education or healthcare industries than in workplaces within the transportation or construction industries.<sup>122</sup>

As a result, disabled women in male-dominated industries may require additional or costlier accommodations than disabled women in female-dominated industries. Imagine, for instance, a male worker and a female worker in the manufacturing industry; both have irritable bowel syndrome and require frequent, easy access to a restroom. Since more than two-thirds of the workers in the manufacturing industry are male, men's restrooms likely abound in the work facility, and the employer will have to spend little to nothing to ensure that the male worker has sufficient restroom access. In contrast, accommodating the female worker may prove more difficult, and more costly, since the number of men's restrooms in the facility almost certainly outnumbers the number of women's restrooms.<sup>123</sup>

As the above example demonstrates, employers in male-dominated industries may be less willing to provide accommodations to disabled females because of the high initial cost to provide the accommodation and because of the reduced likelihood that another woman will be able to take advantage of the accommodation in the future, given the small number of women overall in the industry. If this intuition is correct, then the built environment of the workplace may be driving the higher disability charge rates of gender minorities. A worker of one sex in an industry that is strongly dominated by the opposite sex may be met with heightened resistance from employers whenever the need for a reasonable accommodation arises. The result would be more sex-minority members within an industry filing reasonable accommodation claims than sex-majority members. In essence, this hypothesis implies that differences in reasonable accommodation discrimination charges are driving the sex-based charge patterns seen by industry in Figure 7.

If the built environment theory is correct, then the sex disparities in charge-filing rates across industries should be driven, at least in part, by differences in reasonable accommodation claims. Figure 9 uses the 2000 through 2006 EEOC charge data

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122. In fact, unequal availability of women's restrooms has been the subject of prior litigation. See Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN'S L.J. 263, 276–87 (1991).

123. Restroom access has been the subject of much ADA reasonable accommodation litigation brought by irritable bowel syndrome patients. See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753, 753–55 (6th Cir. 2015); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 463–64 (6th Cir. 1999); *Bracey v. Michigan Bell Tel. Co.*, No. 14-12155, 2015 WL 9434496, at \*1–4 (E.D. Mich. Dec. 24, 2015).

to compare the rate of raising an accommodation claim within an ADA charge, by sex of the charge-filing party and industry (with industries ordered from least male-dominated to most male-dominated). Figure 9 is similar to Figure 7, but instead of comparing the total number of ADA charges by industry and sex (as in Figure 7), Figure 9 compares the percent of ADA charges that contain a reasonable accommodation charge.

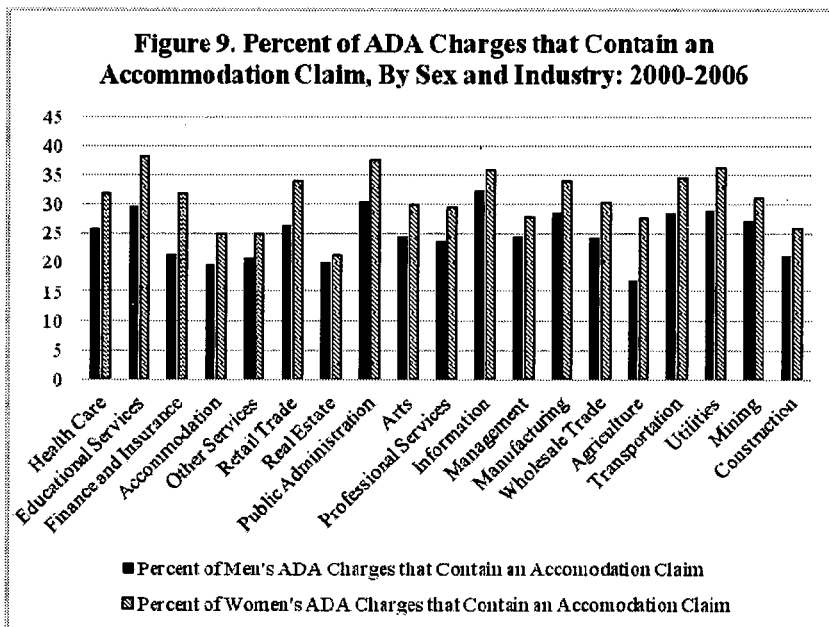


Figure 9 reveals that women raise accommodation claims at higher rates than men, regardless of industry,<sup>124</sup> and there is no apparent relationship between likelihood of filing an accommodation charge and the gender makeup of a worker's industry. Figure 9 casts doubt on the hypothesis that the built environment in the workplace is strictly driving the results in Figure 7. Neither men nor women appear more likely to seek (and be turned down for) accommodation in industries where their sex is heavily outnumbered.

124. Recall from Table 1 that the EEOC charge data summary statistics in the Table had already revealed that women, on average, file more reasonable accommodation charges than do men, but men file more hiring charges than do women.

