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Falling Short: On Implicit Biases and the Discrimination of Short Individuals

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Socio-psychological research solidly shows that people hold implicit biases against short individuals. We associate a host of positive qualities to those with above average height, and we belittle those born a few inches short. These implicit biases, in turn, lead to outright discrimination. Experiments prove that employers prefer not to hire or promote short employees and that they do not adequately compensate them. According to various studies, controlling for other variables, every inch of height is worth hundreds of dollars in annual income, which is no less severe than the wage gap associated with gender or racial discrimination.

Given the proportions of height discrimination revealed in this Article, I examine why it is not legally addressed. How come the federal system and most states do not view height discrimination as illegal, and why are such discriminatory practices ignored even by their victims? Using psychological literature, I argue that the answer lies in the “naming” of this phenomenon. We fail to recognize height discrimination because it does not fit our mental template of discrimination. The characteristics we usually associate with discrimination—intentional behavior, clear harm, specific perpetrator/victim, and specific domain—do not exist in height discrimination, so we fail to categorize it as such. This Article explains why, despite the “naming” difficulties, the legal system should not ignore the widespread heightism phenomenon. Based on the psychological literature, it suggests ways to deal with it, focusing on the provision of information and on consciousness raising.

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Falling Short: On Implicit Biases and the Discrimination of Short Individuals

OMER KIMHI *

“[T]he discrimination in favor of tallness is one of the most blatant and forgiven prejudices in our society.”¹

INTRODUCTION

In his famous (and excellent) song, “Short People,” Randy Newman depicts a character that despises short people.² Short people, the character states, have “little baby legs,” “grubby little fingers,” and “dirty little minds.”³ They spread lies, no one likes them and in general, we are all better off without them.⁴ Newman, of course, did not mean to eradicate all individuals under 5’7”.⁵ The song was written in irony, and Newman actually meant to show the absurdity in racism and prejudices. In fact, Newman chose to write about short people, particularly because he thought no one would take him seriously. In an interview about the controversy that surrounded the song he said: “I had no idea that there was any sensitivity, I mean, that anyone could believe that anyone was as crazy as [the] character [singing the song].”⁶ Indeed, most people, I believe, do not think there is any bias against short people. Outside Randy Newman’s song, people usually do not say they “don’t want no short people,”⁷ and we might find it hard to believe that someone is denied a job or a promotion just because of their height. And yet there is ample evidence that proves the contrary.

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¹ John Kenneth Galbraith, *Galbraith: Turning Economics to Show Biz*, CHRISTIAN SCI. MONITOR, May 18, 1977, at 22.

² RANDY NEWMAN, *Short People*, on LITTLE CRIMINALS (Warner Bros. 1977)

³ *Id.* The song’s lyrics are available at *Randy Newman Lyrics*, AZLYRICS.COM, <https://www.azlyrics.com/lyrics/randynewman/shortpeople.html> (last visited June 19, 2020).

⁴ *Id.*

⁵ Lydia Hutchinson, *Happy Birthday, Randy Newman*, PERFORMING SONG WRITER (Nov. 28, 2016), <http://performingsongwriter.com/randy-newman-songs/>.

⁶ *Id.*

⁷ NEWMAN, *supra* note 2.

Psychological and sociological literature solidly demonstrates that we hold implicit biases against short individuals and favor tall ones.⁸ Unconsciously, we associate a host of positive qualities (not connected to height) to those blessed with a few additional inches, and we belittle people born a few inches short—especially men.⁹ The biases short people suffer start practically at birth. Show mothers pictures of two young babies, and they will consistently pick the taller baby as more competent and able.¹⁰ Ask teachers to evaluate their pupils, and they will rate the taller kids as better than the short ones, even when there is no difference in test scores.¹¹ In adulthood, height is an important factor in perceived power, and taller individuals are accorded a higher social status. We believe tall men are healthier, more intelligent, and more competent than short men, and we perceive short individuals as less successful, less assertive, and less leader-like than their taller counterparts.¹² Only recently it was reported that Donald Trump refused to consider Mr. Bob Corker for the position of Secretary of State due to his height. Mr. Corker is “only” 5’7”, and at this height, according to President Trump, he cannot serve as the nation’s top diplomat.¹³ The association between height and social status is so ingrained in our minds that when we perceive someone as successful, we unconsciously add a few inches to his height.¹⁴ Experiments show that our

⁸ LESLIE F. MARTEL & HENRY B. BILLER, *STATURE AND STIGMA, THE BIOPSYCHOSOCIAL DEVELOPMENT OF SHORT MALES* 36 (1987).

⁹ *Id.*

¹⁰ Nancy Eisenberg et al., *Sex Differences in the Relationship of Height to Children’s Actual and Attributed Social and Cognitive Competencies*, 11 *SEX ROLES* 719, 719 (1984).

¹¹ Carolyn Villimez et al., *Sex Differences in the Relation of Children’s Height and Weight to Academic Performance and Others’ Attributions of Competence*, 15 *SEX ROLES* 667, 667 (1986).

¹² Nancy M. Blaker et al., *The Height Leadership Advantage in Men and Women: Testing Evolutionary Psychology Predictions About the Perceptions of Tall Leaders*, 16 *GROUP PROCESSES & INTERGROUP REL.* 17, 17–18 (2013).

¹³ Eliza Relman, *Trump Reportedly Thought Bob Corker Was Too Short to Be Secretary of State*, *BUS. INSIDER* (Oct. 10, 2017), <https://www.businessinsider.com/trump-mocks-republican-corker-size-liddle-2017-10>; Peter Baker, *For Trump, the Reality Show Has Never Ended*, *N.Y. TIMES* (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/politics/trump-corker-feud-tweet-liddle-bob.html>. President Trump’s height biases are also evident from the way he demeans his opponents. He named Senator Marco Rubio (5’9”) “little Marco,” to put him down during the primaries debate, TANYA S. OSENSKY, *SHORTCHANGED: HEIGHT DISCRIMINATION AND STRATEGIES FOR SOCIAL CHANGE* 42 (2017), he called ABC’s host “little George Stephanopoulos,” Sasha Savitsky, *Trump Mocks ‘Little’ George Stephanopoulos, Doubles Down on ABC Bias Claims*, *FOX NEWS* (Aug. 23, 2017), <http://www.foxnews.com/entertainment/2017/08/23/trump-mocks-little-george-stephanopoulos-doubles-down-on-abc-bias-claims.html>, and he refers to the North Korean leader, Kim Jong Un, as “little rocket man,” Brian Williams, *Trump Calls North Korean’s Kim Jong Un ‘Little Rocket Man’*, *MSNBC* (Sept. 22, 2017), <https://www.msnbc.com/brian-williams/watch/trump-calls-north-korean-s-kim-jong-un-little-rocket-man-1053213251643>.

¹⁴ Paul R. Wilson, *Perceptual Distortion of Height as a Function of Ascribed Academic Status*, 74 *J. SOC. PSYCHOL.* 97, 97 (1968).

mind has difficulties associating short men with high social status, and so it corrects the short person's height to decrease the dissonance.

As a result of these biases, short males suffer from outright discrimination, which, according to research, is no less severe than gender or racial discrimination.¹⁵ First, employers are reluctant to hire short applicants.¹⁶ Employers perceive taller applicants as more competent (generally and job-specific), and they reject short applicants even when their resumes are similar to those of the taller applicants.¹⁷ Experiments show that when given the option most employers hire the taller applicant, and that the level of stigma concerning the short applicants is higher than the level of stigma with respect to all "classical" categories of discrimination (gender, race, religion, etc.).¹⁸ Second, when short individuals are accepted to a job, their chances of promotion are considerably lower than those of their taller peers.¹⁹ Employers do not see short employees as leadership material, and they fail to give them managerial positions.²⁰ Examining the CEO population, for example, reveals that the average CEO is taller than the average American by no less than three inches, and that only 3% of the CEOs are 5'7" or less (compared to 20% in the general population).²¹ The same is true in politics. In the last 122 years there was no shorter than average President, and height was usually a good predictor of elections' outcomes.²² Third, and perhaps most staggering, research shows that a person's income is directly related to his height.²³ Using different databases, researchers consistently conclude that, controlling for other factors, taller males receive higher compensation than their shorter peers.²⁴ Every inch of height is equal to an increase of at least 2.5% in annual salary, and according to some researchers even more,²⁵ which can amount to thousands of dollars each

¹⁵ Nicola Persico et al., *The Effect of Adolescent Experience on Labor Market Outcomes: The Case of Height*, 112 J. POL. ECON. 1019, 1019–20 (2004).

¹⁶ See *infra* notes 81–95 and accompanying text.

¹⁷ Jens Agerström, *Why Does Height Matter in Hiring?*, 52 J. BEHAV. EXPERIMENTAL ECON. 35, 35 (2014).

¹⁸ Paula M. Brochu, *The Prejudice Paradox (Or Discrimination Is Not Dead): Systematic Discrimination in Forced Choice Employment Decisions* 27–39 (Aug. 4, 2011) (Ph.D. thesis, The University of Western Ontario) (on file with the Electronic Thesis and Dissertation Repository).

¹⁹ See *infra* notes 102–28 and accompanying text.

²⁰ Tim Gawley et al., *Height, Gender, and Authority Status at Work: Analyses for a National Sample of Canadian Workers*, 60 SEX ROLES 208, 208, 210 (2009).

²¹ See *infra* notes 106–07 and accompanying text.

²² See *infra* note 110 and accompanying text.

²³ See *infra* notes 129–48 and accompanying text.

²⁴ See *id.* (citing a previous study that found height increases equated to raises in income).

²⁵ See Jessica Tyrrell et al., *Height, Body Mass Index, and Socio-economic Status: Mendelian Randomisation Study in UK Biobank*, 352 BMJ 1, 8 (2016) (discussing evidence of taller stature leading to higher socioeconomic status).

year.²⁶ The height premium exists in various countries, and it is comparable to the premiums associated with race and gender.²⁷

The data about the prevalence and the severity of height discrimination, which has so far been ignored by the legal scholarship, calls for a legal analysis. This Article fills this gap in the literature, and reveals a disparity between the normative analysis and the positive law concerning this issue. From a normative perspective, I show that the legal and philosophical justifications given for addressing the classical forms of discrimination equally apply to height discrimination.²⁸ Height discrimination, I argue, demeans short people, perpetuates the evolutionary status hierarchies between short and tall, is morally objectionable, and should be addressed. From a positive perspective, however, existing law does not adequately deal with height discrimination. Federal law and the law in most states does not view height discrimination as an illegal disparate treatment discrimination, and courts reject claims for discrimination that are based on the plaintiff's stature.²⁹ Moreover, in the few jurisdictions that have enacted height discrimination statutes (like Michigan, Washington, D.C., Santa Cruz, or San Francisco), height discrimination claims are not filed.³⁰ The statute is a dead letter, and short people do not use it to claim remedies.³¹ Why then, despite the prevalence and normative importance of height discrimination, is the legal system helpless in addressing it? Why, although short people are evidently discriminated against, is this phenomenon largely ignored?

This Article explains this conundrum using sociological and psychological literature. The solution, I argue, lies in the “naming” of this phenomenon—i.e., in people’s ability to recognize harmful experiences they suffer as related to height discrimination. According to socio-psychological research, similar to the perception of objects (such as a table or a chair), we decide whether a certain behavior is discriminatory or not by using a mental template of discriminatory behavior.³² Our brain holds a kind of prototype of how discrimination should look, and in order to determine whether a certain behavior or outcome is discriminatory, we compare the incoming information about the behavior to the mental discrimination prototype we have.³³ Unfortunately, however, as I elaborately discuss in this Article, height discrimination does not fit the mental discrimination prototype that most of us hold. It is usually not intentional; its harm is not very perceptible

²⁶ Persico et al., *supra* note 15, at 1030 (analyzing incremental increases in height correlated with increases in wages).

²⁷ See *infra* notes 129–48 and accompanying text.

²⁸ See *infra* notes 161–69 and accompanying text.

²⁹ See *infra* notes 213–20 and accompanying text.

³⁰ See *infra* notes 221–40 and accompanying text.

³¹ See *infra* notes 224–43 and accompanying text.

³² See *infra* note 266 and accompanying text.

³³ See *infra* notes 267–74 and accompanying text.

and it has an unconventional form, both in terms of perpetrator/victim and the domain in which it takes place. As a result, short people have difficulties in attributing the bad outcomes or negative experiences from which they suffer to height discrimination, which they attribute to other reasons (lack of talent, character flaws, or misfortune). Thus, claims of height discrimination are not made, and society does not recognize this grave problem despite its pervasiveness.³⁴

In order to address the plight of the short-statured, this Article, therefore, argues that the legal system should focus on the “naming” of height discrimination. Height discrimination should be recognized as the social phenomenon that it is, so that people—both short and tall—will be aware of its existence and will be able to confront it. This Article suggests that the “naming” of height discrimination should be facilitated through the provision of information. Employers should provide information on the way short employees are treated, and the data should be readily available to the public. Only when awareness of heightism develops will social change occur.

This Article, I believe, makes several important contributions. First, it introduces the data on heightism to the legal literature. So far, legal scholarship failed to notice that height discrimination even exists, and this Article aims to raise the legal consciousness to this undiscussed phenomenon. It examines dozens of research studies that undoubtedly prove the existence of heightism, and it demonstrates the pervasiveness and severity of this type of prejudice. Second, this Article legally analyzes heightism, for the first time, from both positive and normative perspectives.³⁵ It shows that the legal system does not address this type of discrimination, and argues, using psychological literature, that this is due to the difficulties in “naming” height discrimination. This argument can be helpful in understanding not only height discrimination, but also other types of “non-classic” discrimination (such as weight or appearance-based discrimination). Third, this Article contributes to the literature on masculinity and gender. Academic literature and public discussion often focus on the damages of the “ideal” female body type. We note the societal “obligation” on women to have a Barbie-like figure, and we warn about the serious repercussions such unrealistic expectations may have on women and young girls (frustration, sometimes even psychological damage). There is ample writing, therefore, on women’s discrimination in this respect, and in

³⁴ See *infra* notes 277–302 and accompanying text.

