CREATING A PROPER INCENTIVE STRUCTURE: A CASE STUDY OF *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*

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I. INTRODUCTION

A recent Supreme Court decision in *Ledbetter v. The Goodyear Tire & Rubber Co., Inc.*[1] invited heated criticism from civil rights activists and drew immediate attention of legislative members wanting to overturn its impact.[2] The case involved a Title VII pay discrimination claim by a woman who was allegedly denied pay raises due to her sex. The District Court entered a judgment for the plaintiff after the jury verdict in her favor, but the Eleventh Circuit reversed and the Supreme Court affirmed the Circuit Court's decision. The Supreme Court ruled that the plaintiff's claim was time-barred because she failed to file a discrimination charge with the Equal Employment Opportunity Commission ("the EEOC" or "the Commission") within 180 days after the last pay-setting decision that resulted in the allegedly disparate paycheck.[3]

This case is a reminder of another occasion where the Supreme Court limited the availability of Title VII remedy for workplace discrimination claims. In *Pennsylvania State Police v. Suders*,[4] the Court decided that the employer had an

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[1] Ledbetter v. The Goodyear Tire & Rubber Co. Inc , 127 S. Ct. 2162 (2007).

[2] Center for American Progress, *Closing the Ledbetter Loophole*, Jul. 11, 2007, http://www.americanprogress.org/issues/2007/07/ledbetter.html. ("Deliberate and institutional discrimination like that practiced against Lilly Ledbetter is unacceptable, and laws barring them must be enforced, not weakened by ideologically hostile courts and lawmakers representing special, and not constituent, interests."); Liz Gilchrist, National Organization for Women, *Supreme Court Moves Backward on Equal Pay*, May 30, 2007, http://www.now.org/issues/economic/070530equalpay.html. ("The Roberts court strikes again. Tuesday's Supreme Court decision in the case of *Ledbetter v. Goodyear Tire & Rubber Co.* dealt a near-fatal blow to our ability to use Title VII of the landmark Civil Rights Act of 1964 to remedy pay discrimination based on sex, race, national origin, and other protected grounds."). Commensurate with the public outrage, Congress acted. *See* Press Release, Committee on Education and Labor, House of Representatives, *Congress Must Act to Rectify Supreme Court Decision on Pay Discrimination, Witnesses Tell Labor Committee* June 12, 2007, http://www.house.gov/apps/list/speech/edlabor_dem/RelJune12Ledbetter.html. (Rep. George Miller announced that he will soon introduce a bill to rectify the *Ledbetter* decision.).

[3] *Ledbetter*, 127 S. Ct. at 2165.

[4] 542 U.S. 129 (2004).

affirmative defense to the plaintiff's constructive discharge claim[5] because her resignation, allegedly attributable to her supervisor's sexual harassment, did not amount to a "tangible employment action" as a matter of law.[6] Reasoning that a constructive discharge claim cannot be presumed to necessarily result from an official action of the employer or its agent, the Court found it appropriate to afford the employer the opportunity to disprove its alleged vicarious liability for the supervisor's unlawful conduct.[7] In particular, the employer would have to prove that "(1) it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus."[8]

Although *Ledbetter* asked the narrow legal question of what event triggers the charging period with the EEOC, when read in conjunction with *Suders*' line of cases, *Ledbetter* provides an occasion for raising the question of whether *Suders*' legal doctrine should be extended to cases involving "tangible employment action," i.e., disparate pay. The answer to this question should be in the affirmative. Instead of drawing a line along the finding or non-finding of an official employment action, courts should afford the employer the opportunity to disprove its alleged liability whenever doing so creates incentives for the employer and the employee to self-monitor and internally remedy workplace discrimination problems. This Note argues that *Ledbetter* did not have to stop at deciding the precise question of what event triggers the charging period, but should have developed, or at least suggested, a legal doctrine on how the tolling of the charging period affects the incentives of the employer and employee to internalize workplace discrimination remediation processes.

This Note is organized in the following manner. Part II gives a summary of the facts and the legal issue in *Ledbetter* as well as the immediate legislative and public responses to the decision. Part III outlines the framework within which to analyze *Ledbetter* in conjunction with *Suders*. It discusses the legislative history and purpose of Title VII of the Civil Rights Act of 1964, introduces two lines of thought on the role of the judiciary in equality jurisprudence, and advocates a particular model for defining the scope of employer vicarious liability for Title VII violations. Part IV discusses why an employer should be entitled to a *Suders*-type affirmative defense to a Title VII claim, whether or not it involves an alleged official employment action. It then suggests possible ways in which *Ledbetter* could have incorporated such defense. Part V recommends how Congress should legislate in the aftermath of *Ledbetter* and how the courts should respond subsequently to any new legislation. It also suggests practical solutions to deterring

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[5] To establish constructive discharge, the plaintiff must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. *See id.* at 129.

[6] *Id.* at 143.

[7] *Id.* at 148.

[8] *Id.* at 134. This two-pronged affirmative defense was first articulated in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

unlawful pay discrimination for concerned employers. The author concludes the Note by recommending that a future court deciding a Title VII discrimination claim, whether the claim alleges an official employment action or not, should deliberate incentives of the employer and employee to self-monitor and self-remedy workplace discrimination problems. In essence, this Note closely studies *Ledbetter* to provide an example of how a future court may want to develop a legal doctrine that signals such incentives to employers and employees alike.

II. *LEDBETTER* IN SUMMARY

Facts and Legal Issue

Ledbetter involved a Title VII sex-based pay discrimination claim and addressed the question of what triggers the tolling of the clock for filing an employment discrimination charge with the EEOC. It is unequivocal that the charge must be filed within 180 days[9] after the alleged "unlawful employment practice" occurs.[10] The question presented in this case asked whether the receipt of a disparate paycheck can serve as the "unlawful employment practice" triggering a new 180-day charging period in the event that the plaintiff fails to file with the EEOC within 180 days after the occurrence of the discriminatory pay-setting decision.[11]

Lilly Ledbetter held a managerial position largely occupied by men at Goodyear Tire and Rubber from 1979 to 1998.[12] During the course of her employment, Ledbetter received lower pay than her male counterparts in similar positions with equal or less seniority.[13] This pay disparity allegedly reflects the accumulated effect of denying Ledbetter pay raises based on the poor evaluations she received from her supervisors because of her sex.[14] In particular, Ledbetter claimed that her poor performance evaluation in 1997 was attributable to an unlawful retaliation by her supervisor when she rejected his sexual advances.[15] After an early retirement in 1998, Ledbetter filed a formal charge with the EEOC and brought a Title VII pay discrimination claim.[16] The case went to trial and the jury awarded the plaintiff backpay and damages. Raised on appeal and at issue before the Supreme Court was the question of the timing of the plaintiff's filing a charge with the EEOC.[17]

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[9] Or, 300 days if the aggrieved person brought an earlier proceeding before a State or local agency. 42 U.S.C. § 2000e-5(e)(1).