With doubt cast on both the built environment and the kitchen-sinking hypotheses, the residual hypothesis is intersectionality. The multiplicative effect of being a member of more than one minority group appears to be responsible for the gendered nature of disability discrimination. The next Part, as a result, will consider the realities of intersectional claims under current understandings of employment discrimination laws. It will further weigh the potential remedies for victims of simultaneous sex and disability discrimination.

#### IV. FINDING A REMEDY FOR SEX-DISABILITY INTERSECTIONALITY

Using employment discrimination charge data from the EEOC, this Article has revealed a previously unexplored weakness in U.S. disability laws. Disability discrimination, it seems, is not isolated from other types of discrimination; rather, it can be exacerbated by other forms of discrimination, and in particular, by sex discrimination. The compounding effect of disability discrimination on top of sex discrimination can impact both men and women, but as a practical matter, it impacts more women than men. It is most often present when a disabled individual of one sex works in an industry dominated by members of the other sex, and when present, can have potentially devastating labor market consequences on its victims.

Why are the labor market consequences of sex and disability intersectional discrimination potentially devastating? As either a disabled individual or a member of a minority sex, a worker is already at a disadvantage in the labor market. Even in the post-ADA period, disabled individuals continue to be less likely to be hired than non-disabled individuals, and when they do find employment, they earn lower wages than non-disabled individuals for performing the same job.<sup>125</sup> Similarly, even in

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125. See, e.g., Acemoglu & Angrist, *supra* note 15, at 948–50 (finding that the disability employment penalty in the labor market persists, and may have gotten worse, after the passage of the ADA); see also Marjorie L. Baldwin & William G. Johnson, *Labor Market Discrimination Against Men with Disabilities in the Year of the ADA*, 66 S. ECON. J. 548, 561–64 (2000) (finding that physical limitations cannot fully account for the wage penalty encountered by disabled men in the labor market, and demonstrating a correlation between wages and stigma associated with the underlying disability); Jennifer Bennett Shinall, *What Happens When the Definition of Disability Changes? The Case of Obesity*, 5 IZA J. LAB. ECON., 1, 1–31 (2016) (demonstrating that employment for at least one disabled group has not improved since the passage of the 2008 ADA Amendments, which were intended to remedy the shortcomings of the

the post-Title VII period, women famously continue to earn less than men for performing the same job.<sup>126</sup> Just to add these effects up for members of both minority groups—that is, individuals who are both disabled and a member of an unrepresented sex—would already suggest that these individuals face a formidable barrier to success in the labor market. Yet, as demonstrated by this Article, for disabled sex minorities the effects are more than additive; they are multiplicative.

Furthermore, neither federal disability discrimination law nor federal sex discrimination law, as currently enforced, can adequately assist victims of intersectional sex-disability discrimination. Wage and employment data both demonstrate that disabled women are worse off since the ADA, at least in terms of labor market outcomes, than are disabled men.<sup>127</sup> These data indicate that the current single-dimensional framework of U.S. disability law may be inadequate to protect disabled men in the workplace, and it is certainly inadequate to protect disabled women.<sup>128</sup> The framework is insufficient for disabled women, because, as the empirical evidence presented here has demonstrated, disabled women face problems created by claim intersectionality that are analogous to the well-explored prob-

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original Act).

126. Exactly how much less women earn than men for performing the same job is the source of some debate. President Barack Obama and the media often cite the popular statistic that women earn seventy-seven cents for every dollar that a man earns. *See, e.g.*, Barack Obama, President of the U.S., Remarks by the President on Equal Pay for Equal Work (Apr. 8, 2014), <https://www.whitehouse.gov/the-press-office/2014/04/08/remarks-president-equal-pay-equal-work> (“Today, the average full-time working woman earns just 77 cents for every dollar a man earns; for African-American women, Latinas, it’s even less. And in 2014, that’s an embarrassment. It is wrong.”). Yet most economists would revise this figure upwards since this number does not take into account differences in the occupations, industries, and working hours of men and women. *See, e.g.*, Dan A. Black et al., *Gender Wage Disparities Among the Highly Educated*, 43 J. HUM. RESOURCES 630, 651 (2008) (estimating that white women earn approximately ninety-one cents for every dollar that a white man earns).

127. *See* Acemoglu & Angrist, *supra* note 15, at 930 (finding that disabled women ages twenty-one to thirty-nine worked between 2.37 and 4.57 fewer weeks in the years following the implementation of the ADA but disabled men ages twenty-one to thirty-nine worked between 0 and 3.11 fewer weeks); Beegle & Stock, *supra* note 56, at 853 (finding that disabled women’s earnings declined by 4.9% after passage of a state disability law, but disabled men’s earnings declined by only 1.5%).