³⁵ Isaac B. Rosenberg wrote about height discrimination before, but his analysis describes this phenomenon mostly from a positive perspective. He does not go into the normative aspects of height discrimination, and does not analyze the difficulties in the naming of this phenomenon. See Isaac B. Rosenberg, *Height Discrimination in Employment*, 2009 UTAH L. REV. 907, 915.

particular on weight and appearance-based discrimination.³⁶ This Article demonstrates, however, that a similar phenomenon exists also with respect to men. Just like society expects females to be thin and fragile, it also expects males to be tall and strong. Just like society demeans and discriminates against women who do not meet the “ideal” female figure, it also does so with respect to men who do not meet the social height expectations. It shows that women are not the only victims of discrimination as a result of body stereotyping, and that men may suffer too.

The rest of this Article then proceeds as follows: in Part I, following this introduction, I present the data on height discrimination. I show its effects in the employment sphere, and its pervasiveness in our society. In Part II, I examine the law on height discrimination. This part begins with a normative analysis that explains why the law should address height discrimination, and continues with a positive analysis that shows existing law does not adequately address this problem. In Part III, I show the difficulties in naming height discrimination, and, in Part IV, I propose an information-based solution to the naming problem.

I. HEIGHTISM – THE DATA

Social scientists have documented various implicit biases against people with short stature. A tall individual is perceived to be more competent and dominant than his shorter peers, and tall people seem more apt for leadership positions. Natalie Angier, a science journalist for the *New York Times*, described the admiration for the tall and the contempt for the short that is present in our society as follows:

By the simple act of striding into a room, taller than average men are accorded a host of positive attributes having little or nothing to do with height: a high IQ, talent, competence, trustworthiness, even kindness.

And men who are considerably shorter than the average American guy height of 5-foot-9 1/2? These poor little fellows are at elevated risk of dropping out of school, drinking heavily, dating sparsely, getting sick or depressed. . . . Call them whatever you please, and chances are you won't get called on

³⁶ See, e.g., Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1035 (2010) (arguing “that discrimination based upon appearance is a significant form of injustice”); see also Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CALIF. L. REV. 57, 76 (2002) (arguing “for extending the protection of antidiscrimination laws” to people who suffer from being overweight).

it, for making fun of short men is one of the last acceptable prejudices.³⁷

The bias against short people is so ingrained in our brains that when we know someone is successful or in a leadership position we unconsciously add a few inches to his height.³⁸ Paul Wilson, a social psychologist, conducted the following experiment.³⁹ A course director invited a guest speaker to give a talk in front of students.⁴⁰ The students were divided into five different groups, and to each group the guest speaker's academic status was presented differently.⁴¹ To one group he was presented as a regular student (just like his listeners); to the second, a demonstrator; to the third, a lecturer; to the fourth, a senior lecturer; and to the fifth, a full professor highly acclaimed in his field.⁴² After the lecture was over, the students were requested to estimate the height of both the speaker and the course director.⁴³ Surprisingly (or not!), whereas the mean estimate of the course director's height did not significantly change among the different groups, the mean estimate of the guest-speaker's height varied according to his stated academic status.⁴⁴ Students who were told the guest speaker is a full professor thought he was 3.3 inches taller than students who were told he was a regular student.⁴⁵

The association of height with positive attributes is true from infancy through childhood and until adulthood. In one study, 100 mothers were given a photo of two, nineteen-month-old babies (baby1 and baby2).⁴⁶ The two babies closely resembled each other, but the experimenters manipulated their height.⁴⁷ In one photo baby1 looked taller, in a second photo baby2 looked taller, and in the third both babies looked the same height.⁴⁸ After being assigned one of the three photos, the mothers were asked to evaluate the babies' competences, by rating them on several indicators (such as "being independent," "obeying rules or instructions," and "taking care of

³⁷ Natalie Angier, *Ideas & Trends; Short Men, Short Shrift. Are Drugs the Answer?*, N.Y. TIMES (June 22, 2003), <http://www.nytimes.com/2003/06/22/weekinreview/ideas-trends-short-men-short-shrift-are-drugs-the-answer.html>.

³⁸ Wilson, *supra* note 14, at 99–101. Previous research has also indicated significant relationships between authority status and perceptual distortion of size. See W.D. Dannenmaier & F. J. Thumin, *Authority Status as a Factor in Perceptual Distortion of Size*, 63 J. SOC. PSYCHOL. 361, 364 (1964) (noting a "relationship between authority status and perceptual distortion of size").

³⁹ See generally Wilson, *supra* note 14.

⁴⁰ *Id.* at 98.

⁴¹ *Id.* at 98–99.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 99–101.

⁴⁵ *Id.*

⁴⁶ Eisenberg et al., *supra* note 10, at 721.

⁴⁷ *Id.*

⁴⁸ *Id.*

his own needs”).⁴⁹ The experiment showed that the mothers’ perception of a baby’s competence was directly related to the baby’s height.⁵⁰ Mothers consistently picked the taller child in the picture as more able, more independent, and more assertive, even though all other attributes were the same.⁵¹ This effect was stronger for boys, but existed also for girls.⁵²

The same issue has been studied in regards to children aged five through ten.⁵³ Teachers (kindergarten to fourth grade) were asked to rate their pupils’ academic competences on a scale of one to seven. The correlation between the teachers’ evaluations and the children’s height was examined.⁵⁴ A positive relation was found to exist between a boy’s height and the teachers’ ratings of his academic abilities.⁵⁵ Although height was unrelated to the males’ test score achievements, on average teachers perceived taller boys as more competent.⁵⁶ This correlation persisted throughout the academic year, but was not significant for females (for females, weight was a significant negative factor).⁵⁷

A similar study using photographs of male and female subjects, and optical illusions manipulating the subjects’ heights demonstrates the same association in regards to adults.⁵⁸ Some participants were presented with photos of tall subjects (both a tall man and a tall woman), while others saw short subjects (both a short man and a short woman).⁵⁹ The participants were then asked to report their level of agreement with statements, such as “[t]his person looks intelligent,” “[t]his person looks like a leader,” and so on.⁶⁰ The results show that when a male subject looks taller, others perceive him as healthier, more dominant, and intelligent.⁶¹ A taller woman, on the other hand, does not seem healthier or more dominant, but she does seem more intelligent.⁶² The researchers concluded that taller individuals, especially males, are perceived as having leader-like qualities, and thus they have an advantage when competing for leadership positions.⁶³ Leslie Martel and Henry Biller, who wrote a book on the biological, psychological, and social

⁴⁹ *Id.* at 721–22, 724–25 (emphasis added).

⁵⁰ *Id.* at 723.

⁵¹ *Id.* at 723–26.

⁵² *Id.* at 723, 726–28, 730–33.

⁵³ Villimez et al., *supra* note 11, at 669–71.

⁵⁴ *Id.* at 669–72.

⁵⁵ *Id.* at 677, 679–80.

⁵⁶ *Id.* at 675–77, 679–80.

⁵⁷ *Id.* at 672, 674–80; see also Karlsson Roth & Nancy Eisenberg, *The Effects of Children’s Height on Teachers’ Attributions of Competence*, 143 J. GENETIC PSYCHOL. 45, 50 (1983) (showing similar result among teachers in how they assigned punishments for hypothetical transgressions).

⁵⁸ Blaker et al., *supra* note 12, at 19–21, 23–25.

⁵⁹ *Id.* at 20–21.

⁶⁰ *Id.* at 21 (emphasis in original).

⁶¹ *Id.* at 23.

⁶² *Id.* at 23–24.

⁶³ *Id.*

effects of the male stature, summarize the literature on the social stigma of height as follows: “All in all, *the research solidly demonstrates* that height is a very important factor in perceived power and social status. The taller individual is able to attain a more commanding position in the eyes of others, benefiting from the positive attributions based on his height.”⁶⁴

Evidence of the social stigma against the short statured exists not only in scholarly writings, but also in our culture—especially pop-culture. Tanya Osenky points out, that whereas tall (usually thin) characters play leading roles of people worthy of success (in romance or finance), short (often fat) characters are given the role of the friend or the sidekick.⁶⁵ Depictions of short characters are often the comic relief, and are the subject of jokes and mockery. For example, Carlton Banks (as opposed to Will Smith) in the *Fresh Prince of Bel-Air*, Danny DeVito’s characters in *Taxi* (Louie) and *Twins* (Vincent Benedict), or even George Costanza in *Seinfeld*.⁶⁶ Short actors who manage to get leading roles try to conceal their height,⁶⁷ as if their small size is something to be ashamed of. There are hardly any short superheroes,⁶⁸ and even when there is one, such as Wolverine,⁶⁹ movie executives prefer to cast a tall actor to play the role (Hugh Jackman, 6’3”, plays Wolverine, 5’3” in the original comics).⁷⁰

The association between height and positive qualities is even embedded in our language. Idioms containing the adjective “short” are usually pejorative, while idioms referring to a tall or big stature are usually

⁶⁴ MARTEL & BILLER, *supra* note 8, at 36 (emphasis added).

⁶⁵ OSENSKY, *supra* note 13, at 29–30.

⁶⁶ *Id.* at 30. A possible exception is Tyrion Lannister, of *Game of Thrones*. *Id.* at 29–30. Unlike the short individuals discussed in the article, though, Tyrion Lannister suffers from Dwarfism—a disability. It is interesting to note that one of the few short heroes is actually not short, but disabled. The book and the series address the disability. When falsely accused of murdering his nephew, Tyrion Lannister says in his trial, “*I’m guilty of a far more monstrous crime: I’m guilty of being a dwarf! . . . I’ve been on trial for that my entire life!*” Tyrion Lannister, FANDOM: GAME OF THRONES WIKI, https://gameofthrones.fandom.com/wiki/Tyrion_Lannister (last visited Oct. 8, 2019).

⁶⁷ See, e.g., Morgan Baila, *13 Things That Are Taller Than Tom Cruise*, REFINERY29 (July 5, 2016, 12:15 PM), <http://www.refinery29.com/2016/07/115257/how-tall-is-tom-cruise-height> (noting that Tom Cruise is “known to often use smoke and mirrors (and heeled shoes) to trick the public in photos and movie scenes” to appear taller). See also Mara Siegler, *How ‘GMA’ Hides George Stephanopoulos’ ‘Little-Boyish Mini-Legs’*, PAGE SIX (July 12, 2017, 9:42 PM), <https://pagesix.com/2017/07/12/how-gma-hides-george-stephanopoulos-little-boyish-mini-legs/> (describing the use of a silver panel across the front of the anchor desk to hide *Good Morning America* anchor George Stephanopoulos’s height).

⁶⁸ *Marvel Heroes Height Comparison Chart*, IMGUR, <https://imgur.com/a/hJHop#kz0WOz1> (last visited June 17, 2020).

⁶⁹ *Wolverine*, MARVEL, <https://www.marvel.com/characters/wolverine-james-howlett/in-comics> (last visited Oct. 8, 2019).

⁷⁰ See, e.g., Terri Schwartz, *Hugh Jackman Couldn’t Turn Down X-Men: Days of Future Past*, CBR (Feb. 14, 2013), <https://www.cbr.com/hugh-jackman-couldnt-turn-down-x-men-days-of-future-past/> (explaining how director Bryan Singer chose Hugh Jackman to play Wolverine, despite the height difference).

positive.⁷¹ We are disadvantaged when we “come up short” or “fall short,” but it is virtuous when we are “head and shoulders above the rest,” when we “stand tall,” or when we come out “the bigger person.”⁷² Language, as we know, both reflects and creates reality, and in this reality being small is a shortcoming (pun intended).⁷³

This perception, it seems, has biological/evolutionary origins. Gregg Murray and J. David Schmitz explain that the human species has lived in hunter-gatherer tribes of 5 to 150 people for more than 99% of its existence.⁷⁴ Within these tribes, members had to fight with each other over scarce resources, and the larger-sized males usually prevailed and were regarded as the leaders of the group.⁷⁵ Although today human conflicts are rarely resolved through physical bodily contact (so size is far less important), the association between size and status remains as an evolutionary remnant. Taller males are automatically perceived as leaders and are awarded with leadership qualities, such as strength, health, intelligence, and dominance.⁷⁶ Blaker and an Vugt compare this perception to the behaviors in the animal kingdom.⁷⁷ They maintain that the human species, similar to other species, tends to idealize the largest members of the group because the largest members have better chances to win fights over food, territory, and females.⁷⁸ Although physical strength is no longer relevant for humans’ current status hierarchies (now money is much more important), the evolutionary perceptions are still there.⁷⁹

These evolutionary conceptions, in turn, lead to outright discrimination against short individuals (“heightism”). The research on this subject looks at both the social and employment spheres,⁸⁰ but for the purposes of this

⁷¹ OSENSKY, *supra* note 13, at 8.

⁷² See also *id.* (providing other examples of such idioms).

⁷³ See Lera Boroditsky, *Does Language Shape Thought?: Mandarin and English Speakers’ Conceptions of Time*, 43 COGNITIVE PSYCHOL. 1, 2–3, 18–20 (2001) (discussing how language shapes thoughts and affects how we think about the world).

⁷⁴ Gregg R. Murray & J. David Schmitz, *Caveman Politics: Evolutionary Leadership Preferences and Physical Stature*, 92 SOC. SCI. Q. 1215, 1220 (2011).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Nancy M. Blaker & Mark van Vugt, *The Status-Size Hypothesis: How Cues of Physical Size and Social Status Influence Each Other*, in THE PSYCHOLOGY OF SOCIAL STATUS 119, 119–20, 124–25 (J. T. Cheng et al. eds., 2014).