[10] *Id.*

[11] *Ledbetter*, 127 S. Ct. at 2166.

[12] *Id.*

[13] *Id.* at 2178.

[14] *Id.* at 2165-66.

[15] *Id.* at 2171.

[16] *Ledbetter*, 127 S. Ct. at 2165.

[17] *Id.* at 2166.

As illustrated by this five to four opinion, the majority and the dissent drew irreconcilable conclusions on the issue of whether the receipt of a disparate paycheck triggers anew the 180-day limitations period for filing a charge with the EEOC. The majority held that a paycheck issued pursuant to a facially neutral pay-setting system—i.e., merit-based pay raises, determined by supervisor evaluation of performance—alone lacked the requisite discriminatory intent to constitute the "unlawful employment practice" triggering a new charging period with the EEOC.[18] The majority concluded that *Ledbetter*'s Title VII claim was time-barred and reversed the jury verdict.

The majority put forward several policy arguments to support its conclusion. It stated that to uphold Ledbetter's argument would be to "distort Title VII's 'integrated, multistep enforcement procedure'" and "'extend or truncate Congress' deadlines.'"[19] This legislative deference argument explains why the 180-day filing period should be observed, but does not explain why the receipt of a disparate paycheck should not toll in a new charging period. It is true that, as the majority points out, "this short deadline reflects Congress' strong preference for the prompt resolution of employment discrimination allegations" and that "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened," especially because evidence relating to intent is often circumstantial.[20] Knowing that only a discriminatory pay-setting decision can trigger the charging period, the alleged victims of pay discrimination may be quicker to take notice of their disparate treatment and report it promptly, thereby, avoiding the evidentiary difficulties associated with a tardy lawsuit. However, evidentiary problems alone cannot justify denying remedy to those victims who had legitimate reasons for failing to learn that their paychecks were unlawfully lower than those received by their male counterparts.

The dissent argued for a "paycheck accrual rule" on the ground that "[p]ay disparities . . . have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Ledbetter's claim . . . rested . . . on 'the cumulative effect of individual acts.'"[21] Ledbetter's salary fell behind her male counterparts only after a series of successive evaluations and percentage-based pay adjustments, and her claim charged Goodyear for the recurring and cumulative harm of each discriminatory act and not for an isolated incident.[22] The chief justification for the dissent's conclusion lies in the observation that a

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[18] *Id.* ("Ledbetter does not assert that the relevant Goodyear decisionmakers acted with actual discriminatory intent either when they issued her checks during the EEOC charging period or when they denied her a raise in 1998."). *See also id.* at 2170 ("Ledbetter's attempt to take the intent associated with the prior pay decisions and shift it to the 1998 pay decision is unsound . . . . The effect of this shift would be to impose liability in the absence of the requisite intent.").

[19] *Id.* at 2170.

[20] *Ledbetter*, 127 S. Ct. at 2170-7.

[21] *Id.* at 2181.

[22] *Id.*

disparate pay is not as easily identifiable to an employee as other forms of unlawful employment practices such as termination or demotion because it is unusual for the management to publish employee pay scale or otherwise make them available to employees.[23] Staying true to the realities of the workplace, the dissent concluded that each paycheck received should trigger a new 180-day charging period for filing with the EEOC. To hold otherwise would undermine Title VII's remedial purpose.[24]

Legislative and Public Responses

On June 27, 2007, less than a month after the Supreme Court delivered the *Ledbetter* decision, the House Committee on Education and Labor passed the Lily Ledbetter Fair Pay Act.[25] On July 20, 2007, a Senate bill entitled the Fair Pay Restoration Act was referred to the Committee on Health, Education, Labor, and Pensions.[26] Although worded differently, the two bills before Congress singularly purport to amend Title VII and legislatively overturn *Ledbetter,* which is perceived by the public to limit the statutory protection against pay discriminations. The proposed legislation expressly prescribes that an unlawful employment practice triggering the 180-day charging period occurs each time compensation is paid to an individual according to a discriminatory pay-setting practice, and not only when the pay-setting decision is made.[27]

Behind the legislative efforts lies the public's attention to the implications of *Ledbetter* for women's remedial recourse to Title VII. Many women's rights and public policy organizations are of the opinion that *Ledbetter* significantly impairs women's ability to seek redress in court for the pay discrimination they experience in the workplace.[28] Even *The New York Times* issued an article expressing its opposition to the *Ledbetter* decision and urged Congress to amend Title VII and rectify the impact of the Court ruling on civil rights.[29]

III. FRAMEWORK OF ANALYSIS

This section outlines a framework within which to analyze *Ledbetter.* It provides a basis for understanding why the Ellerth/Faragher-type of affirmative defense should be extended to all forms of workplace discrimination that fall within the protection of Title VII, including pay discrimination such as seen in *Ledbetter.*

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[23] *Id.*

[24] *Id.* at 2184.

[25] Lily Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (2007).

[26] Fair Pay Restoration Act, S. 1843, 110th Cong. (2007).

[27] *Id.* at § 3.

[28] Such opinion is expressed or endorsed by, *inter alia,* the National Organization for Women ("NOW"), the Center for American Progress, the American Civil Liberties Union, Women's Rights Project, The Gavel http://speaker.gov/blog/, DMIBlog, http://www.dmiblog.com.

[29] Editorial, *Injustice 5, Justice 4,* N.Y. TIMES, May 31, 2007, at A18.

Dual Purpose of Title VII of the Civil Rights Act of 1964

> It shall be an *unlawful* employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate 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[.][30]

Legislative intent behind Title VII is unequivocal. Title VII as originally enacted purported to prevent, and eventually eliminate, unlawful discrimination in the workplace through the use of formal and informal remedial procedures.[31] Congress created the EEOC to be a forum for informal conference, conciliation, and persuasion in resolving unlawful employment practice disputes.[32]

In 1972, Congress authorized the Commission to issue judicially enforceable orders.[33] In expanding the Commission's function from a mediating body to a quasi-judicial agency, Congress recognized the need for a suitable procedure and adequate remedy.[34] In particular, Congress noted the widespread discrimination against women in the workplace despite the clear mandate prohibiting sex-based discrimination.[35]

It was not until 1991 that Congress granted victims of intentional discrimination the right to compensatory and capped punitive damages in addition to the existing injunctive relief.[36] Congress found that additional remedies were necessary to deter discrimination in the workplace.[37] Additionally, the 1991 amendment allocated the burden to the employer to prove that its employment practice—despite its discriminatory effect—is job-related and a business necessity, thereby easing the burden for the aggrieved employee to obtain relief.[38]

Since the enactment of Title VII, Congress expanded the scope of remedies available to the victims of unlawful workplace discrimination. However, Congress did not necessarily envision a flood of litigation. Rather, Congress voiced its intent to construe Title VII broadly "to provide equal opportunity and *effective* remedies."[39] The kinds of remedies Congress had in mind were not restricted to judicial remedies. In fact, Congress favored alternative ways of resolving Title VII disputes: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations,

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30 42 U.S.C.A. §2000e-2(a) (emphasis added).