128. *Accord* Baldwin & Johnson, *supra* note 98, at 575 (“[E]fforts to reduce discrimination against women with disabilities will not be effective if they are based on the idea that gender is irrelevant.”).



lems faced by African-American women. As prior authors have aptly described for the case of African-American women,

[A]n employer might be willing to hire black men and white women as retail salespeople but unwilling to hire black women because he thinks that customers will stereotype them in disparaging ways that will harm his business. . . . Their employees might make what we call intersectional claims: allegations that they were discriminated against due to more than one ascriptive characteristic. But since these types of discrimination would not affect minority men or white women, under some interpretations of EEO law, the employer could parry a claim of race discrimination by pointing to the hiring of men belonging to the plaintiffs' racial group and deflect a claim of sex discrimination by pointing to his hiring of white women.<sup>129</sup>

A disabled woman will face precisely the same issue in trying to bring a suit that involves evidence of simultaneous sex and disability discrimination. An employer could point to evidence of taking positive employment actions towards disabled men to discredit the disability claim; the employer could then bring forth evidence of positive treatment of nondisabled women to discredit the sex claim. If the employer's evidence is convincing on each front, the disabled woman will lose. She will lose because, in general, courts will only consider workplace discrimination against her based on each single dimension, not on multiple dimensions.<sup>130</sup>

Undoubtedly, the lessons of this Article are pessimistic for the labor market prospects of disabled workers who are also gender minorities within their respective industries. If current understandings of employment discrimination law are insufficient to protect these workers, how can these workers improve their legal fate (and, as a result, improve their labor market prospects)? The possible legal solutions to the intersectional discrimination issues faced by disabled, gender-minority workers are, in one respect, highly similar to those for African-American women. Both groups require a way to get around courts' unwillingness to view discrimination on more than a single dimension. Yet in another respect, the solution for disa-

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129. Best et al., *supra* note 37, at 995; see also Peggie R. Smith, *Separate Identities: Black Women, Work, and Title VII*, 14 HARV. WOMEN'S L.J. 21, 28-29 (1991) (giving similar examples).

130. As mentioned previously, disabled men in female-dominated industries who are victims of sex-disability intersectional discrimination will encounter the same problem. Here, I have focused on the example of disabled women, however, since sex-disability intersectional discrimination affects more women than men (as there are many more male-dominated industries than female-dominated industries).

bled, gender-minority workers may be more complex. The case of African-American female workers asks courts to evaluate a discrimination claim multi-dimensionally within the same statute, Title VII; the case of disabled, gender-minority workers asks courts to evaluate a discrimination claim multi-dimensionally across two statutes, Title VII and the ADA. And even though prior within-statute intersectional claims have not fared particularly well in courts,<sup>131</sup> prior across-statute claims have historically fared even worse.<sup>132</sup> With these issues in mind, the next two Sections consider the viability of two potential remedies for sex-disability intersectional plaintiffs.

#### A. AMENDING CURRENT STATUTES

Even though sex-disability discrimination involves across-statute intersectional discrimination, previous work on within-statute intersectional discrimination may still serve as a suitable point of departure. Frustrated with federal courts' typical proclivity towards considering race and sex discrimination separately (instead of simultaneously), scholars working on with-

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131. See, e.g., *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) ("[T]his lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both . . ."); see also Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1468 (1989) (criticizing cases like *DeGraffenreid* since "[c]ourts have never divided white women into whites and women, or Black men into Blacks and men. Their claims have not been treated as divided because the term 'Blacks' has been understood to mean Black men, and 'women' to mean white women").

132. Most of the prior scholarship on across-statute intersectional claims has focused on the intersection of age and sex discrimination, and it has been even more pessimistic with regards to plaintiffs' prospects than the present Article. See, e.g., Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 88–89 (2003) ("Of the courts that have had the opportunity to address the issue, they have either declined the invitation to decide the issue, or have recognized the cause of action with little or no discussion."). Although one federal district court has allowed one intersectional sex-age claim to proceed under Title VII and the ADEA, see *Arnett v. Aspin*, 846 F. Supp. 1234, 1241–42 (E.D. Pa. 1994), federal courts of appeals have required the sex discrimination and age discrimination claims to proceed separately since they derive from two different statutes. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc) (refusing to recognize an intersectional claim under federal law brought by a former employee who had allegedly been called a "useless old lady" by her supervisors); *Sherman v. Am. Cyanamid Co.*, No. 98-4035, 1999 WL 701911, at \*5 (6th Cir. 1999) (refusing to recognize sex-age intersectional claims under federal law). But see *Lewis v. CNA Nat. Warranty Corp.*, 63 F. Supp. 3d 959, 962–64 (D. Minn. 2014) (allowing a sex-plus-age claim to proceed under *Minnesota* law, not federal law).

in-statute, intersectional discrimination against African-American women have proposed amendments to current employment discrimination laws.<sup>133</sup> These amendments would require courts to evaluate hybrid evidence of multiple types of simultaneous discrimination—that is, to allow explicit intersectional claims—by adding language such as “or any combination thereof” after Title VII’s explicit prohibitions against race, color, national origin, sex, and religious discrimination.<sup>134</sup> This solution may sound simple in theory, but a closer examination reveals both its impracticality and its limitations.