⁷⁸ *Id.* at 120–21, 124–25, 129–30.

⁷⁹ *Id.* at 119, 121–22, 125, 129–31, 133. See also Blaker et al., *supra* note 12, at 18–19, 23–24 (finding that height correlates with perceptions of leadership, in line with these evolutionary principles).

⁸⁰ See, e.g., John Stuart Gillis & Walter E. Avis, *The Male-Taller Norm in Mate Selection*, 6 PERSONALITY & SOC. PSYCHOL. BULL. 396, 399 (1980) (finding that women prefer taller men and men prefer shorter women in the social sphere). Gillis and Avis examined the relative height of males and females in 720 random couples (data collected from bank account application forms that indicate the height of the applicants). *Id.* at 397–98. They find that out of 720 couples, there was only one couple where the man was shorter than the woman. *Id.* at 399. In a later study from 1996, Pierce used a meta-analysis framework to examine the taller male assumption. Charles A. Pierce, *Body Height and*

Article, I focus solely on employment. I describe the biases against short people in hiring, promotions, and compensation, and show that heightism is no less severe, perhaps even more so, than race and gender discrimination.

1. Hiring: The discrimination against short people in the employment sphere starts in hiring decisions. In a seminal research study from 1969, David Kurtz asked recruiters (human resource experts) to choose between two possible applicants for a sales position: short and tall.⁸¹ The two applicants were identical in their qualities and credentials, but one was above 5'11" (180 cm) and the other was below 5'7" (170 cm).⁸² According to Kurtz's findings, 72% of the recruiters preferred the tall applicant and the rest had no preference.⁸³ Only one recruiter favored the short applicant, even though there is no obvious connection between a person's height and his ability to secure a sale.⁸⁴

Later studies reach similar conclusions. Carl Bonuso, for example, sent fake resumes to 585 randomly selected superintendents in New York.⁸⁵ The resumes were similar to each other, except that they represented six different

Romantic Attraction: A Meta-Analytic Test of the Male-Taller Norm, 24 SOC. BEHAV. & PERSONALITY 143 (1996). He examined the results of eight different studies (not including the Gillis & Avis study above), which in total looked at the preferences of 727 males and 922 females, and estimated the importance of height for both sexes. *Id.* at 146. According to Pierce's findings, not all studies reached the same conclusion. *Id.* at 144, 146–47; see also William Graziano, Thomas Brothen & Ellen Berscheid, *Height and Attraction: Do Men and Woman See Eye-to-Eye?*, 46 J. PERSONALITY 128, 133–34 (1978) (demonstrating a correlation between male height and perceived attractiveness). Females prefer to be romantically involved with males who are as tall or taller than themselves, and males prefer to be romantically involved with females who are the same height or shorter than themselves. Pierce, *supra*, at 146–47. More recent studies reach similar conclusions. Yancey and Emerson used two data sources to investigate the role of height in dating decisions: Yahoo! dating personal advertisements and answers to open ended questions in an online survey. George Yancey & Michael O. Emerson, *Does Height Matter? An Examination of Height Preferences in Romantic Coupling*, 37 J. FAM. ISSUES 53, 57–62 (2014). The Yahoo! data shows the importance of height in mate selection (height was important to both sexes, but more important to females than to males). *Id.* at 62. The answers from the online survey indicate that the reason for such preferences is mainly societal expectations or gender stereotypes. *Id.* at 69. Taller men are less likely to be childless than shorter ones. Daniel Nettle, *Height and Reproductive Success in a Cohort of British Men*, 13 HUM. NATURE 473, 482 (2002) (reporting that tall men are more successful in attracting long-term mates and less probable to remain without a long-term partner). *Id.* at 487. Sohn argues that not only is height an important factor in finding a mate, but it is also an important factor in long-term happiness. Kitae Sohn, *Does a Taller Husband Make His Wife Happier?*, 91 PERSONALITY & INDIVIDUAL DIFFERENCES 14, 18 (2016). Using a sample of 7850 Indonesian wives, he finds that a greater height difference in a couple is positively related to the wife's happiness. *Id.* This relationship gradually weakened over time and entirely dissipated by eighteen years of marital duration. *Id.* at 18–19. Thus, discrimination against short individuals also appears in the social sphere, but I focus on employment.

⁸¹ David L. Kurtz, *Physical Appearance and Stature: Important Variables in Sales Recruiting*, 48 PERSONNEL J. 981, 982–83 (1969).

⁸² *Id.* at 982.

⁸³ *Id.* at 983.

⁸⁴ *Id.*

⁸⁵ Carl A. Bonuso, *Body Type: A Factor in the Hiring of School Leaders*, 64 PHI DELTA KAPPAN 374, 374 (1983).

applicant body types (short/tall, ideal weight/overweight, and so on).⁸⁶ The superintendents were asked to rate the job applicants, and the answers revealed a significant height and weight bias.⁸⁷ Tall applicants, male and female, were rated significantly better than their shorter peers, and the superintendents were more willing to hire them.⁸⁸ A more recent study from 2014 aimed to probe deeper into the motives of job recruiters.⁸⁹ Here, the experimenters were interested not only in the recruiters' willingness to hire an applicant, but also in their perception of more general qualities (such as warmth, general competence, job competence, health, attractiveness, and so on).⁹⁰ Using height manipulation in the applicant's C.V., they showed that height significantly influenced the recruiters' evaluations.⁹¹ When an applicant appeared taller on the C.V., he also received significantly higher marks with respect to general competence, physical health, and job competence.⁹² In addition, and as a result of the better evaluations of the general qualities, recruiters were much more willing to hire the tall applicants for specific jobs.⁹³ This occurred despite the relatively small height manipulation created by the researchers—a difference of just 3.1 inches between the tall and the short applicants.⁹⁴ Wayne Hensley and Robin Cooper reviewed the psychological literature and reached the following conclusion: "This review undoubtedly discouraged many of the 'taller is better' proponents. *The evidence, we think, is rather clear.* While taller than average persons may enjoy advantages in obtaining positions, their job performance is no better than that of their shorter colleagues."⁹⁵

Paula Brochu shows that the effect of height on hiring decisions is even greater than the effect of the applicant's gender, age, sexual orientation, or religion.⁹⁶ She presented participants with eight different scenarios in which participants had to decide between two job applicants.⁹⁷ The applicants were similarly qualified and equally competent in all respects, except for one dimension that was different in each scenario.⁹⁸ In one scenario, the applicants were of different genders (one male applicant, one female); in

⁸⁶ Each resume included a mention of the applicant's height and weight. *Id.* A photograph of the applicant was also attached. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Agerström, *supra* note 17, at 35.

⁹⁰ *Id.* at 37.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 38.

⁹⁵ Wayne E. Hensley & Robin Cooper, *Height and Occupational Success: A Review and Critique*, 60 PSYCHOL. REP. 843, 847 (1987) (emphasis added).

⁹⁶ Brochu, *supra* note 18, at 21.

⁹⁷ *Id.* at 16–17.

⁹⁸ *Id.* at 17.

another they were different ages (young/old), and so on (with respect to ethnicity, religion, nationality, height, weight, and sexual orientation).⁹⁹ She then compared how many stigmatized applicants were accepted in each scenario.¹⁰⁰ According to her results, the percentage of short applicants chosen to be hired by the experiment's participants was lower than all other stigmatized candidates (female, black, old, homosexual, Muslim, etc.), except overweight candidates.¹⁰¹ This indicates that the level of stigma concerning height is higher than the "classical" categories of discrimination.

2. Promotion to authority-managerial position: But the bias against short people does not stop when they are hired. After being hired, short employees are promoted less, and they are much less likely to attain leadership positions than their taller colleagues.¹⁰² Malcolm Gladwell surveyed the height of CEOs of Fortune 500 companies.¹⁰³ He found that the average CEO is taller than the average American male by about three inches.¹⁰⁴ Only 14.5% of American males are six feet or taller, as compared to 58% of CEOs.¹⁰⁵ Only 3.9% of American males are six feet two or taller, while a whopping third of the CEOs (almost tenfold) reach this height.¹⁰⁶ Another survey looked at the short end of the tale: the *Economist* reports that a measly 3% of the CEOs are five feet seven inches or under,¹⁰⁷ compared to 20% of the general male population.¹⁰⁸ The same is true with regard to American Presidents.¹⁰⁹ Timothy Judge and Daniel Cable noted that a shorter-than-average President

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 17–18, 21. In each scenario one applicant had (what Brochu refers to as) a "stigmatized" quality (old/short/Muslim), and the other had a non-stigmatized quality (young/tall/Christian/etc.). *Id.* at 17.

¹⁰¹ *Id.* at 21.

¹⁰² See Erik Lindqvist, *Height and Leadership*, 94 REV. ECON. & STAT. 1191, 1191 (2012) ("A robust finding in the social sciences is that tall men are more likely to attain leadership positions than shorter men."); Melvyn R.W. Hamstra, 'Big' Men: Male Leaders' Height Positively Relates to Followers' Perception of Charisma, 56 PERSONALITY & INDIVIDUAL DIFFERENCES 190, 190 (2014) ("Physical height substantially affects individuals' success in society, predicting outcomes such as higher salary and increased likelihood of occupying leadership positions." (citation omitted)).

¹⁰³ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 86–87 (2005).

¹⁰⁴ *Id.* Whereas the average American male is five foot nine inches tall, the average CEO is a bit less than six feet tall. *Id.*

¹⁰⁵ *Id.* at 87.

¹⁰⁶ *Id.* See also Renée Adams et al., *Are CEOs Born Leaders? Lessons from Traits of a Million Individuals*, 130 J. FIN. ECON. 392, 393 (2018) (reporting how Swedish CEOs tend to be taller than average).

¹⁰⁷ *Short Guys Finish Last*, 337 ECONOMIST 19, 21 (1995) [hereinafter *ECONOMIST*].

¹⁰⁸ The data regarding the general population is taken from the U.S. Census Bureau. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at 136 tbl.205 (2011), <https://www2.census.gov/library/publications/2010/compendia/statab/130ed/tables/11s0205.pdf>.

¹⁰⁹ Timothy A. Judge & Daniel M. Cable, *The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model*, 89 J. APPLIED PSYCHOL. 428, 428 (2004).

has not been elected in the United States since 1896.¹¹⁰ Gert Stulp and his team, after conducting an exhaustive analysis of this issue, concluded that on average, Presidents are 7.23 centimeter and losing presidential candidates 6.95 centimeters taller than the average Caucasian American male.¹¹¹ In recent elections, the taller of the two candidates was also more likely to win, and in general, taller candidates usually receive the majority of popular votes.¹¹² Studies suggest that in recent times, height has become even more important in presidential politics, probably due to broader media exposure.¹¹³

The correlation between height and leadership positions, however, does not apply solely to top executives or to presidential candidates. Research shows that chances to achieve an authority position of any kind are significantly associated with height.¹¹⁴ Tuvia Melamed and Nicholas Bozionelos studied the relationship between height and managerial promotion in 132 managers from the British Civil Service.¹¹⁵ Their analysis suggests that the rate of promotion is positively correlated with the employees' height, even when the effect of personality profiles is taken into account.¹¹⁶ Judge and Cable conducted a meta-analysis of no less than forty-four research studies that examined the correlation between height and various indicators of success, such as leadership, earnings, income, and status.¹¹⁷ After analyzing the data, they concluded, based on all forty-four studies, that height has a corrected correlation coefficient of 0.26 across all leadership criteria, and that height is positively related to males' (as opposed to females') chances of career success.¹¹⁸ A subsequent research conducted by Gawley and others has examined the correlation between height and authority status in the workplace using a sample of 4025 full-time Canadian employees (2210 males and 1815 females).¹¹⁹ They developed seven alternative measures of authority statuses (such as, the level of management, employee supervision, number of employees supervised and so on), and they

¹¹⁰ *Id.*; see also Gert Stulp et al., *Tall Claims? Sense and Nonsense About the Importance of Height of US Presidents*, 24 LEADERSHIP Q. 159, 167 (2013) (citing to Judge & Cable as part of their study) [hereinafter Stulp et al., *Tall Claims?*].

¹¹¹ Stulp et al., *Tall Claims?*, *supra* note 110, at 164.

¹¹² *Id.* at 162–63.

¹¹³ *Id.* at 168. Regarding elections in Canada, see Philip A. Higham & D. William Carment, *The Rise and Fall of Politicians: The Judged Heights of Broadbent, Mulroney and Turner Before and After the 1988 Canadian Federal Election*, 24 CAN. J. BEHAV. SCI. 404, 404 (1992).

¹¹⁴ See Tuvia Melamed & Nicholas Bozionelos, *Managerial Promotion and Height*, 71 PSYCHOL. REP. 587, 587 (1992) (citing studies that found positive associations between height and authority positions).

¹¹⁵ *Id.* at 589.

¹¹⁶ *Id.* at 592.

¹¹⁷ Judge & Cable, *supra* note 109, at 431–33.

¹¹⁸ *Id.* at 432–33.