31 H.R. REP. NO. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

32 *Id.* at 2404.

33 H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137.

34 *Id.* at 2139.

35 *Id.* at 2140-41.

36 Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1071, 1072 (1991).

37 *Id.* §102 at 1071.

38 *Id.* §105 at 1074.

39 H.R. REP. NO. 102-166 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552 (emphasis added).

conciliation, facilitation, mediation, fact finding, and arbitration, is encouraged . . . ."[40] Thus, Congress' intent behind Title VII is two-fold: to provide adequate compensation to victims of unlawful discrimination seeking judicial redress, but also to prevent and reduce actionable discrimination by encouraging informal dispute resolution forums.

Judicial Role in Equality Jurisprudence

The equality principle embedded in Title VII is a widely shared norm. However, much room is left for the judiciary to elaborate on this public value when the facts of the dispute provide for such occasion. This section discusses two scholarly views on the proper role of the court in advancing the equality principle.

Imperial Judiciary[41]

Writing in the aftermath of school desegregation efforts and in the context of the rising criticism against vesting too much power in the judiciary, Owen M. Fiss[42] advocated for an active judicial role in "giv[ing] meaning to constitutional values in the operation of large-scale organizations."[43] Fiss believes that the court occupies a unique position to give concrete meaning to constitutional values such as the equality principle, because the court is obligated to engage in a dialogue through the process of adjudication and is able to distance itself from the litigants and the political exigencies. He explains that, "[t]he task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just. He does not become a participant in interest group politics."[44] Fiss concludes that only the court can impute "true meaning of our constitutional values, but when [others] do, they will have to mimic—if they can—the process of the judge."[45] Through the lens of Fiss' construct, adjudication is the very process by which the court articulates and attributes meaning to public values such as equality.[46]

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[40] Civil Rights Act § 118, 105 Stat. at 1081.

[41] Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 52 (2003).

[42] Fiss is Sterling Professor of Law at Yale Law School and teaches and writes on the subjects of procedure, legal theory, and constitutional law. *See* http://www.law.yale.edu/faculty/OFiss.htm.

[43] Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979).

[44] *Id.* at 9. Fiss was writing in response to the advocates of the theory of legislative failure. The proponents of this theory advocate that the judiciary has a limited role and should intervene in the value-creating efforts only to fill in any gap in legislative processes. Examples of such gaps would include abridgement of the right to vote or failure to effectively include a discrete minority in majoritarian politics. *Id.* According to Fiss, confining the judiciary to such a limited role is flawed for a variety of reasons. *Id.* First, if the judiciary is second to the legislature, why should the former correct the latter at all? *Id.* Second, why should legislative supremacy stand at all when constitutional values are at stake? Fiss, *supra* note 43, at 9. Third, what should be done with the judicial power when occasions for its exercise do arise? *Id.* Fiss believes that the theory of legislative failure fails to answer these questions. *Id.*

[45] *Id.* at 16.

[46] *Id.* at 14.

Facilitator Judiciary

While Fiss conceives a top-down approach, vesting the norm-creating power in the judiciary, Susan Sturm[47] advocates a collective norm-generating dialogue between the judiciary and responsible non-legal actors.[48] In Sturm's view, judges should act as a "catalyst," prompting incentives for non-legal actors to identify and remedy discriminatory practices by implementing internal anti-discrimination policies and dispute resolution mechanisms.[49] In particular, where the form of discrimination is complex,[50] non-legal actors are better suited than the court in identifying Title VII problems and generating context-specific remediation processes.[51] Additionally, placing identification and remediation responsibilities in the hands of non-legal actors can potentially alleviate the gravity of discrimination experienced by the alleged victims when the recurring patterns of complex and subtle discrimination are given prompt attention through an adequate internal inquiry.[52]

Large corporations, such as Deloitte & Touche ("D&T"), Intel Corporation, and Home Depot have successfully implemented internal problem-solving mechanisms to address the particular biases and inequity they faced.[53] Whether as a litigation avoidance measure or motivated by ethical and economic considerations, these companies adopted what Sturm calls an "internal workplace regime" to systematically locate workplace problems, remedy them, and compile individual cases to generate a set of data to be used for conducting an ongoing analysis of remaining and potential dysfunctions within the company as well as evaluating the effectiveness of the current problem-solving processes.[54] Their respective reforms produced, and over time reinforced, the normative significance of their problem-solving patterns, namely, a norm of equal employment opportunity.[55]

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[47] Susan Sturm is the George M. Jaffin Professor of Law and Social Responsibility at Columbia Law School, where her principal areas of teaching and research include employment discrimination, workplace regulation, race and gender, public law remedies, and civil procedure. *See* http://www.iserp.columbia.edu/people/sturm.html.

[48] In the context of workplace discrimination, non-legal actors include employers, independent counsels, and anti-discrimination educators and trainers.

[49] Sturm, *supra* note 41, at 76.

[50] Hostile work environment sexual harassment disputes are much more complex than *quid pro quo* sexual harassment claims—the latter occurs when submission to unwelcome sexual advances is made, either explicitly or implicitly, as a term or condition of an individual's employment. *See* 29 C.F.R. §1604.11(a) (2007).

[51] Sturm, *supra* note 41, at 68.

[52] *Id.* at 68-69.

[53] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 489-520 (2001).

[54] *Id.* at 489, 519-20.

[55] *Id.* at 520.