First, and practically speaking, the chances of an amendment that expands civil rights protections passing both houses of Congress seem slight to nonexistent, especially given the current political climate.<sup>135</sup> True, Congress came together in 2008 to pass the Americans with Disabilities Act Amendments Act (ADAAA), which expanded the definition of disability under the original ADA by explicitly overturning four U.S. Supreme Court cases, and thus expanded preexisting civil rights.<sup>136</sup> But

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133. See Areheart, *supra* note 39, at 234; Rosalio Castro & Lucia Corral, Comment, *Women of Color and Employment Discrimination: Race and Gender Combined in Title VII Claims*, 6 LA RAZA L.J. 159, 173 (1993); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory To Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771, 811 (1996).

134. Areheart, *supra* note 39; Castro & Corral, *supra* note 133, at 172.

135. For news articles discussing the recent inability of Congress to pass major legislation on important issues, including issues on which both Democrats and Republicans agree, see James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (Jan. 2015), <http://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516> (describing the 2013–2014 Congressional term as “unusually short and historically unproductive”); Ed Hornick, *Why Can’t Congress Just Get Along?*, CNN (Oct. 11, 2011), <http://www.cnn.com/2011/POLITICS/10/11/congress.problems> (describing Congress’s inability to get legislation passed as “pathetic but not unexpected. This is really what we’ve come to expect from this divided Congress”); Carl Hulse, *No Room for Compromise and, Again, No Room for Action*, N.Y. TIMES, June 22, 2016, at A12 (blaming Congress’s ability to pass a gun bill, despite agreement on some points between both parties, on “partisanship, a reluctance to compromise and the influence of powerful special interests”); see also Ed O’Keefe, *ENDA, Explained*, WASH. POST (Nov. 4, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda> (documenting proponents’ long, unsuccessful struggle to pass another civil rights bill, the Employment Non-Discrimination Act, to protect lesbian, gay, bisexual, and transgender employees from discrimination).

136. See Americans with Disabilities Act Amendments Act § 2(a), Pub. L. No. 110-325, 122 Stat. 3553 (2008) (“[T]he holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases

those particular amendments to the ADA arose in a very different context than would the intersectionality amendments proposed by prior scholars. The ADAAA was a direct reaction to the tremendous amount of litigation regarding the definition of disability, which Congress had failed to define fully in the original version of the ADA,<sup>137</sup> and the restrictive judicial decisions that had rendered the act inapplicable to many individuals in need of its protections.<sup>138</sup> Moreover, the ADAAA was passed in the context of empirical evidence that the original Act had actually *harmed* the labor market prospects of the intended protected class, disabled individuals.<sup>139</sup> In contrast, intersectional scholarship, including the present Article, has presented evidence that federal discrimination statutes *have not helped* the labor market prospects of individuals who are members of multiple protected classes.<sup>140</sup>

Second, the legislative history of Title VII at least points to an argument that courts should already be considering intersectional discrimination claims, even without an amendment to the statutory language. During the floor debate on Title VII, Representative John Dowdy introduced an amendment to add the word “solely”<sup>141</sup> prior to the then-bill’s prohibitions on discrimination “because of such individual’s race, color, religion, sex, or national origin.”<sup>142</sup> But the amendment to Title VII was

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have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; . . . the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA.”).

137. See Shinall, *supra* note 125, at 2 (“Congress failed to define what the terms ‘impairment,’ ‘substantially limits,’ ‘major life activities,’ and ‘regarded as’ precisely meant. Nor did Congress provide any rules of construction for the undefined terms in the ADA. As a result, years of litigation ensued over the meaning of these terms and, more broadly, over who was disabled for the purposes of the ADA.”).

138. See *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002); *Alberson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

139. For well-known empirical work finding a decline in labor market outcomes after the passage of the 1990 version of the ADA, see Acemoglu & Angrist, *supra* note 15; DeLeire, *supra* note 56.

140. See, e.g., Best et al., *supra* note 37, at 995 (suggesting that Title VII is not as beneficial to non-white women as it is to white women, but *not* arguing that non-white women are worse off under Title VII than they were in the absence of the statute).

141. 110 CONG. REC. 2728 (1964).

142. 42 U.S.C. § 2000-e(a)(1) (2012).

rejected, creating a colorable argument that Congress, in its act of rejecting the amendment, *intended* Title VII to encompass multidimensional discrimination claims. Furthermore, the qualifier “solely” does not appear (nor has it ever appeared) in any subsequent employment discrimination statute like the ADA<sup>143</sup> or ADEA.<sup>144</sup> This observation, by extension, raises an argument that multidimensional claims may be cognizable under all employment discrimination statutes, not just Title VII.