¹¹⁹ Tim Gawley et al., *Height, Gender, and Authority Status at Work: Analyses for a National Sample of Canadian Workers*, 60 SEX ROLES 208, 213 (2009).

surveyed the height of employees holding authority status vis-à-vis the height of employees who did not.¹²⁰ For male employees, they found a significant difference in the average heights in the two groups, and this applies to every one of the different authority status definitions they suggested.¹²¹ This difference was significant and robust even after controlling for various other factors (such as an employee's education, social background, and other socioeconomic factors).¹²²

Studies conducted with respect to specific professions also reveal interesting results. Wayne Hensley, for example, examined the importance of height in academia.¹²³ His findings show that the average academic is taller than the average American, and that the height difference varies according to academic rank.¹²⁴ Hensley and Stulp conducted a height study with respect to football referees.¹²⁵ They revealed that in both the French League and in the 2010 international World Cup, referees who had an authority role were on average taller than their assistants, who merely had an advisory role.¹²⁶ Taller referees were assigned to more prestigious games (matches in which the visiting team had a higher ranking), suggesting that the height of the referee was also associated with his perceived competence.¹²⁷ Both Hensley and Stulp separately concluded that height is correlated with an employee's ability to secure an authority position.¹²⁸

3. Height and Income: The effect height has on career success and promotion can explain the connection between height and income. Multiple studies from several countries show that every inch of height is worth hundreds of dollars in yearly income.¹²⁹

¹²⁰ *Id.*

¹²¹ *Id.* at 215.

¹²² *Id.* For a study investigating the correlation between the level of corporate employees and their status positions at work, see Donald B. Egolf & Lloyd E. Corder, *Height Differences of Low and High Job Status, Female and Male Corporate Employees*, 24 SEX ROLES 365 (1991).

¹²³ Wayne E. Hensley, *Height as a Measure of Success in Academe*, 30 PSYCHOLOGY 40, 41–42 (1993).

¹²⁴ *Id.* at 42.

¹²⁵ Gert Stulp et al., *High and Mighty: Height Increases Authority in Professional Refereeing*, 10 EVOLUTIONARY PSYCHOL. 588, 588 (2012).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* See also Hensley, *supra* note 123, at 40 (“The perception seems to exist that taller individuals are somehow more capable, able or competent; consequently, this perception leads to taller persons being disproportionately selected for jobs.”). With respect to coal miners in India, see Soumyananda Dinda et al., *Height, Weight and Earnings Among Coalminers in India*, 4 ECON. & HUM. BIOLOGY 342 (2006); with respect to MBA students, see Irene Hanson Frieze et al., *Perceived and Actual Discrimination in the Salaries of Male and Female Managers*, 20 J. APPLIED SOC. PSYCHOL. 46, 62–64 (1990).

¹²⁹ See Anne Case & Christina Paxson, *Stature and Status: Height, Ability, and Labor Market Outcomes*, 116 J. POL. ECON. 499, 499 (2008) (“It has long been recognized that taller adults hold jobs of higher status and, on average, earn more than other workers.”); Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1011 (1993) (“Height also predicted socioeconomic characteristics among men. Among women,

Persico and others have examined the relationship between height and wages both in Britain and in the United States.¹³⁰ Using different databases,¹³¹ they explore how much height adds to a person's income, when other factors, such as gender, race, education, and socio-economic background, are controlled for (what they call "the height premium").¹³² They concluded that in Britain "every additional inch of adult height is associated with an increase in wages of 2.7 percent," and in the United States an increase of 2.5% in wages.¹³³ Measured in dollars, this amounts to \$756 in Britain (as per 1991 full-time annual wages) and \$820 in the United States (as per 1996 full time annual wages) for every inch of height.¹³⁴ Persico and his team maintain that the height premium is comparable to the premiums associated with race and gender.¹³⁵ Thus, a wage gap between two otherwise similar individuals with a height difference of six to eight inches is similar to the wage gap between Caucasians and African-American males—i.e., a 15% gap.¹³⁶ Anna Case and Christina Paxson used the same databases but with a much larger sample (4860 observations versus 1617).¹³⁷ They arrived at similar results, although their explanation to "heightism" is different.¹³⁸

Using a different data set gathered from the U.K. BioBank, Jessica Tyrell and her team find an even greater height premium.¹³⁹ Their data set includes both observable height and genetic information of more than 100,000 British individuals (Caucasians), and calculates the correlation between height and genetic information with several socioeconomic measures including annual income.¹⁴⁰ According to their findings, every

this variable had little independent value in predicting subsequent characteristics after we controlled for base-line variables. Among men, however, a 30-cm (12 in.) reduction in height was independently associated with a 10 percent increase in the prevalence of poverty. . . .").

¹³⁰ Persico et al., *supra* note 15, at 1019.

¹³¹ For Britain, they used data from Britain's National Child Development Survey (NCDS) and for the United States they used data from the National Longitudinal Survey of Youth (NLSY). These databases contain measures of height at different ages (which, as will be explained further on, is important for their research) and wages. *Id.* at 1021.

¹³² *Id.* at 1020.

¹³³ *Id.* at 1030 (emphasis added). After controlling also for family characteristics (including parents' education, occupation status, and the number of siblings), the coefficients of wages on adult height are reduced to 2.2 percent in Britain and 1.8 percent in the United States. *Id.* at 1021.

¹³⁴ *Id.* at 1030.

¹³⁵ *Id.* at 1020.

¹³⁶ *Id.* at 1049.

¹³⁷ Case & Paxson, *supra* note 129, at 528.

¹³⁸ *Id.* at 499; Persico et al., *supra* 15, at 1024. Both Persico and Case and Paxson argue that the wage difference reflects qualities that tall people possess and are rewarded in the labor market. However, whereas Persico and others associate the difference to non-cognitive abilities (namely—social dominance and self-esteem), Case and Paxson associate the differences to cognitive abilities. Case and Paxson show that taller children have higher than average cognitive abilities, and that these test scores explain a large portion of the height premium in earnings.

¹³⁹ Tyrell et al., *supra* note 25, at 1.

¹⁴⁰ *Id.*

inch in actual (observable) height leads to a £1130 increase in annual income.¹⁴¹ Using the genetic analysis, they try to assess the source of this difference, and they conclude that the height premium is a result of a mixture of direct causal effects and other factors that the study did not fully consider, such as self-esteem, stigma, and increased intelligence.¹⁴² They also find that the correlation between height and income for males is much stronger than for females.¹⁴³

Studies in additional countries also show the existence of a height premium in income. Petter Lundborg and his co-authors, for example, reach a similar conclusion about the correlation between height and salary with respect to Sweden.¹⁴⁴ According to their findings, based on a sample of 145,210 individuals, in Sweden 3.9 inches of height (10 cm) adds a 6% premium to an individual's wages.¹⁴⁵ This is a somewhat lower premium when compared to the 10% premium (for four inches of height) observed by Persico and his team, but the researchers explain that this is due to the narrow wage distribution (or relative equality in wages) that exists in Sweden. They note that in all three countries the return on four inches of height corresponds to the return on one additional year of schooling—about 10% in the United States and U.K. and about 6% in Sweden.¹⁴⁶ In other words, in order to earn the same wages, a man shorter than his counterpart by four inches would have to obtain, and pay for, an additional year of education. Hübler examined the height premium in Germany, finding the premium at 0.65% of the wages for every inch of height, but he also observed that the connection

¹⁴¹ *Id.*

¹⁴² *Id.* at 8.

¹⁴³ *Id.* See also Tuvia Melamed, *Correlates of Physical Features: Some Gender Differences*, 17 PERSONALITY & INDIVIDUAL DIFFERENCES 689, 689 (1994) (examining the effect of height and body mass on personality and salary for British employees, finding a stronger correlation for men than women).

¹⁴⁴ Petter Lundborg et al., *Height and Earnings: The Role of Cognitive and Noncognitive Skills*, 49 J. HUM. RESOURCES 141, 141 (2014).

¹⁴⁵ *Id.* at 150, 161–63.

¹⁴⁶ See *id.* at 163 (noting “that the association between height and paycheck in the three countries (wages in the United States, United Kingdom and earnings in Sweden) corresponds to the return to one additional year of schooling in the respective countries—about 10 percent in the United States and United Kingdom . . . and 6 percent in Sweden (using the data explored in this study). Hence, the height-earnings association in Sweden, though somewhat lower than the wage premiums in the United States and United Kingdom, is still substantial”). See also Olaf Hübler, *The Nonlinear Link Between Height and Wages in Germany, 1985–2004*, 7 ECON. & HUM. BIOLOGY 191, 197 (2009) (describing different ways to interpret the “maximum height effect . . . experienced by moderately tall men at 191 cm and moderately short women at 160 cm. The results of the latter are sensitive to the modelling of height effects. This pattern is due not only to endowment differences but also to unobserved factors related to productivity and discrimination”); Guido Heineck, *Up in the Skies? The Relationship Between Body Height and Earnings in Germany*, 19 LABOUR 469, 477 (2005) (describing that although findings did not indicate wage differences based on height for female workers and male East German workers, there is a “wage premium” for male workers of a certain stature from West Germany).

was non-linear.¹⁴⁷ He notes that the maximum height effect is achieved when a man is 3.9 inches above the average (in Germany, 6'3"), and then the premium slides downwards.¹⁴⁸ This corresponds with Gladwell finding that a large number of the CEOs of Fortune 500 companies are taller than the 5'9" American male average.¹⁴⁹

It is interesting to compare the wage gap caused by height differences to the wage gap caused by gender differences. According to the U.S. Bureau of Labor Statistics, as of January 2016, a woman earns on average 82.5 cents per every dollar a man does.¹⁵⁰ This is a significant wage gap—comparable to the height premium gained by being seven to nine inches taller (between two Caucasian males). However, looking more closely at the gender wage gap reveals a more nuanced picture. The gender wage gap varies widely between professions. In some professions (law, for example), the gap is extremely wide, whereas in other professions (construction or administrative work, for example) the gap is relatively small.¹⁵¹ Second, the gender wage gap varies significantly according to marital status and the number of children. Married women with children under eighteen earn 80% of their male counterparts, while unmarried women¹⁵² with no children earn 94% of their male counterparts.¹⁵³ This implies that other factors, besides employer discrimination per se, are at play in the gender wage gap—mainly the relative roles women and men serve in our (patriarchal) society.¹⁵⁴

Height discrimination, on the other hand, is more direct and blunter. Heightism cannot be systematically reasoned through short people's choices of certain professions, or because short employees devote less time to their

¹⁴⁷ Hübler, *supra* note 146, at 197, 199.

¹⁴⁸ *Id.* at 194.

¹⁴⁹ GLADWELL, *supra* note 103, at 86–87.

¹⁵⁰ *Women's Earnings 83 Percent of Men's, But Vary By Occupation*, U.S. BUREAU LAB. STAT.: ECON. DAILY (Jan. 15, 2016), <https://www.bls.gov/opub/ted/2016/womens-earnings-83-percent-of-mens-but-vary-by-occupation.htm>.

¹⁵¹ *Id.*

¹⁵² U.S. BUREAU OF LABOR STATISTICS, REPORT NO. 1058, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2014, at 30 (2015), <https://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf> (noting this "[i]ncludes never-married, divorced, separated, and widowed persons").

¹⁵³ *Id.* See Andres Erosa et al., *A Quantitative Theory of the Gender Gap in Wages*, 85 EUR. ECON. REV. 165, 184 (2016) (measuring "how much of the gender wage gap . . . is due to the fact that working hours are lower for women than for men" through "a quantitative theory of fertility, labor supply, and human capital accumulation decisions to measure gender differences in human capital investments over the life cycle").

¹⁵⁴ Some may argue that a patriarchal society holds women back, Uri Gneezy et al., *Gender Differences in Competition: Evidence From a Matrilineal and Patriarchal Society*, 77 ECONOMETRICA 1637, 1638–39 (2009), others might say that women spend more time than men with their children, even at the expense of their careers, Lyn Craig, *Does Father Care Mean Fathers Share?: A Comparison of How Mothers and Fathers in Intact Families Spend Time with Children*, 20 GENDER & SOC'Y 259, 259 (2006). I do not aim to assess the causes of the gender wage gap, but I do suggest they are complex.

careers.¹⁵⁵ It originates from perceptions that associate height with positive qualities (such as leadership, dominance, health, or intelligence) and that denote inferior qualities to short individuals.¹⁵⁶

Despite the evolutionary source of these biased perceptions, the fact that they are still prevalent in today's society causes height discrimination. Short employees are misjudged due to a trait over which they have no control, and their qualities and performance in the job are sometimes underestimated.¹⁵⁷ As the empirical research suggests, they are discriminated against no less than women or racial minorities.

II. HEIGHTISM – THE LAW

The psychological and sociological research on the prevalence of height discrimination illuminates a legal question: How does the legal system respond to this type of discrimination? In this Part, I aim to explore whether the law provides an adequate response to such heightism.¹⁵⁸ Before examining the positive anti-discrimination law, however, I begin with a normative inquiry: Should the legal system be concerned with heightism at all? I examine the justifications for addressing height discrimination, and argue that the law cannot ignore this phenomenon.

A. *Why Addressing Height Discrimination Is Important*

The justifications for addressing height discrimination, I believe, are similar to the justifications for addressing other forms of discrimination. Simply put, if there are good reasons to prohibit discrimination against women, racial minorities, or religious groups, there are also good reasons to prohibit discrimination against short individuals. In order to explain why height discrimination should be addressed, I look at the literature justifying general anti-discrimination legislation. Various scholars explain why discrimination is immoral,¹⁵⁹ and I apply their reasoning to the specific case

¹⁵⁵ Judge & Cable, *supra* note 109, at 433–39 (showing statistics that explain extent of height discrimination does not significantly change among professions, although the gap does tend to be larger in social-interaction professions).

¹⁵⁶ Judge & Cable, *supra* note 109, at 428–29.

¹⁵⁷ *Id.*

¹⁵⁸ With regard to gender-based discrimination, as early as 1971 the Supreme Court stated “the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex.” *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971). In connection with the discrimination of African Americans, the Supreme Court established that “[i]f an employment practice which operates to exclude . . . cannot be shown to be related to job performance, the practice is prohibited.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁵⁹ See, e.g., John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 427 (2002) (stating the article’s purpose “to determine both what makes discrimination morally objectionable and the circumstances under which it is appropriate for the state to suppress such morally objectionable discrimination”).

of height discrimination. Note that I do not aim to fully analyze the literature on the justifications of anti-discrimination. The literature on the subject is vast, and it is not within the scope of this Article to discuss it in depth. I only touch upon some of the main arguments given to justify anti-discrimination policies—individual equality, group equality, and dignity—and show their relevancy with heightism.