D & T interviewed current and former female employees to find the root causes of the low promotion rate and the high turnover rate among women.[56] Finding that women were often passed over for high-profile assignments and lacked effective mentoring and networking opportunities, D&T launched a company-wide Initiative on the Retention and Advancement of Women.[57] This initiative called for an external advisory body as well as an internal task force to locate problem areas and develop solutions.[58] The task force instituted annual reviews of the assignment process to redress a strong gender bias in the assignment distribution,[59] made flexible work schedule a viable option for employees without undermining an individual's prospect for advancement,[60] and created a forum for women to assemble and network.[61] As a result, D&T recorded a dramatic increase in the percentage of women admitted to partnership and an equally dramatic decrease in the turnover rate for female senior managers.[62]

Similarly, Intel Corporation engaged in a major reorganization of its human resources department when it realized that its employees made little use of the existing dispute resolution system.[63] The company opened a telephone complaint line to address routine problems and designated "senior specialists" to resolve problems requiring more extensive investigation and analysis.[64] Individual inquiries would be recorded in a secure computerized database to allow unlimited access by the specialists and enable them to analyze and resolve future complaints in the context of a broader pattern of workplace problems in the company.[65]

Home Depot, as part of the settlement of a class action lawsuit alleging gender discrimination in hiring, promotion and training, adopted a new hiring and promotion system called "Job Preference Process (JPP)" to replace the arbitrary, subjective and male-oriented decision-making process.[66] Although the consent decree covered only the western division of the company, Home Depot instituted JPP as a company-wide effort to eliminate systematic discrimination against women seeking to qualify for a position.[67] The JPP would match open positions with the preferences and minimum qualifications of applicants in an objective and formalized manner,[68] tracking each step of the hiring and promotion process so that

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[56] *Id.* at 493-94.

[57] *Id.* at 495.

[58] Sturm, *supra* note 53, at 495.

[59] *Id.* at 496.

[60] *Id.* at 497.

[61] *Id.* at 499.

[62] The percentage of women admitted to partnership rose from 8% in 1991 to 21% in 1995; the turnover rate for female senior managers fell to 15% from 26% during the same period. *Id.* at 498.

[63] Sturm, *supra* note 53, at 501.

[64] *Id.* at 502-03.

[65] *Id.* at 503.

[66] *Id.* at 510-12.

[67] *Id.* at 514.

[68] Sturm, *supra* note 53, at 513.

an individual who is repeatedly declined a position for which she qualifies receives due attention.[69] Home Depot went beyond the mandates of the consent decree in its overhauling reform to replace the ad hoc approach to hiring and promotion with an automated and highly transparent decision-making process. As a result, Home Depot was able to overcome the male-dominated corporate culture.[70]

Engaging employers in the elaboration and implementation of equality principle does not negate the court's role in holding private actors accountable.[71] After all, courts have the opportunity to assess the effectiveness and fairness of employers' informal dispute resolution forums by looking into factors such as the level of employee and expert participation in designing grievance procedures or the self-reflective nature of data collection and revisions to address recurring problems and accommodate new issues.[72]

The Superior Model of Employer Vicarious Liability

This section surveys three alternative legal doctrines for determining an employer's vicarious liability for Title VII violations. Each doctrine is assessed for its effect on the furtherance of the dual purpose of Title VII. The strict liability model guarantees compensation at the expense of deterrence, while the mandatory training regime promotes deterrence at the expense of adequate compensation. As such, this author advocates what she terms an "incentive-creation" model because it reduces the trade-off between deterrence and compensation—the two goals of Title VII—and gives effect to Sturm's construct on the proper role of the judiciary. The incentive-creation model is the very legal doctrine adopted in *Ellerth*, *Faragher* and *Suders* and should have been employed more explicitly in *Ledbetter*.

Compensation-Friendly Model: Strict Liability Regime

Earlier courts held employers strictly liable for the discrimination against an employee by a supervisor or manager. Strict liability meant that an employer would be liable for its employee's conduct, regardless of the employer's express disapproval of such conduct. The Sixth Circuit, deciding a racial discrimination claim against a hospital, held that the racially motivated termination of the plaintiff by a lower-level manager was imputable to the hospital even though "the Board of Directors and the high management of the hospital [had] an outstanding record in regard to fair and impartial treatment of the races."[73] The court's decision was premised on the fact that "Title VII provide[s] the aggrieved employee with a remedy."[74] It can be inferred that the court viewed the chief purpose of Title VII as

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[69] *Id.* at 515.

[70] *Id.* at 519.

[71] *See* Sturm, *supra* note 41, at 76.

[72] *Id.* at 79.

[73] Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (6th Cir. 1972).

[74] *Id.* at 725.

giving an adequate remedy to the victim of employment discrimination and was thus willing to hold the employer liable without fault. Again, in a sexual discrimination lawsuit against Bank of America, the Ninth Circuit held that the bank's anti-discrimination policy could not mitigate its strict liability for supervisor discrimination.[75] The court further held that the plaintiff was not required to exhaust the bank's internal remedies as a condition for seeking a Title VII remedy in court.[76]

Reflecting the aforementioned case law, the EEOC in 1980 amended its guidelines on sexual harassment claims as the following:

> (c) Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment *regardless of* whether the specific acts complained of were authorized or even forbidden by the employer and *regardless of* whether the employer knew or should have known of their occurrence.[77]

Now repealed, this amendment expressed the contemporaneous view of the courts that Title VII's remedial purpose could be achieved most effectively by holding employers strictly liable for the discriminatory conduct of their supervisors against an employee.

Joanna L. Grossman[78] advocates a strict liability regime because it rewards employers solely for their prevention efforts and "only if their actions work."[79] Grossman believes that the current Title VII jurisprudence recognizing an affirmative defense[80] to employer vicarious liability gives employers incentives to adopt anti-harassment policies, but fails to give them additional incentives needed to encourage reporting by the aggrieved employees: the affirmative defense collapses on the second prong when the alleged victim makes use of the internal reporting procedure, but brings a formal suit against the employer at a later time.[81] Therefore, Grossman concludes, the current sexual harassment regime discourages employers from reaching an optimal level of prevention efforts and thwarts compensation for those who fail to promptly report harassment incidents for legitimate reasons. On the other hand, to hold employers strictly liable for the

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[75] Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979).

[76] *Id.* at 214.

[77] 29 C.F.R. § 1604.11(c) (1980) (emphasis added).

[78] Joanna L. Grossman is a Professor and Associate Dean for Faculty Development at Hofstra School of Law. Professor Grossman teaches courses in family law, sex discrimination, and trusts and estates. Her primary research interests are sexual harassment, work/family issues, pregnancy discrimination, state regulation of marriage, and the history of family law. *See* http://law.hofstra.edu/Directory/Faculty/FullTimeFaculty/ftfac_grossman.html.

[79] Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L. J. 3, 71 (2003).

[80] An employer has an affirmative defense to vicarious liability for Title VII violation if it proves that: (1) it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to avail herself of the employer-provided remediation forum. *See Suders*, 542 U.S. at 134.