Third, an amendment that adds the phrase, “or any combination thereof,” to current federal discrimination statutes may actually be harmful for victims of across-statute interdisciplinary discrimination. If the phrase were added to Title VII, for instance, it would strongly nudge courts in the direction of considering multidimensional discrimination claims, as long as those claims were *on the dimension of Title VII*. For instance, such language would strongly endorse the cognoscibility of race-sex claims, religion-national origin claims, and race-color claims.<sup>145</sup> But such language would also arguably exclude the possibility of multidimensional discrimination claims that go beyond the scope of Title VII—including the type of multidimensional discrimination claim at issue here, sex-disability claims. For all these reasons, amending federal employment discrimination statutes is neither a realistic nor a satisfying solution to the problems faced by workers who are both disabled and a gender minority within their industry. Instead, the more practical solution is to work within the confines of current interpretations of Title VII and the ADA to address intersectional sex-disability discrimination, which is the subject of the next Section.

## B. WORKING WITH CURRENT STATUTES

Perhaps the most obvious way for intersectional sex-disability plaintiffs to proceed is through the existing sex-plus framework under Title VII. The sex-plus theory of liability under Title VII alleges that the employer treats a certain characteristic better in one sex than the employer treats the same characteristic in the opposite sex. Recognition of this theory of

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143. See *id.* §§ 12101–12213.

144. See 29 U.S.C. §§ 621–634 (2012).

145. See Areheart, *supra* note 39, at 234 (“This solution would expressly allow cases that allege discrimination based upon more than one category to proceed without forcing the plaintiff to choose among the distinct categories explicit in the statute.”).

Title VII liability traces its origins to the 1971 Supreme Court decision, *Phillips v. Martin Marietta Corp.*<sup>146</sup> In *Phillips*, the employer-defendant, Martin Marietta, had a policy against hiring women with preschool-aged children, but not men with preschool-aged children. The plaintiff, Ida Phillips, had preschool-aged children and had applied, but had been rejected, for a position in which approximately three-quarters of all applicants hired were women.<sup>147</sup> Thus, Phillips would have had a difficult time bringing a traditional disparate treatment or disparate impact case under Title VII, since Martin Marietta was obviously willing to hire women (just not women with preschool-aged children). Phillips, as a result, brought the case under the theory that by treating women with preschool-aged children differently than men with preschool-aged children, Martin Marietta was discriminating on the basis of sex.<sup>148</sup> The Supreme Court agreed and endorsed the sex-plus theory of liability, at least with respect to the right to have children.<sup>149</sup>

Extending the logic of *Phillips*, a sex-plus-disability case would take the same sex-plus theory and allege that an employer who treats disabled workers of one sex less favorably than disabled workers of the other sex violates Title VII. Indeed, broadening the theory from sex-plus-reproduction to sex-plus-disability is relatively straightforward under the line of cases extending from *Phillips*. Courts have taken *Phillips* to stand for the proposition that employers who treat one sex differently than the other sex on the basis of any fundamental right, not just reproduction, violate Title VII.<sup>150</sup> Moreover, courts have extended the theory to include discrimination between the sexes on the basis of any immutable characteristic.<sup>151</sup> Disability, of course, may be mutable for some individuals af-

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146. 400 U.S. 542, 544 (1971).

147. See *id.* at 543.

148. See *id.* at 544.

149. See *id.*

150. See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. Similarly, an employer cannot have one hiring policy for men and another for women if the distinction is based on some fundamental right").

151. See *id.*; *Arnett v. Aspin*, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994) (holding that sex-plus liability under Title VII "allows plaintiffs to bring a Title VII claim for sex discrimination if they can demonstrate that the defendant discriminated against a subclass of women (or men) based on either (1) an immutable characteristic or (2) the exercise of a fundamental right").

fects by nonpermanent conditions (e.g., pregnancy-related disability),<sup>152</sup> but for the most part, courts have traditionally considered disability an immutable characteristic.<sup>153</sup> Consequently, the sex-plus-disability theory of liability should provide an available remedy for individuals who endure intersectional sex-disability discrimination in the workplace.

Yet a brief search for prior sex-plus-disability cases brought in federal court turns up only a handful of cases,<sup>154</sup> in spite of the fact that the EEOC charge data presented in Part II indicates that sex-disability intersectional discrimination is not an uncommon occurrence. This observation raises questions about why sex-plus-disability is a theory of liability virtually unheard of in federal court. Several forces may be at work to limit the number of sex-plus-disability claims on the federal court dockets. On one hand, the sex-plus-disability theory may be too conceptually limited to cover all sex-disability intersectional claims. As one scholar has commented, the sex-plus theory “does not involve discrimination based on something *in addi-*

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152. Note, however, that a great deal of early ADA litigation centered on the issue of whether a nonpermanent condition could ever be a disability for the purposes of the ADA, but the 2008 ADA Amendments largely resolved this debate in the affirmative. See *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 333 (4th Cir. 2014) (“Under the ADAAA and its implementing regulations, an impairment is not categorically excluded from being a disability simply because it is temporary.”).