Perhaps the most intuitive justification to the prohibition of discrimination is the concept of individual equality.¹⁶⁰ Equality, according to this view, requires that any differentiation made among individuals will be justified by the individuals' ability to serve the aims being sought. Thus, if individuals are distinguished on the basis of characteristics irrelevant to the tasks they are supposed to perform, the act of differentiation becomes immoral.¹⁶¹ It is no longer meritocratic, and it offends the liberal principle of equal opportunity. As a corollary, if we reject someone for a job application or give her smaller compensation based on the fact that she is a woman, an African American, or short statured, our actions are objectionable and should be disqualified.¹⁶²

Another approach to justifying discrimination focuses not on the individual, but rather on group equality. Owen Fiss has argued that the anti-discrimination principle should not be understood as promoting individual rights, but rather as a tool for advancing underprivileged social groups.¹⁶³ The purpose of anti-discrimination law, according to his view, is to prohibit practices that aggravate existing class hierarchies in our society, redistribute wealth, and promote substantive equality.¹⁶⁴ Correspondingly,

¹⁶⁰ Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 18 (2003).

¹⁶¹ Hasnas, *supra* note 159, at 431–33.

¹⁶² A separate, albeit connected argument in favor of anti-discrimination policies, concerns the Rawlsian principles of liberalism. Elizabeth Kristen explains that Rawls warned that “accidents of natural endowment” should not be used to achieve economic advantages. Justice, she argues, mandates that society will not deprive those who start with less favorable characteristics (also bodily characteristics), because behind a “veil of ignorance” people will be inclined to choose rules that will treat everyone equally. Kristen, *supra* note 36, at 76.

¹⁶³ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 148 (1976) (defining a social group as having two conditions: (1) it is an entity—i.e. it has a distinct existence apart from its members, and you can talk about the group without reference to the particular individuals who happen to be its members at any one moment; and (2) there is inter-dependence between the group and its members). The identity and wellbeing of the members of the group and the identity and wellbeing of the group are linked. This definition applies also for short people. The group of short people exists apart from its members, because you can talk about short people, just as Randy Newman does in his song, *NEWMAN supra* note 2, or as the *Economist* does in its article, *ECONOMIST supra* note 107, without reference to any particular individual. Height is doubtless a part of people's identity, and when short stature is made fun of, short individuals as a group are offended. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 151 (1992) (asking “[w]hat explains and justifies the distinctions we make between discrimination that is wrongful and discrimination that is not,” and arguing “that answering this question is much more difficult than most people assume”).

¹⁶⁴ Fiss, *supra* note 163, at 152–57, 166.

Cass Sunstein offers the “anti-caste principle.”¹⁶⁵ According to this principle, irrelevant differences between social groups, even when highly visible, should not turn into systematic social disadvantages.¹⁶⁶ Such disadvantages trigger insults to self-respect and prevent the underprivileged groups from developing and realizing their full capacity.¹⁶⁷

And yet a third approach to discrimination focuses on the concept of dignity (moral worth). This approach assumes that all individuals have an equal moral worth,¹⁶⁸ and that every person has a basic right to be treated with dignity.¹⁶⁹ When people are distinguished in a way that denies or violates their dignity, they are treated as lesser beings, and this is inconsistent with the basic premise of moral worth.¹⁷⁰ Deborah Hellman, who developed the concept of dignity as a justification for anti-discrimination laws, explains that whether a certain classification/distinction is demeaning, and therefore whether it is immoral, depends on cultural perceptions and social context.¹⁷¹ She argues that it is not demeaning, and hence permissible, for an employer to decide not to hire people whose last name begins with the letter “A” because there is no sociocultural background and history of disenfranchising the letter “A.”¹⁷² It is demeaning, however, to apply the same policy towards women or African Americans because the cultural backdrop on the basis of which such behaviors take place is charged with a history of humiliation and a social stigma against women and blacks.¹⁷³ Larry Alexander makes a similar argument.¹⁷⁴ Alexander differentiates between biases or incorrect negative stereotypes, which are intrinsically morally wrong, and discrimination based on deep seated aversions or accurate stereotypes, which may be wrong but not intrinsically so.¹⁷⁵ What makes wrongful discrimination wrong, in his view, is the context in which it is made (culture, history, or politics), and not the act of differentiation itself. Thus, “particular types of such discrimination

¹⁶⁵ Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411–12 (1994).

¹⁶⁶ *Id.* at 2429.

¹⁶⁷ *Id.* at 2430; Rhode, *supra* note 36, at 1052.

¹⁶⁸ DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 29 (2008).

¹⁶⁹ Denise Réaume, *Dignity, Equality, and Comparison*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 7, 8 (Deborah Hellman & Sophia Moreau eds., 2013).

¹⁷⁰ See HELLMAN, *supra* note 168, at 29.

¹⁷¹ *Id.* at 25, 27.

¹⁷² *Id.* at 14.

¹⁷³ The turn to a social context connects to Fiss’s argument regarding group discrimination, but there is an important difference. Fiss looks at the present situation of the social group. See Fiss, *supra* note 163, at 151 (“But a redistributive strategy need not rest on this idea of compensation, it need not be backward looking”). Whereas Hellman believes that the history of mistreatment and the current status of the social group both matter. HELLMAN, *supra* note 168, at 14–15.

¹⁷⁴ See generally Alexander, *supra* note 163.

¹⁷⁵ *Id.* at 218.

will be wrong in particular cultures, historical eras, and contexts, and not wrong in others.”¹⁷⁶

Under any of these approaches, height discrimination is morally wrong. First, it violates the principle of individual equality, because in most jobs height is an irrelevant trait for performance. Employees do not perform better because they are tall and are no less qualified when they are short. Allowing employers to make employment decisions on the basis of an employee’s height, therefore, contradicts the principle of equal opportunity, and can be considered intrinsically impermissible per Alexander’s taxonomy.¹⁷⁷ In addition, height discrimination means giving tall people an unfair advantage on the basis of a hereditary accident of natural endowment. If behind a veil of ignorance (without knowing if you are short or tall) individuals would not support a rule favoring the tall and depriving the short, society should not implement such rule when a veil of ignorance is lifted.¹⁷⁸

Heightism is also morally wrong when considering the principles of group inequality and dignity. Although there is no intentional oppression on the basis of height, both the historical background and the social context reveal socially ingrained hierarchies between short and tall. The group of tall people is favored and admired, and the group of short people is ridiculed and demeaned. Stephen S. Hall, in his book, *Size Matters*, explains that the origins of this attitude, at least in documented history, go back thousands of years.¹⁷⁹ He tells of the Roman historian Tacitus who described with awe the Germanic tribes, just because they were tall and strong.¹⁸⁰ He recounts medieval and Renaissance scholarly literature that connects physical height with moral fiber¹⁸¹ and he tells of the Prussian King Frederick William who was obsessed with height and size.¹⁸²

The same attitude continues today. An article in the *Economist* demonstrates the meaning of height in our current society and just how demeaning being branded “short,” or “shrimpy,” can be:

Every boy knows, practically from birth that being “shrimpy” is nearly as bad as being a chicken, and closely related at that.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Cf. Kristen, *supra* note 36, at 76 (applying the Rawlsian veil of ignorance to weight discrimination).

¹⁷⁹ STEPHEN S. HALL, *SIZE MATTERS: HOW HEIGHT AFFECTS THE HEALTH, HAPPINESS, AND SUCCESS OF BOYS—AND THE MEN THEY BECOME* 175–77 (2006). And perhaps we can find evidence of heightism even before Roman times. The Bible itself tells of the way King Saul was elected for the high position as follows: “[W]hen he stood among the people, he was higher than any of the people from his shoulders and upward. And Samuel said to all the people, ‘See ye him whom the LORD has chosen, that there is none like him among all the people?’ And all the people shouted and said, ‘God save the king!’” *I Samuel* 10:23–24 (King James).

¹⁸⁰ HALL, *supra* note 179, at 175–77.

¹⁸¹ *Id.* at 177.

¹⁸² *Id.* at 170–73.

*Call a man "little", and he is understood to be demeaned. When Mr. Bush [President George H.W. Bush] called Mr. Ortega [Daniel Ortega, the president of Nicaragua] "that little man" [although Mr. Ortega stands at 5'10" tall], his primate-male cerebellum knew what it was doing. It was engaging in what may be the most enduring form of discrimination in the world.*¹⁸³

Donald Trump uses the same tactics. He named Senator Marco Rubio (5'9") "little Marco" to put him down during the primaries debate, called ABC's host "little George Stephanopoulos" in order to show his contempt to the journalist, and refers to the North Korean leader, Kim Jong Un, as "little rocket man," as if size has anything to do with the conflict.¹⁸⁴

Leslie Martel and Henry Biller, in their book *Stature and Stigma*, describe the social stigma short people face today.¹⁸⁵ They claim that "[i]ntensely pejorative stereotypes are associated with shortness . . . which are absorbed even by very young children. The short male learns to perceive his own body as defective, and the social milieu reinforces his sense of inadequacy."¹⁸⁶ The empirical account given in the first part of this Article shows the social consequences of this perception. As demonstrated, the social norm associates height with positive qualities such as health, intelligence, leadership, and social skills, and this perception negatively affects short people's well-being and their chances of success in social and employment contexts.¹⁸⁷ In language we categorize "short" as a negative adjective, and in popular culture, short characters are depicted merely as a comic relief.¹⁸⁸

There can be little doubt, therefore, that like race or gender, the cultural meaning assigned to shortness is that of inferiority. Short stature in our society, in the past as well as in the present, has become a symbol of low status, of failure (as in "selling himself short"), and even of defect. To discriminate on the basis of height is, therefore, to treat the group of short people as having an unequal moral worth. Heightism, thus, is demeaning in the sense Deborah Hellman assigns to the word, and it perpetuates the status hierarchies between tall and short in the same manner that Fiss and Sunstein

¹⁸³ ECONOMIST, *supra* note 107 (emphasis added).

¹⁸⁴ See sources cited *supra* note 13.

¹⁸⁵ MARTEL & BILLER, *supra* note 8, at 38–39.

¹⁸⁶ *Id.* at 39–40.

¹⁸⁷ See Blaker et al., *supra* note 12, at 17 ("Research shows a positive relationship between tall stature and measures of status and leadership.").

¹⁸⁸ See *supra* notes 66–67 and text accompanying notes 65–73.

have argued about racism.¹⁸⁹ It is immoral and objectionable, both with respect to short individuals and with respect to short people as a group.

In addition to the moral argument, height discrimination can also be objectionable from an economic perspective. Although there is a fierce economic debate on the desirability of anti-discrimination legislation,¹⁹⁰ many economists believe discrimination distorts the efficient allocation of

¹⁸⁹ HELLMAN, *supra* note 168, at 28–29; *see also* FISS, *supra* note 163, at 134–35 (discussing subordination dynamics); SUNSTEIN, *supra* note 165, at 2435 (noting the theory that hierarchy based on race is unnatural).

¹⁹⁰ Some economists argue that anti-discrimination laws, in general, are unnecessary because market forces can eliminate discrimination in a more efficient manner. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 84–89 (2d ed. 1971). Gary Becker claims that employers have an exogenous taste for discrimination, in the sense that discriminating employers have an aversion to associating with certain types of people—for example, white employers may have an aversion to black employees (this argument can also apply with equal force to an aversion against women, Muslims, short people, and so on). *See id.* at 39 (stating that single employers do not discriminate based on objective criteria but rather subjective bias). This aversion renders the hiring of black employees more costly, because the employer's dislike of black people adds a non-monetary cost. *Id.* at 39–41. Discriminating employers, therefore, prefer to hire more expensive white employees, in order to avoid the extra, non-monetary cost associated with hiring black ones, but as a result their costs of production rise. *Id.* at 41. Altogether, the idea is that they become less efficient than their non-discriminating peers, and in the long run they will be forced out of the market, and the discrimination will be eliminated. *Id.* Relying on Becker's model, scholars of law and economics argued that anti-discrimination laws are useless and damaging: they claim that on the one hand, the laws are very expensive to administer, and further, there is little evidence that they actually do any work to eliminate discrimination. *See, e.g.,* RICHARD A. POSNER, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1320 (1989) (describing inefficiencies). *See also* RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 2 (1992) (opining that antidiscrimination laws focus “too heavily on historical injustices . . . and too little on economic and social consequences” of their enforcement). On the other hand, Becker's model is also highly contested among economists. Kenneth Arrow, for example, showed that to sustain the model, discrimination must be widespread, because otherwise the discriminated employees will be able to find a job at non-discriminating firms for a typical worker's wages. KENNETH J. ARROW, *SOME MODELS OF RACIAL DISCRIMINATION IN THE LABOR MARKET*, at vi (1971). In this case, the salary of the non-discriminated employees (the white employees in our example) will not rise, and discriminating employees will not be less efficient than non-discriminating ones. *Id.* Edmund S. Phelps developed a model for *statistical* discrimination that shows that under certain assumptions, mainly that certain groups are indeed less productive than others, employers can actually profit from discrimination. Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972). Discriminating enables them to increase productivity and save on screening costs. *Id.* Under Phelps's assumptions, market forces not only do not diminish the discrimination, but they actually strengthen the discrimination trend. *Id.* John Donohue, however, argued that even if we accept Becker's model, and agree that in the long-run market forces can eliminate discrimination, anti-discrimination laws are still required for the interim period. Anti-discrimination laws accelerate the shift to the non-discriminatory equilibrium, and thus save the interim costs associated with discrimination in the present. John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1412, 1423–27 (1986) [hereinafter Donohue, *Is Title VII Efficient?*]. In addition, argues Donohue, the existence of discrimination imposes externalities on those offended by it (not necessarily just the victims of the discrimination). John J. Donohue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1589 (1992) [hereinafter Donohue, *Assessing Employment Discrimination Law*]. Naturally, the market does not take into account these external effects of discrimination, and therefore it may reach an inefficient outcome. *Id.*

goods and services and that it creates externalities.¹⁹¹ If, due to height discrimination, short people do not realize their full potential, then society as a whole loses. Short people do not maximize their earning potential, and they do not benefit society as much as they could.