[81] *See* Grossman, *supra* note 79, at 70.

sexual harassment perpetrated by a supervisor is to reward employers only if their prevention and correction efforts succeed in actually preventing workplace harassment.[82] According to Grossman, "the employer is in a better position to prevent [harassment] by screening and monitoring supervisors [and] it should bear the risk of loss when those measures fail."[83]

Without discounting the validity of Grossman's argument, this author finds that a strict liability regime in the workplace discrimination context will tend to discourage employers from implementing effective anti-discrimination procedures. Although Grossman's view may hold true in the short-run, an employer who expects to assume liability for any and all harassment perpetrated by its supervisor-agents will be unwilling to monitor their behavior and invest in prevention efforts in the long-run. This is particularly true in the modern workplace where alleged sexual harassments take subtle and subjective forms and arise from a complex relational web.[84] A sensible legal regime should provide protection for employers against the increasing risk of misinterpreting "innocent" behavior as sexually abusive.

Deterrence-Promoting Model: Mandatory Training Regime

The more recent approach to defining the scope of employer liability for supervisor conduct can be captured in the California's sexual harassment training law. In 2004, the California legislature passed a law mandating that employers hiring fifty or more employees provide at least two hours of training and education regarding sexual harassment and other forms of workplace discrimination to all employees holding a supervisory position.[85] The training must be provided once every two years and presented by educators with expertise in the prevention of workplace discrimination.[86] The California Fair Employment and Housing Commission was vested with the authority to force compliance on delinquent employers.[87] The California legislature added that this mandatory training requirement established only a "minimum threshold and should not . . . relieve any employer from providing for longer, more frequent, or more elaborate training and education . . . in order to meet its obligations to take *all reasonable steps necessary to prevent and correct* harassment and discrimination."[88]

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[82] *Id.* at 71.

[83] *Id.* at 73.

[84] *See* Sturm, *supra* note 53, at 468-69. What Susan Sturm terms as "second generation discrimination" refers to "subtle, interactive, and structural bias" because "exclusion increasingly results not from an intentional effort formally to exclude, but rather as a byproduct of ongoing interactions shaped by the structures of day-to-day decisionmaking and workplace relationships."

[85] CAL. GOV CODE § 12950.1(a) (2004).

[86] *Id.*

[87] *Id.* at § 12950.1(e).

[88] *Id.* at § 12950.1(f) (emphasis added).

Anti-discrimination policies and educational trainings originally developed in response to the ambiguity of Title VII.[89] In the late 1970s and early 1980s, defense attorneys and human resource professionals began advocating for internal grievance procedures as a litigation avoidance mechanism.[90] It was not until 1986 that employers began to rely on internal grievance policies as a formal defense to their liability for sexual discrimination.[91] Largely initiated by employers and their counsel in the absence of any judicial mandate, anti-discrimination policies and sexual harassment trainings were eventually endorsed by the two Supreme Court decisions in 1998[92] and fully incorporated into a legal doctrine as a way of limiting employer liability for sexual harassment.[93] Because the anti-discrimination training regime is designed by employers, the potential defendants to sexual harassment claims, some criticize that the primary objective of sexual harassment training lies in litigation prevention rather than harassment prevention.[94]

Promoting a compliance culture such as through the California's mandatory training law runs the risk of trumping substance with form.[95] The purported efforts at preventing workplace discrimination may result in nothing more than a systematic shield from liability when the preventive efforts help employers avoid litigation but do not translate into reduced incidents or minimize gravity of discrimination experienced by the aggrieved employees.[96] After all, no empirical evidence conclusively supports the hypothesis that employee training and education efforts effectively alter employee behavior, create a tolerant workplace culture and thereby deter actionable discriminatory conducts.[97]

Incentive-Creation Model

It was not until 1998 that the Supreme Court formally endorsed the voluntary education and training efforts at preventing workplace discrimination and

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[89] Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 131 (2002).

[90] *Id.* at 136. *See also* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 412-13 (1999).

[91] Bisom-Rapp, *supra* note 89, at 130. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-73 (1986) (recognizing for the first time the hostile work environment as a Title VII sexual harassment claim, Justice Rehnquist observed that the defendant-employer would have had a stronger case had it adopted a more effective grievance procedure to encourage victims of harassment to come forward).

[92] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[93] Bisom-Rapp, *supra* note 89, at 134.

[94] See Joann Keyton & Steven C. Rhodes, *Organizational Sexual Harassment: Translating Research into Application*, 27 J. OF APPLIED COMM. RES. 158, 161 (1999); Donald J. Petersen & Douglas P. Massengill, *Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson*, 18 EMP. REL. L.J. 489, 514 (1993) (concluding that harassment training is an important measure in preventing costly litigation).

[95] Bisom-Rapp, *supra* note 89, at 144.

[96] *Id.* at 143.

[97] *Id.* at 126-27.

incorporated them into the Title VII jurisprudence.[98] Despite the criticisms hurled at the corporate compliance culture for effecting litigation prevention rather than discrimination prevention, the Court created a sensible incentive structure when it embraced employer-initiated grievance mechanisms and the attendant anti-discrimination trainings.

In determining the scope of employer liability for sexual harassment perpetrated by a supervisor, the Court in *Burlington Indus., Inc. v. Ellerth*[99] crafted an affirmative defense for the defendant-employer for proving that: "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[100] Viewing Title VII as "designed to encourage the creation of anti-harassment policies and effective grievance mechanisms," the Court suggested that the employer could satisfy the first prong of the defense by adopting anti-discrimination policies and implementing a complaint procedure.[101] However, the defense would not be available if the harassment resulted in a tangible employment action such as discharge or demotion, in which case the change in the subordinate's employment status was indisputably aided by the agency relationship between the employer and the harasser-supervisor.[102] The Court justified limiting employer's vicarious liability on the ground that it would help deter workplace discrimination and promptly correct it "to the extent . . . [that it] could encourage employees to report harassing conduct before it becomes severe or pervasive."[103]

Similarly viewing Title VII as primarily embodying a deterrence purpose, the Court in *Faragher v. City of Boca Raton*[104] added that simply promulgating anti-discrimination policies without disseminating them would be inadequate to show that the employer took reasonable care to prevent sexual harassment behavior.[105]

The *Ellerth/Faragher* jurisprudence provides a better solution than either the strict liability regime or the mandatory compliance model for delineating the appropriate scope of employer vicarious liability for workplace discrimination. The availability of an affirmative defense to employer vicarious liability means that the employer-defendant and the employee-plaintiff alternate to sometimes win and sometimes lose a litigated case. The prospect of prevailing on the affirmative defense incentivizes employers to expend efforts at preventing sexual harassment and other forms of workplace discrimination. Such efforts include enacting anti-

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98 *Id.* at 134-35.
99 524 U.S. 742 (1998).
100 *Id.* at 765.
101 *Id.* at 764.
102 *Id.* at 765.
103 *Id.* at 764.
104 524 U.S. 775 (1998).
105 *Id.* at 808-09.

discrimination policies, communicating them to employees, giving timely and relevant training to supervisors and redressing individual complaints as they arise. This legal doctrine also incentivizes the aggrieved employee to report and obtain remedy through the internal grievance procedure so that she does not jeopardize her chance at winning in court should litigation become necessary.