153. See *Clarke*, *supra* note 52, at 41 (recognizing that even though courts have traditionally considered disability an immutable characteristic, “[m]any forms of disability, too, might fall through the cracks of the revised immutability, as conditions subject to control and yet seldom celebrated as features of identity”); see also *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (“It is clear that by ‘immutability’ the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. . . . At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.”).

154. An advanced Westlaw search for federal cases using the terms “sex plus” and “disability” brings up only three prior cases in which the sex-plus-disability theory was advanced by the plaintiff. See *Martinez v. NBC, Inc.*, 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999); *Cardenas-Meade v. Pfizer, Inc.*, No. 3:09-CV-268, 2011 WL 6026893, at \*9–10 (E.D. Tenn. Dec. 5, 2011), *aff’d*, 510 F. App’x 367 (6th Cir. 2013); *Preston v. Bristol Hosp.*, No. 3:12-CV-1252 RNC, 2015 WL 1456764, at \*3 (D. Conn. Mar. 30, 2015). In all three cases, the plaintiff was ultimately unsuccessful in proving sex-plus-disability discrimination.

tion to sex"; the theory instead prohibits employer practices that are, first and foremost, based on sex, but only apply to a subset of that sex."<sup>155</sup> Along these lines, it is important to recognize that a sex-plus-disability claim is, at bottom, a sex discrimination claim. A successful plaintiff under this theory would be entitled to a remedy under Title VII, not the ADA.<sup>156</sup> This statutory distinction may be important for disabled individuals who, at the time of filing a charge, believe that the principal basis for discrimination is their disability (and as a result, only file an ADA charge). If such individuals realize only later during the investigation or discovery processes that sex also played a role in their adverse employment action, they are nonetheless barred from pursuing a sex-plus theory, as they will have failed to exhaust their Title VII administrative remedies.<sup>157</sup>

On the other hand, an even more likely explanation for the scarcity of sex-plus-disability claims is the difficulty of proof. A sex-plus claim, by its very nature, requires a plaintiff to prove that an employer treats members of one sex with a certain immutable characteristic or fundamental right differently than members of the other sex with that same immutable characteristic or fundamental right.<sup>158</sup> In the case of disability, presenting such proof might be exceptionally difficult, as it would re-

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155. Shoben, *supra* note 29, at 804.

156. See *id.* at 802 ("Another argument supporting the view that Title VII prohibits intentional discrimination against compound groups relies on the principles of 'sex-plus' discrimination. Sex-plus discrimination occurs when a hiring practice, while not explicitly directed at a particular sex, operates to exclude only one sex."). A plaintiff who, instead, tried to bring a disability-plus-sex claim under the ADA (a claim that an employer treats each sex differently among disabled workers) would face even more difficulty given that courts have not recognized the existence of plus claims under any other discrimination statute besides Title VII. See, e.g., *Kelly v. Drexel Univ.*, 907 F. Supp. 864, 875 n.8 (E.D. Pa. 1995), *aff'd*, 94 F.3d 102 (3d Cir. 1996) ("Although I recognized a 'sex-plus-age' discrimination claim under Title VII in *Arnett*, I specifically stated: 'It is important to remember that . . . *Arnett's* complaint contains a claim for sex discrimination, not age discrimination.' I find no authority to recognize an 'age-plus-disability' discrimination claim under the ADEA. Therefore, plaintiff is not entitled to protection as a member of a subclass of older workers with disabilities." (citation omitted)); *Arnett*, 846 F. Supp. at 1240 (allowing a sex-plus-age discrimination case to proceed under Title VII, but not an age-plus-sex case).

157. See *supra* note 16.

158. See, e.g., *Scarborough*, *supra* note 131, at 1472 (noting that the sex-plus-race theory of liability "requires that the court ask only 'if the employer's rule singled out only women among Black persons. The answer might be yes, but then only a sex discrimination claim has been established'").



quire a showing that the employer treats disabled workers of one sex differently than disabled members of the other sex. In the absence of any smoking-gun statements from the employer, proving comparative disadvantage in an employment discrimination case is most commonly done via a similarly situated comparator—in this instance, providing evidence of another employee who is similarly situated to the plaintiff in all respects except sex.<sup>159</sup> But finding such a comparator would require sex-plus-disability plaintiffs to identify a fellow employee of the opposite sex who has both the same (or highly similar) job title and is similarly disabled, but who has been treated more favorably by the employer.<sup>160</sup> Clearly, finding such a comparator would prove quite difficult for most sex-plus-disability plaintiffs, as it requires plaintiffs to have both a non-unique job title and at least one similarly disabled coworker<sup>161</sup> of the oppo-