These arguments mandate, from moral and economic perspectives, legal intervention when height discrimination takes place. Society has a duty to try and uproot the demeaning social biases against those born a few inches short, and the law should reflect this moral standpoint and aim to alter the way we view short people. I now proceed, therefore, to examine how the law actually addresses height discrimination.

B. *The Law on Height Discrimination*

Generally speaking, there are two types of behavior which are considered discrimination in an employment context and are actionable by law: disparate treatment and disparate impact.¹⁹² Disparate treatment deals with a situation where the employer intentionally treats some people less favorably than others due to the fact that they belong to a protected group under Title VII (e.g., women, racial minorities, etc.).¹⁹³ Disparate impact does not involve a direct mistreatment of a protected group, but rather an indirect adverse impact of a facially neutral employment practice.¹⁹⁴ In Subsection 1, I explain how courts viewed height discrimination under both these categories. I examine the relevant case law and show that under both categories the law does not provide an adequate response to heightism. The law usually does not recognize height discrimination itself as wrongful at

¹⁹¹ See, e.g., John J. Donohue III, *Discrimination in Employment*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 615, 615–17 (Peter Newman ed., 1998) (discussing both sides and criticizing the Becker model predictions); J. G. MacIntosh, *Employment Discrimination: An Economic Perspective*, 19 OTTAWA L. REV. 275, 306–08 (1987) (doubting efficiency of discriminatory practices); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1031 (1995) (doubting the same). It should also be noted that the economic arguments criticizing anti-discrimination laws are largely irrelevant to the solution through which I propose to address heightism. At the heart of the economic arguments against anti-discrimination laws are the enormous costs of administering Title VII litigation and the legal system's inefficiency in confronting the discrimination. The costs of litigation are arguably high, but I believe markets can do a much better job than legislation in eliminating discrimination. Yet, as will be elaborated further on, the solution through which I suggest to address heightism, at least at the first stage, does not involve litigation (in courts or in any other administrative system). It requires, first and foremost, the provision of information, which is a necessary component in reducing the discrimination in whatever mechanism we decide to use.

¹⁹² *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971) (describing both disparate treatment and impact). With respect to discrimination on the basis of religion and disability there is a third category: refusal to reasonably accommodate. This category requires the employer to accommodate the working environment to meet the needs of a religious or a disabled person. See generally *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (discussing reasonable accommodation for disability).

¹⁹³ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

¹⁹⁴ *Id.* at 609 (citation omitted).

all, and even when it does, it does so in an ineffective way. I begin with the disparate impact doctrine, which is used to disqualify minimum height requirements.

1. *Disparate Impact*

According to the disparate impact doctrine, an employment practice can be invalidated as illegal discrimination when it disproportionately harms a protected group under Title VII.¹⁹⁵ The employment practice may be facially “neutral,” but if it has a “disparate adverse impact” on women, racial minorities, or religious groups, and if it is not essential for job performance, it may be disqualified. A good example is a requirement of a high school diploma. Although fair in form, such requirement was invalidated by the Supreme Court because the Court determined it disproportionately affected African Americans and it was not essential for performing the job at hand.¹⁹⁶

Using the disparate impact doctrine, minimum height requirements for certain jobs were also invalidated. Since, on average, women are shorter than men and, on average, Asian and Latin Americans are shorter than Anglo-Americans, these protected groups are disproportionately harmed by the minimum height requirement. The Court considered such treatment illegal discrimination in *Dothard v. Rawlinson*, where the Court used the disparate impact doctrine to nullify minimum height and weight requirements for a position of prison guard in Alabama. The Court determined that the two requirements combined excluded over 30% of the female population, as opposed to only 1% of the male population, and since the State offered no explanation as to why the requirements were essential for good job performance, the requirements were found to be in violation of Title VII.¹⁹⁷ Correspondingly, in *Davis v. County of Los Angeles*, the Ninth Circuit found that the height requirements of the Los Angeles Fire Department had a discriminatory impact on the basis of national origin.¹⁹⁸ The 5’7” height requirement disqualified 41% of otherwise eligible Mexican-American applicants (far more than Anglo-American applicants)¹⁹⁹ without proof that it was manifestly related to the job of a firefighter.²⁰⁰ Courts have interpreted minimum height requirements to

¹⁹⁵ *Id.*

¹⁹⁶ *Griggs*, 401 U.S. at 430 (such requirement de facto operated “to ‘freeze’ the status quo of prior discriminatory employment practices,” and the employer was unable to prove the connection between a high school diploma and a successful performance on the job).

¹⁹⁷ *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977).

¹⁹⁸ *Davis v. County of Los Angeles*, 566 F.2d 1334, 1334 (9th Cir. 1977), *vacated as moot*, *County of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979).

¹⁹⁹ *Id.* at 1377. The average height of Hispanic-American males is 5’4.5”, as opposed to 5’8” of Anglo-American males. See 3-60 LARSON ON EMPLOYMENT DISCRIMINATION § 60.02 (Matthew Bender & Co. 2017), LexisNexis.

²⁰⁰ The County of Los Angeles later appealed to the Supreme Court; the case was vacated as moot because the discriminatory practice was subsequently remedied, but the Ninth Circuit’s decision

create at least a *prima facie* case for disparate impact discrimination. They have disqualified these practices unless the defendant was able to show that the practices were job-related or that they resulted from a bona fide business necessity.²⁰¹

But notwithstanding the invalidation of minimal height requirements, I maintain that the disparate impact doctrine does not serve as an adequate response to the heightism phenomenon. It protects the already protected Title VII groups from indirect discrimination, but in terms of prohibiting height discrimination *per se*, it is both ineffective and normatively wrong.

It is ineffective because employers who wish to discriminate on the basis of height can easily circumvent the application of the disparate impact doctrine. Instead of establishing a single uniform minimal height requirement, which has a disproportional impact on certain protected groups (those shorter than average), employers can create a different minimum height requirement for different groups—for example, females and males or Latin Americans and Anglo-Americans. This method has already been tried and accepted by the courts. Eastern Airlines created two separate sets of height requirements for flight attendants—one for males (between 5’7” and 6’2”) and the other for females (between 5’2” and 5’9”).²⁰² This policy was challenged by a female flight attendant, but her claim was rejected.²⁰³ The court determined that the policy had no discriminatory effect because it had the same impact on males and females.²⁰⁴ Thus, since policies discriminating against short people can be designed so that they do not constitute discrimination against other protected classes, a direct approach should be adopted.

But more importantly, the disparate impact doctrine is not sufficient to address heightism because it misconceives the social perceptions that are the basis of height discrimination. It does not capture the gender stereotyping height discrimination makes—that in this case works more against men and less against women. At the heart of heightism is the social expectation for males to fit the stereotypical western body size. Just as women suffer from the societal expectation to be thin (and perhaps fragile), men suffer from the

regarding the disparate impact of the minimal height requirement remained unchanged. *County of Los Angeles v. Davis*, 440 U.S. 625, 629 (1979).

²⁰¹ See 3-60 LARSON ON EMPLOYMENT DISCRIMINATION, *supra* note 199, § 60.02; Allen L. Schwartz, Annotation, *Employer’s Height or Weight Requirement as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.), 29 A.L.R. Fed. 792 § 2[a] (1976) (“Although employers’ height or weight requirements for employees are not specifically alluded to in Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.), it has been held that such requirements are within the proscriptions of Title VII if they have a discriminatory effect as to protected groups . . . and if such requirements cannot be justified as bona fide occupational qualifications . . .” (internal citations omitted)).

²⁰² *Smith v. E. Airlines, Inc.*, 651 F. Supp. 214, 216 (S.D. Tex. 1986).

²⁰³ *Id.* at 220.

²⁰⁴ *Id.* at 218.

societal expectation to be tall and massive. We want our men to be strong, dominant, and tough. When they are not, we do not see them fit to be leaders, CEOs, policemen, or firefighters. But if the expectation to be tall and powerful is largely associated with the male gender, it makes little sense to confront height discrimination via the disproportional impact minimal height requirements have on women or on other protected groups. The disparate impact minimal height requirements have on protected groups is but a derivative side effect of the main problem of heightism—the fact that short people, especially short men, are perceived as inferior to others. They are hired less, promoted less, and paid less—not because they are women or because they are of a certain race or religion—but precisely because they are short.²⁰⁵ The height is the issue, not the effect height discrimination has on the currently protected groups.

Thus, if we want to uproot heightism we need to address the biases people have against short people directly, and not address the side effects such biases have on other groups in the society. Height discrimination should be addressed through the disparate treatment doctrine, which is designed to address direct discrimination, and not indirectly through the disparate impact doctrine. Unfortunately, however, the disparate treatment doctrine is also of little help.

2. *Disparate Treatment*

Notwithstanding moral and other justifications for addressing heightism, courts have rejected claims based directly on height discrimination. Despite the undeniable prevalence of height discrimination (as shown in the previous part), the disparate treatment doctrine is not used to challenge heightism. Height discrimination, it seems, does not fit the doctrinal framework of the disparate treatment discrimination.

One possible reason for the misfit between height discrimination and the disparate treatment doctrine is evidentiary. According to legal doctrine, in disparate treatment, as opposed to disparate impact, it is not enough that the outcome is discriminatory—the plaintiff is required to show a discriminatory motive.²⁰⁶ The court needs to consider the decision maker's state of mind and determine whether the discrimination was intentional and not just random.²⁰⁷ With respect to height discrimination, however, this seems hard to do. As explained before, the discrimination is often unconscious and the evidence is mainly statistical. The data may show discrimination towards short people in general, but it is difficult to demonstrate intentional discriminatory behavior towards any short individual/employee in

²⁰⁵ DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 28 (2010).

²⁰⁶ *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988).

²⁰⁷ Leora F. Eisenstadt & Jeffrey R. Boles, *Intent and Liability in Employment Discrimination*, 53 AM. BUS. L.J. 607, 613 (2016).

particular. But despite this evidentiary difficulty, it seems unlikely that this is the reason height discrimination is not considered illegal disparate treatment practice. With regard to other types of discrimination, in the past at least, courts permitted plaintiffs to establish systemic disparate treatment cases, which focused on pattern and practices towards protected groups as a whole and not just towards one particular individual.²⁰⁸ Courts also agreed to infer intent from circumstantial evidence and, in particular, from statistical evidence regarding the effects of the discriminating practice on the group.²⁰⁹ Thus, in *Hazelwood School District*, the Court explained that where gross statistical disparities can be shown, that alone may constitute prima facie proof of a pattern or practice of discrimination.²¹⁰ Although the strength of statistical evidence diminished in *Wal-Mart*,²¹¹ recently in *Tyson Food*, the Court clarified such evidence is still permissible in appropriate cases.²¹² There is no reason, therefore, why height discrimination statistics should not be employed to prove systemic disparate treatment height discrimination cases. And in any event, courts have never relied on this reason to reject a height discrimination case.

The reason courts use to dismiss height discrimination cases is that height is not a protected quality under Title VII. Title VII does not mention

²⁰⁸ THOMAS R. HAGGARD ET AL., UNDERSTANDING EMPLOYMENT DISCRIMINATION 53–54 (2d ed. 2008); MICHEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 107 (8th ed. 2013); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 119 (2003).

²⁰⁹ RAMONA L. PAETZOLD & STEVE L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 1:9 (2018); Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 835–36 (2017).

²¹⁰ *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–08 (1977) (explaining that absent the discriminatory practices, the composition of employees should be representative of the racial and ethnic composition of the population, and when the plaintiff shows a disparity from the representative composition it is indicative of discrimination); see also *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (illustrating another example of statistical evidence constituting prima facie proof of employment discrimination).

²¹¹ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356–58 (2011) (rejecting plaintiff's statistical evidence as showing prima facie proof of disparate treatment); see also Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 405 (2011) (suggesting that after *Wal-Mart*, statistical evidence is not sufficient to prove systemic disparate treatment, but rather plaintiffs must show a company-wide policy of discrimination); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 480 (2011) (analyzing the impact of *Wal-Mart* and the need to go beyond statistical evidence to establish employment discrimination). For a retrospective view of *Wal-Mart* after several years, see Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1072–77 (2017) (arguing that *Wal-Mart*'s effect on the disparate treatment doctrine was not as severe as had been expected: "A basic survey of Title VII cases decided by federal courts in the wake of *Wal-Mart* reveals that the bark—the decision's potential impact on the future of implicit bias evidence—may have been bigger than its bite.").