It is true that the current legal regime may inadvertently promote a rule compliance culture rather than producing genuine efforts at preventing discrimination. It may further create perverse incentives for the employer to deliberately limit access to its grievance procedure for fear of failing on the second prong of the affirmative defense should an aggrieved employee promptly report the complaint internally and still bring a formal lawsuit at a later time. Additionally, the lack of conclusive empirical studies evidencing the effectiveness of internal dispute resolution mechanisms puts into question whether there should be a legal impetus at all for widespread anti-discrimination training and complaint procedures. However, courts do not have the competence nor do they have the responsibility for testing the empirical feasibility of each incentive it creates for non-legal actors. As Susan Sturm argues, the court's structural role in the equality jurisprudence is limited to incentivizing employers to prevent and remedy Title VII violations, and evaluating the legitimacy and efficacy of their anti-discrimination policies and grievance procedures.[106] If an employer implements a procedure for eliminating sexual bias and exclusion in the workplace but fails to actually minimize their discriminatory effects, the court should be able to find that the employer failed to meet the first prong of the affirmative defense. As such, the *Ellerth/Faragher* regime serves to minimize the trade-off between the deterrence and compensation objectives of the Title VII jurisprudence.

IV. DISCUSSION

This section explores two questions. First, should *Suders*' legal doctrine—namely, the *Ellerth/Faragher* affirmative defense—be extended to Title VII discrimination claims involving an official employment action? In answering this question in the affirmative, this author identifies *Suders*' legal doctrine and explains why the *Ellerth/Faragher*-type affirmative defense should be extended to all forms of workplace discrimination including pay discrimination. Second, what could the Court have done differently in *Ledbetter* to give effect to the concept of a facilitator judiciary?[107] This question involves evaluating the majority and dissent opinions of *Ledbetter* in light of the legal doctrines developed in *Ellerth*, *Faragher* and *Suders*. This author concludes that, while *Ledbetter*'s two opinions shed light to the competing interests at stake in Title VII claims,[108] the Court fell short of

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[106] Sturm, *supra* note 41, at 78-79.

[107] This concept was discussed earlier. *See supra* Part III.2.B.

[108] Namely, these interests refer to: compensation to discriminated employee and legal protection for employer against groundless claims.

exploring fully the impact its decision would have on the incentives of employers and employees to build an institutional capacity to resolve workplace discrimination disputes.

A Case for Extending the Ellerth/Faragher Affirmative Defense

Suders held that a constructive discharge claim resulting from hostile work environment sexual harassment, absent an adverse official act such as demotion or termination, did not amount to a "tangible employment action."[109] In the absence of an official employment action, the employer-defendant could show that "(1) it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus."[110] Although the Court admitted that the effect of resignation is indistinguishable from the effect of involuntary termination on the employee's employment status, the Court noted that "harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts" and found it inappropriate to treat constructive discharge as an official employer act as a matter of law.[111]

Suders was not the first court to delineate the scope of the just-mentioned affirmative defense along the finding or non-finding of an adverse official act by the employer-defendant. Earlier, *Ellerth* and *Faragher* had barred the employer-defendant from raising the affirmative defense if the alleged discrimination involved a tangible employment action such as demotion or termination.[112] However, it was not until *Suders* that the scope of the affirmative defense became a legal issue for the Court to decide. The following two subsections purport to show why the *Ellerth/Faragher* affirmative defense should not be limited to claims involving unofficial supervisor or co-worker conduct, but should extend to cases where the unlawful behavior of the supervisor or co-worker has materialized into an official employment action such as termination, demotion or pay disparity.

Mitigating Perverse Incentives

The *Ellerth/Faragher* affirmative defense purports to incentivize non-legal actors in the workplace to design and implement internal remediation processes.[113] Viewed in this light, the court should impose on the employee-plaintiff the burden to mitigate the harmful effects of discrimination, regardless of whether the employee expects to be able to show an adverse official action by the employer should the employee decide to bring a claim in court. Knowing that the proof of an

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109 *Suders*, 542 U.S. at 140-41.

110 *Id.* at 134.

111 *Id.* at 148.

112 *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

113 Sturm, *supra* note 41, at 76.

official employment action bars the employer from raising the affirmative defense, the employee may have perverse incentives to wait and see whether her experiences of discrimination culminate to the point where the supervisor's unlawful conduct results in an official employment decision adversely affecting her employment status. What is worse, in the event that the supervisor's conduct never translates into an official employment action, the employee would have suffered from prolonged workplace discrimination without ever barring the affirmative defense from the employer. This observation may be a logical conclusion rather than a valid behavioral observation because an average employee is unlikely to prolong her discrimination experiences and worsen them to the point of materializing those experiences into a termination or demotion. However, it is worth noting that lawyers or human resources professionals may well advise the aggrieved employee to wait until her case becomes more advantageous to win in court.

Of course, the most reasonable course of action is for the aggrieved employee to report her case internally and at the same time reserve the opportunity to defeat the employer's affirmative defense on the second prong, should the employee nonetheless decide to bring a formal charge against her employer. However, this course of action assumes that the employer has a workable and accessible grievance procedure and that the employee is willing to avail herself of that procedure. Moreover, the employer can always dispute the reasonableness of the employee's recourse to the internal reporting—i.e., the employee may have to go through the multi-step remediation procedures until her availment of the internal policy is considered "reasonable" in the eyes of the court.

The *Ellerth/Faragher* defense imposes a parallel duty on the employer to first implement a workable forum to resolve complaints, and second, prove that the plaintiff unreasonably failed to make use of the forum.[114] This duty creates incentives for the employer to create a grievance forum that is sufficiently workable and accessible, but not too accessible to risk losing on the second prong of the affirmative defense. On the other hand, the employer knows that the affirmative defense is altogether unavailing if the aggrieved employee fails to give notice of the discrimination problems but later brings a formal lawsuit when the employer has already taken an official adverse decision against her. In sum, the artificial line-drawing along the existence of a "tangible employment action" sends confusing signals to the employer regarding which one is a better course of action: the more open grievance procedure with the risk of losing on the second prong of the affirmative defense, or the less open process with the risk of overlooking the workplace discriminations that later materialize into an official employment decision. By removing the notion of "tangible employment action," the court may help alleviate that confusion on the part of the employer.

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[114] *Ellerth*, 524 U.S. at 742; *Faragher*, 524 U.S. at 775.

Problem With Bringing Reform Through Litigation

If extending the *Ellerth/Faragher* defense to all forms of discrimination is justifiable on the ground that it reinforces the incentives of the employer and employee to self-monitor and self-remedy workplace discriminations, why is this internal remediation process so important? This subsection intends to demonstrate why and how the informal preventive and remedial measures are superior to litigation in resolving workplace discrimination disputes.