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159. See Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1491 (2009) (“The most common method is to show that similarly situated employees of a different race or sex received more favorable treatment.”). Some federal circuits require similarly situated comparator evidence in order to prove an employment discrimination case in the absence of direct evidence; others strongly prefer such evidence. For a discussion of the problems created by federal courts’ insistence on a similarly situated comparator, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

160. See generally Goldberg, *supra* note 159 (engaging in a discussion about the problems created by the judiciary’s dependence on comparators); Ernest F. Lidge III, *The Courts’ Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831 (2002) (analyzing the complications in courts’ analyses of the comparator concept); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009) (arguing for a more objective standard of comparability).

161. Here and henceforth, I refer to a worker finding a coworker to serve as a similarly situated comparator for simplicity. Finding such a comparator would be appropriate outside the hiring context; in the hiring context, the appropriate comparator would be a fellow applicant. As a practical matter, identifying potential comparators from an applicant pool is even more challenging since individuals typically know very little about whom they are competing against for a job, and firms often do not keep good, discoverable records of their applicants (or at least, records as good as the ones they keep for their employees). The unavailability of firm applicant flow data can prove an insurmountable barrier for many plaintiffs trying to prove hiring discrimination. For a recent discussion of plaintiff proof barriers in the absence of applicant flow data (in the context of criminal background check disparate impact cases), see Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 7, 16 (2012).

site sex.<sup>162</sup> Indeed, finding a comparator would almost certainly be impossible outside of a large employer.<sup>163</sup>

The proof problems that arise from identifying (or, more accurately, the inability to identify) a similarly situated comparator are not unique to sex-plus-disability plaintiffs, or even sex-plus plaintiffs more generally. The problems may be more acute for sex-plus plaintiffs, who, due to the underlying nature of their claim, have a narrower pool of potential comparators.<sup>164</sup> Still, these problems arise for nearly all Title VII, ADA, and ADEA plaintiffs who lack direct, non-circumstantial evidence of employer discrimination.<sup>165</sup> For this reason, outcries for reform of the current proof structures in employment discrimination cases abound from scholars<sup>166</sup> and even federal judges.<sup>167</sup> Moreover, federal courts clearly have the ability to reform current employment discrimination proof structures since the relevant federal statutes do not contain any language regarding method

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162. See Jennifer Bennett Shinall, *Distaste or Disability? Evaluating the Legal Framework for Protecting Obese Workers*, 37 BERKELEY J. EMP. & LAB. L. 101, 139 (2016) (“The use of comparators to prove discrimination can be problematic, particularly for employees of small companies (since few other employees can serve as potential comparators) and employees with unique job titles (since arguably no other employee is similarly situated).”).

163. See *id.*

164. Cf. Kotkin, *supra* note 159, at 1491–92 (discussing the difficulty of finding a similarly situated comparator in Title VII cases and noting that “[i]n the typical ‘reduction in force’ situation, as long as one woman or one minority group members survives the RIF, it will be difficult to rely on comparator evidence alone”).

165. Goldberg, *supra* note 159, at 731–32, 738 (noting that “in a mobile, knowledge-based economy, actual comparators are hard to come by, even for run-of-the-mill discrimination claims” and arguing that courts’ continued preferences for comparator evidence “has put comparators in a position to shape and limit what courts can see as discriminatory”).

166. See *id.* at 728 (arguing that comparators must be “dislodged from their methodological pedestal” in order to “recover space for the renewed development of discrimination jurisprudence and theory”); Lidge, *supra* note 160, at 833 (“[C]ourts should not require a similarly situated showing as an element of plaintiff’s prima facie [discrimination] case.”); Sullivan, *supra* note 160, at 197 (“[S]uggesting a more commonsensical approach to discrimination claims—one that reframes proof in terms of the underlying substantive law rather than focusing on special evidentiary rules or proof structures.”).

167. See, e.g., *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) (“I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and simplify the plaintiff’s task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside.”).

of proof,<sup>168</sup> and the current proof structures are entirely the creation of the Supreme Court.<sup>169</sup>

### CONCLUSION

In thinking about how to reform employment discrimination proof structures in a manner friendlier to sex-plus-disability plaintiffs, and intersectional plaintiffs more generally, at least one scholar has contemplated a manner through which

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168. Title VII only dictates *burden of proof* in disparate impact cases, as a result of the Civil Rights Act of 1991. See 42 U.S.C. § 2000e-2(k) (2012). Title VII says nothing about indirect or direct methods of proof or similarly situated comparators in the text of the statute. See *id.* §§ 2000e-2–2000e-17. Nor does the ADA and ADEA contain any text about proof structures or similarly situated comparators. See *id.* §§ 12101–12213; 29 U.S.C. §§ 621–634 (2012).