²¹² *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016); see also Robert G. Bone, *Tyson Foods and the Future of Statistical Adjudication*, 95 N.C. L. REV. 607, 610 (2017) ("In an important decision last term, *Tyson Foods, Inc. v. Bouaphakeo*, the Supreme Court changed course and breathed new life into statistical adjudication." (citation omitted)).

short people as a protected group²¹³ and, in light of the legislature's omission, courts refuse to give remedy to people discriminated against on the basis of their height. Short people remain remediless, even in situations which would surely count as discrimination with respect to Title VII protected groups. In the case of *Smith v. Wilkinsburg*, for example, the court affirmed a rule requiring police officers to be at least 5'8" tall.²¹⁴ Despite the fact that the Police Commission failed to show that height is a necessary, or even a relevant, quality to the performance as a police officer, the court refused to accept a height discrimination argument as a basis for legal action.²¹⁵ The court explained:

Plaintiff cites no authority to support his obvious contention that "height" discrimination constitutes a violation of Title VII. To the contrary, that the statutory language means precisely what it says was recently confirmed by the Fourth Circuit in *King v. Seaboard Coast Line Railroad Co.*, 538 F.2d 581, 583, 13 FEP Cases 122-123 (4 Cir. 1976)²¹⁶

The court also refused to give remedy to Gloria Ekerman, a 4'10" woman working in the Chicago police force.²¹⁷ Her deputy chief officer, Lesniak, told her, "Boy are you short. How tall are you? How can you do this job?"²¹⁸ But the court did not see this remark as illegal discrimination.²¹⁹ The statute, according to the court, does not prohibit discrimination on the basis of height or size, and Lesniak never made any explicit remark towards Ekerman that could be connected to the protected forms of discrimination (such as sex discrimination).²²⁰

It seems, therefore, that the federal legislature's decision not to include height or size as a protected quality under Title VII is the reason why height discrimination is not seen as illegal disparate treatment. Courts see the protected groups of Title VII as a closed list, and they do not afford protection to groups not mentioned in the statute. Indeed, the few scholars who have noticed the height discrimination phenomenon have advocated for the legal prohibition on discrimination to extend to height based discrimination.²²¹ They suggest either broadening the list of protected groups under Title VII to include short people or enacting similar state legislation,

²¹³ 42 U.S.C. § 2000e-2 (2000).

²¹⁴ *Smith v. Wilkinsburg*, No. 75-513, 1977 U.S. Dist. LEXIS 15926, at *1, *5 (W.D. Pa. May 12, 1977).

²¹⁵ *Id.* at *6.

²¹⁶ *Id.* at *5.

²¹⁷ *Ekerman v. City of Chicago*, No. 01 C 9686, 2003 U.S. Dist. LEXIS 3775, at *7-8 (N.D. Ill. Mar. 12, 2003).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ RHODE, *supra* note 205, at 93.

so as to allow a remedy for those who are discriminated against due to their height.²²² Experience shows, however, that in jurisdictions that have expressly prohibited height discrimination in their statute, nothing has changed. Even when available, height discrimination provisions are not used and the legislation, although important *de jure*, is *de facto* dead letter.

Michigan enacted the Elliot-Larsen Civil Rights Act.²²³ Section 37.2202 of the Act precludes an employer from refusing to hire or recruit, or from otherwise discriminating against an individual due to his/her height (among other discrimination categories), and it allows for a broad range of remedies (including reinstatement to employment or monetary damages) when discrimination occurs.²²⁴ Victims of discrimination can either sue in court, or submit complaints to the Department of Civil Rights.²²⁵ But despite the progressive statute, short individuals hardly take advantage of it. According to Deborah Rhode, in the two-year period between 2005 and 2007, there were only thirteen complaints involving height, seven of which also involved weight issues.²²⁶ None of these complaints resulted in a final judgment of discrimination, and they were either rejected or settled.²²⁷ Even fewer cases of height discrimination ended up in the Michigan court. In more than forty years, between 1976 and 2017, there were only five cases involving height discrimination decided in the courts;²²⁸ two of the cases were dismissed²²⁹ and in one case, the plaintiffs suffered from achondroplasia dwarfism—a disability.²³⁰

The same is true with respect to local governments that enacted anti-height discrimination provisions. The City of Santa Cruz's ordinance states that it is the intent of the Council "to protect and safeguard the right and opportunity of all persons to be free from all forms of arbitrary discrimination, including discrimination based on . . . physical characteristics."²³¹ The definition of the term "physical characteristic" includes height, and the ordinance permits the imposition of fines on discriminating employers.²³² Isaac B. Rosenberg, however, examined the

²²² *Id.* at 154; Rosenberg, *supra* note 35, at 910.

²²³ MICH. COMP. LAWS ANN. § 37.2101 (West, Westlaw through 2019 Reg. Sess.).

²²⁴ *Id.* §§ 37.2202, 37.2801.

²²⁵ *Id.* §§ 37.2801, 37.2602.

²²⁶ RHODE, *supra* note 205, at 132–33.

²²⁷ *Id.* at 133.

²²⁸ See Rosenberg, *supra* note 35, at 944 n.288 (explaining that Michigan has only received a handful of height-based cases during this period, most of which have failed).

²²⁹ *Berry v. Way Bakeries, Inc.*, No. 248841, 2005 Mich. App. LEXIS 459, at *10–13 (Mich. Ct. App. Feb. 22, 2005); *Terry v. Daimlerchrysler Corp.*, No. 263339, 2005 Mich. App. LEXIS 3202, at *4–6 (Mich. Ct. App. Dec. 20, 2005).

²³⁰ *Snyder v. Chrysler Grp., LLC*, No. 15-cv-12238, 2016 WL 3213388, at *2 (E.D. Mich. June 10, 2016).

²³¹ SANTA CRUZ, CAL., MUN. CODE § 9.83.010 (2019).

²³² *Id.* §§ 9.83.020(12), 9.83.120(2).

use of the local ordinance and could not find even a single complaint alleging height discrimination since 1992.²³³ The San Francisco code also has various provisions that prohibit discrimination on the basis of height.²³⁴ The City's human rights commission issued compliance guidelines to prohibit weight and height discrimination, which require "all agencies, business establishments and organizations" not to discriminate on the basis of weight or height when providing services, employment, or housing.²³⁵ But here again, according to Rosenberg, no complaints of height discrimination were filed.²³⁶ The potential legal remedy is not used, and the existence of an anti-height discrimination statute makes little difference. The District of Columbia,²³⁷ Urbana, Illinois,²³⁸ Howard County, Maryland,²³⁹ and Madison, Wisconsin,²⁴⁰ all have anti-personal appearance discrimination provisions that can include height; but in all the jurisdictions the provision is a dead letter. In the District of Columbia there is only one height discrimination case on record since 1981;²⁴¹ in Urbana there is no height discrimination case reported in the last thirty years since the ordinance was enacted;²⁴² and in Howard County there is just one appearance-based complaint between 2003–2007, and it remains unclear whether the case was based on height.²⁴³

These figures cast doubt on the efficiency of anti-height discrimination clauses in general and on proposals to adopt them in state or in the federal system. As shown, even when the legislature expressly allows the possibility for a disparate treatment discrimination claim on the basis of height, no height discrimination claims are filed. Short people do not take advantage of the potential of these sections, and employers are hardly deterred by them.

²³³ Rosenberg, *supra* note 35, at 943 n.287.

²³⁴ S.F., CAL., ADMIN. CODE, ch. 12, § 12A.1 (2001). The City requires all city departments and all its contracting agencies to include a non-discrimination clause, including non-height discrimination, in all of their contracts. *Id.* at ch. 12B, § 12B.2(a).

²³⁵ See S.F., CAL. POLICE CODE art. 33, §§ 3303, 3304 (2002), http://sf-hrc.org/sites/default/files/Police_Code_Article%2033_6-13-2016_1.pdf.

²³⁶ Rosenberg, *supra* note 35, at 943 n.287.

²³⁷ D.C. CODE § 4-1001.1 (2001).

²³⁸ URBANA, ILL., MUN. CODE ch. 12 (2007).

²³⁹ COUNTY OF HOWARD, MD., CODE § 12.200(II) (1992).

²⁴⁰ MADISON, WIS., CODE OF ORDINANCES ch. 39 (2007).

²⁴¹ Rosenberg, *supra* note 35, at 944 n.288. See also Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1084 (2009) (noting the lack of enforcement with the District of Columbia code).

²⁴² RHODE, *supra* note 205, at 127.

²⁴³ *Id.* at 130–31 (reporting that the Equal Opportunity Commission of Madison, Wisconsin receives the largest number of complaints, but according to her account none of the complaints relates to height discrimination).

III. NAMING, BLAMING, AND CLAIMING HEIGHT DISCRIMINATION

The analysis leaves us with a conundrum. On the one hand, we see that height discrimination is a widespread phenomenon, and that short people often suffer because of their height. These individuals are not hired. They are overlooked in promotions. They are not adequately compensated. On the other hand, the legal tools that can address heightism, even when available, are left unused. Laws that offer remedies against height discrimination (whether state or local) remain a dead letter, as if the problem does not exist at all. As the economist, John Kenneth Galbraith, once said, the bias towards tallness and against shortness is one of society's "most *blatant* and *forgiven* prejudices."²⁴⁴

In this Section, I seek to better understand the sources of this conundrum—to examine why, despite the fact that height discrimination is undoubtedly and blatantly harmful, society, and short people in particular, remain passive and even forgiving about it. To do so I combine two strands of literature. The first is the socio-legal literature about the initiation of legal disputes in general. The second is the psychological literature about the attribution of certain behaviors to discrimination. The combination of these two strands of literature suggests that the initiation of legal proceedings with respect to height discrimination is especially difficult.

A. *The Process Through Which Injurious Experiences Become Legal Disputes*

Problematic and injurious experiences are by no means rare in our everyday life.²⁴⁵ It is not uncommon for employees to be treated unfairly or be discriminated against, for consumers to be damaged by products they consume, or for shareholders and other stakeholders to be harmed by corrupt corporate decisions. But notwithstanding the abundance of injurious experiences, only a portion of such experiences transform into legal disputes.²⁴⁶ In most cases, the injured party remains passive, and the experience passes with no compensation or remedy. Why do some injurious experiences give rise to legal disputes, while other experiences, which are perhaps no less harmful, do not have a similar impact? What is the process through which an injurious experience is transformed into a dispute that will result in a remedy for the injured party?

²⁴⁴ GORDON L. PATZER, THE POWER AND PARADOX OF PHYSICAL ATTRACTIVENESS 120 (2006) (emphasis added) (quoting John Kenneth Galbraith, *Galbraith: Turning Economics to Show Biz*, CHRISTIAN SCI. MONITOR, May 18, 1977, at 22).

²⁴⁵ William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633 (1980–81) ("Trouble, problems, personal and social dislocation are everyday occurrences.").

²⁴⁶ *Id.* at 636.

In their seminal article *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, William Felstiner, Richard Abel, and Austin Sarat explore this question.²⁴⁷ They identify three stages that are required in order for a legal dispute to emerge from an injurious experience, and they analyze the causes and effects of the transformation between the stages. Since their analysis, I believe, is very much relevant to the impact of height discrimination, I briefly discuss the different stages in which disputes emerge.

The first stage, which Felstiner, Abel, and Sarat call “naming,” is the initial perception that an injury has transpired. In this stage, a person realizes that a certain experience has devalued her in some way, and she can observe (“name”) the injury.²⁴⁸ They argue that the perception of an injurious experience is by definition illusive because it often depends on initial societal perceptions. Thus, if society does not perceive an experience as disvaluing, individuals will not perceive it as such as well, even if subjectively they feel harmed.²⁴⁹ After an injury is perceived (“named”), the second stage of the transformation is the attribution of the injury to actions or omissions of another. It does not suffice that the victim understands that she is injured; she must also hold someone else responsible for the injury (“blaming”).²⁵⁰ The third and final stage of the transformation is called “claiming.” Claiming takes place when the blame, attributed in the second stage, is voiced to the person who is believed to be responsible or to a competent authority in a request for remedy.²⁵¹ In case the responsible party accepts the claim, then the grievance is settled, and no legal action is necessary. In case the claim is rejected, then a dispute between the parties is created.²⁵²

The transformation of an injurious experience through the three stages into a legal dispute is by no means a certain or predictable process. It is not clear under what circumstances an experience will be perceived as injurious, whether the injury can and will be attributed to a legal person, and whether the grievance will be voiced and transformed into a dispute.²⁵³ The transformation depends on the parties involved, their economic means and personality, the relationship among them, the social perceptions that

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 635.

²⁴⁹ For example, if society does not perceive an infringement of privacy as disvaluing, people will fail to “name” an invasion of their privacy as an injury, even if subjectively they are harmed and offended.

²⁵⁰ Felstiner and his team distinguish blaming from general complaints. Felstiner et al., *supra* note 245, at 635 (explaining that, in order for a grievance to be initiated, a person must attribute her injury to actions or omissions of a certain party).

²⁵¹ *Id.* at 635–36.

²⁵² *Id.* at 636.

²⁵³ *Id.* at 637.

surround the experience, and many more factors.²⁵⁴ One important factor is the area of law to which the injurious experience can be categorized—contract, torts, consumer protection, property, and so on. A study by Richard Miller and Austin Sarat examined the likelihood of claiming in injurious experiences involving damages of \$1000 or more.²⁵⁵ According to their findings, in most legal contexts (specifically torts, consumer protection, and property), more than 70% of the individuals who have an injurious experience make claims for redress, and about two-thirds of these claims transform into legal disputes.²⁵⁶ A noticeable exception, however, are injurious experiences connected to discrimination. Here, despite a relatively high percentage of individuals reporting a discriminatory experience, the claiming rate drops to below 30%.²⁵⁷ Jeffrey FitzGerald reports a similar pattern in Australia. According to FitzGerald, the claim rate in torts, consumer claims, and landlord claims are all above 80%, while discrimination grievances have the lowest claim rate of below 50%.²⁵⁸

The low claim rate in discriminatory experiences is often attributed to difficulties in the claiming stage. Victims of discrimination are aware of the injury they suffered (they name the injury), and they attribute the injury to the perpetrator's discriminatory behavior (they blame the perpetrator), but they are reluctant to make the claim. They are concerned with the social stigma that may ensue from such claim, are not sure whether they have sufficient evidence, or are concerned about the employment repercussions.²⁵⁹ Deborah Brake and Joanna Grossman argue that the low claim rate stems from a problematic legal doctrine.²⁶⁰ They argue that, on the one hand, Title VII does not give employees who suffer from discrimination sufficient time to process the experience, and on the other hand, Title VII does not give those employees sufficient protection from a

²⁵⁴ *Id.* at 639–51. See Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400, 400–16 (1991) (comparing “claiming” rates among different countries).