A short-hand justification for the *Ellerth/Faragher* defense lies in the statutory mandate. Title VII expressly endorses resolving workplace discrimination disputes outside the courtroom.[115] Although the statute does not specifically prescribe employer's internal grievance procedure as one of the alternative means of dispute resolution, it can be inferred that Congress preferred such forum to litigation.

Early reporting and informal negotiation as encouraged by the *Ellerth/Faragher* defense is superior to litigation's win-or-lose situation for resolving Title VII disputes because employer and employee have aligned interests in preventing workplace discrimination, whereas the employee has a stronger, if not exclusive, interest in remedying the discrimination. Whether motivated to avoid liability or create an enjoyable workplace environment, the employer and the employee have aligned incentives to prevent discrimination. This alignment of interests is particularly relevant to the current Title VII jurisprudence that places an enormous importance on the prevention efforts, in addition to the remediation aspect, of workplace discrimination.

More importantly, a feminist perspective explains why an informal, employer-provided forum is superior to a formal adjudication. According to the relational feminist theory, the law's abstract notion of rights is not always compatible with a type of reasoning that considers the impact a particular decision has on relationships and responsibilities vis-à-vis others: "[t]his theory recognizes two distinct ways of approaching moral problems: 'whereas the logic of justice celebrates qualities like autonomy, equality, universalizability, and rights, the ethic of care celebrates the somewhat opposite qualities of connectedness, responsiveness to need, contextualization and duty.'"[116] Rather than assert their rights, women are more likely to contextualize their decision-making process and reason the implications of their decision for maintaining relationships and harmonizing conflicting demands.[117]

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[115] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

[116] Margaret Moore Jackson, *A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment*, 81 N.D. L. REV. 739, 752 (2005) (citing Pamela S. Karlan & Daniel R. Ortiz, *In a Different Voice: Relational Feminism, Abortion Rights, and The Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 886 (1993)).

[117] Moore Jackson, *supra* note 114, at 758.

The relational feminist theory helps explain women's tendency to react non-confrontationally to workplace sexual harassment. While the law assumes that a reasonable individual asserts his right when breached, women "gage the relations they have with management and distinguish between formal rights they have and relationships and benefits that actually can be protected."[118] This behavioral theory explains why women tend to remain silent about the workplace harassment they experience and are reluctant to bring a formal complaint, but instead rely on social support groups—co-workers, friends and families—to cope with the harassment.[119] Even women who ultimately file a formal charge of Title VII violation take a considerable time of tolerance and endurance before bringing the charge.[120] In *Ledbetter*, the plaintiff did not sue her boss until 1998, even though she suspected pay discrimination, because she was a "team player" and wanted to "solve the problem on her own until there was no other way."[121] Ultimately, Ledbetter lost her Title VII claim precisely because of this wait, when the Court found her claim time-barred. Nonetheless, when courts hear sexual harassment claims, they place the burden on the woman-plaintiff to prove that the sexual advances were "unwelcome" and erroneously conclude that any evidence of untimely, non-confrontational or indirect resistance towards the harasser tends to negate the unwelcome nature of the harassment.[122] Interested mainly in the manifested behavior, courts are reluctant, if not institutionally incompetent, to take into consideration a woman's relational concerns—such as the fear of losing her job, the need to support her family, or the desire to protect her social network—and reconcile the plaintiff's simultaneous tolerance and her disapproval of the harassing conduct.

This author proposes that the *Ellerth/Faragher* affirmative defense can potentially bring a solution to this mismatch between law's expectation of a woman experiencing sexual harassment to stand up and voice her complaint and the actual conduct and natural tendency of a woman to resolve workplace harassment outside the courtroom. The obvious solution is to provide an alternative forum where women who make relation-based judgments can resolve sexual harassment disputes. Unless we are ready to argue that women should adopt the rights-based reasoning and deny their cooperative and inter-relational problem-solving tendencies, the formal adjudication is not an appropriate mechanism for furthering the legislative intent of Title VII to prevent and remedy sex-based workplace discrimination.

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118 *Id.* at 757.

119 *Id.* at 756-57.

120 Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 L. & SOC'Y REV. 83, 86 (2005).

121 Steven Greenhouse, *Experts Say Decision on Pay Reorders Legal Landscape*, N.Y. TIMES, May 30, 2007, at A18.

122 Labra v. Mid-Plains Constr., Inc., 90 P.3d 954 (Kan. Ct. App. 2004); Kouri v. Liberian Services, Inc., Civ. A. No. 90-00582-A, 1991 WL 50003 (E.D. Va. Feb. 6, 1991).

Finally, an informal remediation forum is superior to a formal adjudication because employer-initiated reforms rather than the court-mandated directives are suitable for a commitment to a long-term structural reform. The *Ellerth/Faragher* doctrine is a fine example of Susan Sturm's conception of the court's role as an organizational catalyst prompting non-legal actors to participate in elaborating and implementing the equality principle. Embedded in this conception is the institutional incompetence of the court to design a one-size-fits-all standard to address complex problems of workplace discrimination. Title VII's ultimate goal is to regulate the workplace and rid it of unlawful discrimination, requiring a contextualized, long-term structural change.

V. LEDBETTER *IN A DIFFERENT LIGHT*

The Court in *Ledbetter* answered the narrow legal question of whether the receipt of a disparate paycheck, as opposed to the actual pay-setting decision, triggers the 180-day charging period with the EEOC. Inevitably, reflecting the various competing interests at stake in Title VII claims, this legal question produced polarized, and yet equally persuasive, split opinions. The majority held that the receipt of a paycheck itself lacked the requisite discriminatory intent to trigger a new charging period.[123] In so holding, the majority interpreted the explicit 180-day limitation as Congress' desire to resolve Title VII claims promptly and avoid the difficulty of proving delayed discrimination claims.[124] On the other hand, the dissent took the position that each paycheck, in addition to the disparate pay-setting decision, should trigger a new charging period.[125] The dissent was sensitive to the realities of the workplace and was chiefly concerned that pay disparities often are not as easily noticeable to an employee as other forms of workplace discrimination such as termination or demotion.[126]

Although the Court was correct in answering the precise legal question presented to it, this author explores what the Court could have done to effectuate the important signaling function advocated by Susan Sturm, that is, to prompt non-legal actors to design and implement private remedies in the pay discrimination context. The majority makes one suggestion regarding this endeavor: "Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and *communicated* to her."[127] The majority could have designed a rule that would prompt employers to make their pay-setting practices more transparent. This can be done by penalizing them for failing to communicate their pay raise structure and decision-making processes to employees. Accordingly, should the employee-plaintiff fail to file a charge with the EEOC

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123 *Ledbetter*, 127 S. Ct. at 2170.