169. The indirect method of proof—through which plaintiffs prove employment discrimination in the absence of increasingly less common “smoking gun” statements from the employer—was first outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In this landmark case, the Court outlined a three-stage burden-shifting process for proving an employment discrimination case indirectly: employee proves a *prima facie* case of discrimination, employer produces a legitimate nondiscriminatory reason for the alleged adverse employment action, and employee proves that the employer’s reason is merely pretext. *Id.* at 802–06. Evidence of a similarly situated comparator who was treated better than the plaintiff may be relevant at both the *prima facie* case stage and the pretext stages, depending on the federal circuit court. See Sullivan, *supra* note 160, at 194 (“[S]ometimes the presence or absence of a comparator is assessed by the court in determining whether plaintiff has made out her *prima facie* case; in other instances, it arises in deciding if the plaintiff can establish pretext.”). None of the three-part *McDonnell Douglas* test is grounded in the statutory text of Title VII or any other employment discrimination statute. See *McDonnell Douglas*, 411 U.S. at 802–06. Although the Court’s three-stage process was intended “to clarify the standards governing the disposition of an action challenging employment discrimination,” the process has arguably generated more confusion than clarity. *Id.* at 798; accord Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 744–60 (1995); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1188–90 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1241 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2236–38 (1995); see also Coleman, 667 F.3d at 863 (Wood, J., concurring) (“Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, . . . the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation . . . could not be handled in the same straightforward way.”).

courts might expand the permissible methods of proof to demonstrate discrimination indirectly:

In order to have a fighting chance in a complex claim, it seems obvious that the evidentiary net must be cast wide. In fact, the more specific the complex claim, the wider the net must be to prove pretext. . . . To determine whether there was complex discrimination at work, the pool of possible comparators would have had to be expanded, as would the database from which statistical evidence could have been gathered. "Me too" evidence would have had to be sought up the chain of supervisory command. There is nothing in discrimination law doctrine that necessarily prevents some expansion of the evidentiary pool in this manner.<sup>170</sup>

As suggested above, few sex-plus-disability discrimination plaintiffs will ever be able to succeed if not allowed to present additional circumstantial evidence in the courtroom besides a similarly situated comparator. This additional evidence might include employer practices with respect to coworkers in non-similar jobs to the plaintiff, coworkers with non-similar disabilities to the plaintiff, and even non-disabled coworkers. Statistics regarding the overall hiring and promotion practices of the employer with regards to members of the minority sex and disabled individuals might also be useful, even if these statistics include some jobs that are dissimilar to the plaintiff's job. Together, an abundance of this type of evidence, while not enough to sustain a case on its own, might be enough to form the "convincing mosaic"<sup>171</sup> of circumstantial evidence necessary for the plaintiff to win the case.

What is certain is that victims of sex-plus-disability discrimination will remain largely marginalized and without a complete remedy in the absence of employment discrimination proof reforms. This Article is not unique in its call for such reforms. This Article is unique, however, in its identification of a previously ignored yet substantial group of discrimination victims who remain disenfranchised by the current system of resolving employment discrimination claims. For these victims, proving an employment discrimination case under current proof structures is even *more* difficult than it is for the groups

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170. Kotkin, *supra* note 159, at 1497-98.

171. This phrase, first coined by Judge Posner in the well-known opinion *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994), is now frequently used by federal judges, particularly in the Seventh Circuit, to signify the amount of circumstantial evidence necessary to prove an employment discrimination case successfully. See, e.g., *Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 637 (7th Cir. 2013); *Coleman*, 667 F.3d at 835.

of victims highlighted by previous scholars.<sup>172</sup> The issues raised by intersectionality under the current system of adjudicating employment discrimination claims are relevant to more than African-American women. As this Article has demonstrated, they are relevant to the non-negligible group of disabled workers who are also a gender minority within their industry. Undoubtedly, they are also relevant to other groups of workers who are members of two or more protected classes and, as a result, fall victim to intersectional discrimination. Without proof reforms, these workers who, in name, are protected by multiple employment discrimination provisions, but in fact, cannot access these provisions, will continue to be victimized. And without an accessible legal remedy, these workers will remain substantially impaired in the labor market.

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172. Indeed, as difficult as it would be for an African-American female plaintiff to find a similarly situated comparator (who would need to be an African-American male with a highly similar job) in order to prove a sex-plus-race case circumstantially, the difficulty pales in comparison to the hurdle faced by sex-plus-disability plaintiffs (who would need to find a similarly disabled comparator of the opposite sex in a highly similar job). *Cf.* Goldberg, *supra* note 159, at 736 (“[A]n employee, such as a black woman or a disabled older man, claims to have experienced discrimination based on a combination of legally protected traits. He or she struggles under a comparator regime in part because it can be difficult to decide who is the proper comparator.”).

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