124 *Id.* at 2170-71.

125 *Id.* at 2184.

126 *Id.* at 2181.

127 *Id.* at 2169 (emphasis added).

within 180 days of the pay-setting decision, the court would afford the plaintiff the opportunity to prove that the employer-defendant failed to effectively communicate the discriminatory pay decision, and that therefore, the delay in filing the charge was justifiable. Absent the successful defense, the plaintiff would be time-barred for a Title VII action, but otherwise, the claim would move forward.

By dealing with the communication problem directly, the majority would be prompting employers to internally control each pay-setting decision, including the supervisor evaluation process, and investigate for any discriminatory intent before communicating any pay raise or denial to employees. In fact, Ledbetter's delay in filing with the EEOC can be attributable to the fact that Goodyear kept compensation levels confidential and employees had only limited access to information regarding their colleagues' earnings.[128] Targeting the communication problem can potentially cure the unrealistic assumption held by the majority—that employees have ready access to their colleagues' pay level for comparison—while still affording employers the benefit of repose granted by the 180-day limitations period.

The dissent hints at an alternative way of giving effect to Susan Sturm's judiciary construct: "[p]ay disparities, of the kind Ledbetter experienced, have a closer kinship to hostile work environment claims than to charges of a single episode of discrimination. Ledbetter's claim . . . rested not on one particular paycheck, but on 'the cumulative effect of individual acts.'"[129] Perceiving pay discrimination claim as a succession of acts mounting to a pattern of discriminatory pay, the Court had the option of permitting the receipt of a disparate paycheck as the unlawful employment practice triggering a new 180-day charging period without undermining the benefit of repose to the employer. This way, the court would afford the employee-plaintiff an essentially unlimited timeframe for bringing a formal suit and grant the employer-defendant an equally appealing affirmative defense to the complaint. As a result, the employer would have the opportunity to prove that it had a readily accessible procedure for reporting suspected cases of discriminatory pay-setting decisions and yet the employee failed to resort to it and unreasonably accumulated the pay disparity.

Under this legal rule, employers have incentives to design and implement a system that timely and adequately redresses pay disparities due to sex. At the same time, it would afford an informal and fair forum to an employee who suspects a disparate paycheck due to her sex and not tied to her performance, but is reluctant to bring a formal complaint because the amount involved is too small or the employer's intent is ambiguous.

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[128] *Ledbetter*, 127 S. Ct. at 2181-82.

[129] *Id.* at 2181.

VI. RECOMMENDATION AND CONCLUSION

Future Direction of Title VII Pay Discrimination in the Aftermath of Ledbetter

Congress has two ways of legislatively overruling *Ledbetter*. Congress has the option of codifying the dissent's "paycheck accrual rule" or alternatively, extending the filing period with the EEOC, thereby allowing more time for the plaintiff to bring a formal charge.[130] Currently, proposed legislation giving effect to the former is pending in Congress.[131] While it is premature to decide on the ultimate development of the timing issue in Title VII pay discrimination claims, it is worth considering how the future courts should respond to any new legislation overruling the *Ledbetter* rule.

If Congress eventually codifies the paycheck accrual rule, thereby giving effect to the dissent's opinion, a future court should consider using the equitable doctrine of laches[132] to bar discrimination claims that it finds prejudicial to the employer for the fair adjudication of the case.[133] In determining whether the doctrine should apply to a particular case, the court should penalize employers for failing to make the pay raise structure more transparent or for failing to make accessible for comparison the pay scale of colleagues and supervisors. Courts should also penalize employees who delay in exercising their right and fail to put their employer on notice of the allegedly discriminatory pay.

If, on the other hand, Congress codifies an amendment extending the filing period, courts should give effect to the newly prescribed period for filing charge with the EEOC. When the employee fails to file charge within the prescribed period, however, the court should place the burden on the employee to show an adequate reason for such failure. If the employee's failure is reasonable, the employer forfeits the benefit of repose and must litigate the case on the merit. This scheme incorporates Susan Sturm's construct of a facilitator judiciary[134] by incentivizing employees to participate in any internal reporting and investigation apparatus provided by their employer.

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130 *See Ledbetter*, 127 S. Ct. at 2177, 2181, 2188.

131 *See* Lily Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (2007); Fair Pay Restoration Act, S. 1843, 110th Cong. (2007).

132 The defense of laches—summing doctrines such as waiver, estoppel and equitable tolling—can be invoked by an employer to block an employee's suit if the unreasonable delay in filing the charge results in impairing the employer's ability to defend itself. *See Ledbetter*, 127 S. Ct. at 2186 (internal citations omitted).

133 *Id.* ("Doctrines such as 'waiver, estoppel, and equitable tolling' 'allow us to honor Title VII's remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.'") (internal citations omitted).

134 *See supra* Part III.2.B.

Practical Solutions to Prevent Unlawful Pay Discriminations

This subsection briefly suggests some practical solutions to preventing instances of unlawful pay discrimination. As long as the Congress and the judiciary remain sensitive to Sturm's incentive-creating approach,[135] non-legal actors such as employers and their counsels are prone to design creative and context-specific solutions. Some of these solutions will possibly include: training supervisors on objective evaluation techniques regarding subordinate's work performance for purposes of determining pay raise or denial; layered evaluation processes for pay-setting decisions by permitting review of the supervisor evaluation by a higher or another supervisor well-acquainted with the disputing employee's work performance; and availability of transparent pay scale to employees.

Conclusion

When the Supreme Court handed down *Ledbetter*, the public described the sharply divided Court as a "clash between formality and practicality"[136] and as one that "conservatives had long yearned for and that liberals feared."[137] Without denying some truth in these comments, this author finds that courts should not be perceived merely as "employer-friendly" or "employee-friendly." Rather, this author prefers to comment on *Ledbetter* in light of the broader Title VII jurisprudence—i.e., the incentive-creation model—as it has been developed in *Ellerth*, *Faragher* and *Suders*. Although *Suders* limited the applicability of the *Ellerth/Faragher* defense to Title VII claims devoid of any official adverse employment decision, this Note makes a case for extending the doctrine of the affirmative defense to all forms of actionable discrimination, including pay discrimination. Based on this premise, this author suggests that a future court deciding a Title VII dispute—whether a tangible employment action is alleged or not—should articulate a legal doctrine that encourages non-legal actors of the workplace to design and implement an alternative dispute resolution forum.

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135 *Id.*

136 Linda Greenhouse, *Job Bias Case Turns on Filing Right Form*, N.Y. TIMES, Nov. 7, 2007, at A25.

137 Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.