²⁵⁵ Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 534–46 (1980–81). Miller and Sarat report on a relatively wide household survey—1000 randomly selected households from five federal districts. The interviewer in the survey inquired whether the household was involved in injurious experience involving damages of \$1000 or more, and if so, whether the household filed a legal claim. For a survey of researches of “claiming” in different areas of law, see Kritzer, *supra* note 254, at 402–06.

²⁵⁶ Miller & Sarat, *supra* note 255, at 561.

²⁵⁷ *Id.* at 563–64.

²⁵⁸ Jeffrey FitzGerald, *Grievances, Disputes & Outcomes: A Comparison of Australia and the United States*, 1 LAW CONTEXT 15, 31 (1983); see also W. A. Bogart & Neil Vidmar, *Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment*, in ACCESS TO CIVIL JUSTICE 1, 9, 13 (Allan C. Hutchinson ed., 1990) (reporting various discrimination grievances in Canada).

²⁵⁹ For a research survey on the subject, see L. Camille Hébert, *Why Don't “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 737–42 (2007).

²⁶⁰ Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 905–16 (2008).

potential retaliation by their employers.²⁶¹ According to Brake and Grossman, under these legal constraints, many discriminated employees decide not to file a claim at all, or they miss the short period in which they had a chance to file it.²⁶²

These explanations hold true also with respect to height discrimination. Just as with other types of discrimination, height discrimination victims are not sufficiently protected from their employers and they may suffer social stigma as a result of their complaint. In addition, legal doctrine on height discrimination is not yet settled, and so the chances of success, even in jurisdictions that have a specific height discrimination statute, are relatively uncertain. However, with respect to height discrimination, the obstacles are even more severe. Victims of height discrimination, I argue, have difficulties not only in the claiming stage of the initiation of legal disputes, but also, and more importantly, in the “naming” stage. The victims of heightism do not perceive the experiences they undergo as an injury, and they do not attribute the maltreatment to discrimination. In the following, I use psychological research to develop this point and explain the difficulties in the “naming” of height discrimination.

B. *The Attribution of Certain Behaviors to Height Discrimination*

Generally speaking, people usually do not attribute bad outcomes or negative experiences from which they suffer to discrimination.²⁶³ They tend to attribute the outcomes to their own behavior or to their lack of skills, rather than to the attitude of the decision maker who mistreated them (their employer, their evaluator, their teacher, and so on).²⁶⁴ These difficulties, I

²⁶¹ *Id.* at 867–70, 894, 902–06.

²⁶² *Id.* at 934; see also Laura B. Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* (Am. Bar Found., Research Paper No. 08-04, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313 (analyzing whether employment discrimination litigation provides meaningful remedies for targets of employment discrimination).

²⁶³ See Derek R. Avery et al., *What Are the Odds? How Demographic Similarity Affects the Prevalence of Perceived Employment Discrimination*, 93 J. APPLIED PSYCHOL. 235, 236 (2008) (“We should note that research . . . has shown some individuals to be reluctant to attribute negative experiences to discrimination.”). For a summary of some of these studies, see Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1292–1300 (2012). Interestingly, although people tend to minimize their own personal discrimination, they do recognize that the group they belong to as a whole suffers from discrimination. Thus, as Faye Crosby explains, women acknowledge that women in general are being discriminated against, but they deny their own personal discrimination. See generally Faye Crosby, *The Denial of Personal Discrimination*, 27 AM. BEHAV. SCIENTIST 371 (1984). Crosby points out the irony in this attitude as follows: “The major premise states; [sic] ‘Women are discriminated against.’ The minor premise states: ‘I am a woman.’ But instead of the expected conclusion (‘therefore, I am discriminated against’), women seem to say, ‘Phew, that was a close call.’ Such reasoning smacks of denial.” *Id.* at 372.

²⁶⁴ The tendency to minimize personal, as opposed to group, discrimination was demonstrated in multiple psychological researches. Karen Ruggiero and Donald Taylor, for example, conducted an experiment designed to examine people’s perception of situations in which discriminatory practices may

argue, are even more severe when it comes to height discrimination. The characteristics of height discrimination render it elusive, and due to our cognitive patterns the “naming” of height discrimination is complicated.

In her article, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, Katie Eyer reviews the psychological literature concerning the perception of discrimination.²⁶⁵ She explains that, similar to the perception of objects (such as a table or a chair),²⁶⁶ we decide

have played a role. See generally Karen M. Ruggiero & Donald M. Taylor, *Coping with Discrimination: How Disadvantaged Group Members Perceive the Discrimination that Confronts Them*, 68 J. PERSONALITY & SOC. PSYCHOL. 826, 832–33 (1995). In their experiment, participants, female university students, were purposefully given a failing grade in a writing test and were then asked to explain their bad results. *Id.* The results of the experiment show that although the participants were told, supposedly in confidence, that the majority of the judges that graded the tests are known to discriminate against women, participants tended to attribute their failure to the quality of their answers much more than to possible discrimination. *Id.* at 833–35. In all cases, except when participants were told that 100% of the judges were discriminating, the vast majority of them believed that their grade was due to the quality of their writing, rather than to the flawed grading of a biased judge. *Id.* at 836. Other experiments, using a different design, reached comparable conclusions. Collette Eccleston and Brenda Major described to participants, 160 Latino-American Students, a set of negative, albeit ambiguous, experiences, in which discrimination may have played a role (such as maltreatment at a restaurant, a job interview, mistreatment by the police, and more). Collette P. Eccleston & Brenda N. Major, *Attributions to Discrimination and Self-Esteem: The Role of Group Identification and Appraisals*, 9 GROUP PROCESSES & INTERGROUP REL. 147, 151–53 (2006). They asked the participants whether they attribute the maltreatment in the situation described to discrimination or to other more benign reasons. Although all of the described scenarios indicated at least suspicious behavior (by a landlord/restaurant owner/policeman, etc.), participants rated the probability they were connected to discrimination on average by less than 40%. *Id.* at 153. Most participants did not connect the described scenarios with ethnicity, but related them to factors other than prejudice. *Id.* at 154. Correspondingly, Teri Elkins and James Phillips described fictitious employment scenarios and examined people's perceptions as to the likelihood of gender discrimination. Teri J. Elkins & James S. Phillips, *Evaluating Sex Discrimination Claims: The Mediating Role of Attributions*, 84 J. APPLIED PSYCHOL. 186, 190 (1999). Their experiment shows that unless the evidence alluding to discrimination was strong, most of the participants did not believe discrimination took place. *Id.* at 193–96. They attributed the negative outcome to the female-plaintiff or to other reasons that were unconnected to prejudices against women. *Id.* at 196. For more discussion of how members of stigmatized groups process discrimination, see Brenda Major et al., *Attributions to Discrimination and Self-Esteem: Impact of Group Identification and Situational Ambiguity*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 220, 221–29 (2003); Robin E. Roy et al., *If She's a Feminist It Must Not Be Discrimination: The Power of the Feminist Label on Observers' Attributions About a Sexist Event*, 60 SEX ROLES 422, 428–29 (2009); Gretchen B. Sechrist et al., *When Do the Stigmatized Make Attributions to Discrimination Occurring to the Self and Others? The Roles of Self-Presentation and Need for Control*, 87 J. PERSONALITY & SOC. PSYCHOL. 111, 117–21 (2004); Anna Berlin, *The Effects of Differential Discrimination Cues on Attributions for Failure: Implications for Subsequent Performance* (Aug. 2006) (unpublished M.S. Thesis, Ohio University), https://etd.ohiolink.edu/pg_10?0::NO:10:P10_ACCESSION_NUM:ohiou1156451468.

²⁶⁵ Eyer, *supra* note 263, at 1292.

²⁶⁶ Generally, in order to decide the nature of a certain object, the human brain often relies on pre-existing mental prototypes. We take the incoming data we receive about the object, and compare it to an existing mental template we already have that our brain associates with the object. Eyer, *supra* note 263, at 1311–12. If there is a match, the object is identified. If there are too many divergences, then the template is rejected. People, for example, have a mental prototype of a table as a flat surface on legs. If our senses observe a flat surface on legs, our brain knows it is a table. If the surface is smaller and has a back support, we know to classify it as a chair. *Id.* at 1312. Following experiments, Eyer maintains that

whether a certain behavior is discriminatory by using a mental template of discriminatory behavior. Our brain holds a kind of prototype of how discrimination should look and to assess whether a certain behavior or outcome is discriminatory we compare the incoming information about the behavior to the mental discrimination prototype we have. To the extent there is a match, we classify the behavior as discriminatory; otherwise, we explain the behavior or outcome through other causes (often reasons connected to our own performance).²⁶⁷

Psychological research characterizes several common features of this mental template we tend to have of discrimination.²⁶⁸ It does not mean that absent one or more of these features no one will perceive a behavior as discriminatory, but it does mean that most people are less likely to do so. The literature identifies five important features of the discrimination proto-type:²⁶⁹ (1) discrimination needs to be intentional;²⁷⁰ (2) discrimination needs to cause some sort of harm;²⁷¹ (3) discrimination should be manifested within the “classic disparate treatment dyads” (i.e., man discriminating against woman, white discriminating against black, and

the same procedure works not only with respect to objects, but also with respect to more complex and abstract concepts or phenomena, such as discrimination. *Id.*

²⁶⁷ Eyer, *supra* note 263, at 1312–13; Brenda Major & Tessa L. Dover, *Attributions to Discrimination: Antecedents and Consequences*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 213, 216 (Todd D. Nelson ed., 2009).

²⁶⁸ Eyer, *supra* note 263, at 1313.

²⁶⁹ Eyer details four of these features in her model. *Id.* at 1314–15. She does not view the domain in which the behavior takes place (the fourth feature) as a separate feature of the discrimination mental template.

²⁷⁰ See Mindi D. Foster & Kenneth L. Dion, *The Role of Hardiness in Moderating the Relationship Between Global/Specific Attributions and Actions Against Discrimination*, 51 SEX ROLES 161, 161–68 (2004) (relating actions to discrimination); Diane M. Kappen & Nyla R. Branscombe, *The Effects of Reasons Given for Ineligibility on Perceived Gender Discrimination and Feelings of Injustice*, 40 BRIT. J. SOC. PSYCHOL. 295, 301–03 (2001) (comparing discrimination attributions and personal attributions); Stefanie Simon et al., *Pick Your Perspective: Racial Group Membership and Judgments of Intent, Harm, and Discrimination*, 22 GROUP PROCESSES & INTERGROUP REL. 215, 215–17, 229–30 (2019) (arguing that intentional discrimination can be difficult to prove when subtle) [hereinafter Simon et al., *Judgments of Intent, Harm, and Discrimination*]; Janet K. Swim et al., *The Role of Intent and Harm in Judgments of Prejudice and Discrimination*, 84 J. PERSONALITY & SOC. PSYCHOL. 944, 956–57 (2003) [hereinafter Swim et al., *The Role of Intent and Harm*] (discussing the influence of intent on judgments).

²⁷¹ See Swim et al., *The Role of Intent and Harm*, *supra* note 270, at 944, 956 (“Consistent with the current conceptualization of prejudice and the legal concept of adverse impact, harm played an important role in judgments of prejudice and discrimination.”); Janet K. Swim et al., *Judgments of Sexism: A Comparison of the Subtlety of Sexism Measures and Sources of Variability in Judgments of Sexism*, 29 PSYCHOL. WOMEN Q. 406, 408–10 (2005) (“[E]xpressions of traditional gender-role and hostile sexist beliefs are more likely to be identified as sexist than expressions of modern and benevolent sexist beliefs.”); Lisa Feldman Barrett & Janet K. Swim, *Appraisals of Prejudice and Discrimination*, in PREJUDICE: THE TARGET’S PERSPECTIVE 11, 22 (Janet K. Swim & Charles Stangor eds., 1998) (predicting that “attributions to prejudice will become more likely as the negative consequences and the behavior in question become increasingly contiguous”); Simon et al., *Judgments of Intent, Harm, and Discrimination*, *supra* note 270, at 216 (positing that “people consider intent and harm when making judgments of racial discrimination”).

so on),²⁷² (4) the discrimination should occur in a domain in which the victim's group is usually negatively stereotyped;²⁷³ and (5) the victim of the discrimination should not have control over her stigmatized status.²⁷⁴ Unfortunately, except for the last feature, height discrimination does not fit these attributes, and so we fail to recognize it as discrimination.

The first feature of our discrimination prototype is intent.²⁷⁵ If we believe someone intentionally treats a member of a protected group (like women or racial minorities) less favorably, then we are more likely to view that behavior as discrimination.²⁷⁶ The centrality of the intent in our mental template can be seen even in the legal doctrine. In order to prove disparate treatment discrimination, the victim needs to show the perpetrator's intent to discriminate; otherwise, the legal system does not recognize the discrimination.²⁷⁷ Height discrimination, however, is usually not intentional. As we have seen, it is an unconscious behavior, stemming from deep evolutionary mechanisms, rather than from a desire to inflict harm on the short or to confer a benefit on the tall.²⁷⁸ As Rosenberg points out, in most cases employers do not have formal rules barring short applicants from being

²⁷² Eyer, *supra* note 263, at 1301. See Angela J. Krumm & Alexandra F. Corning, *Perceived Control as a Moderator of the Prototype Effect in the Perception of Discrimination*, 38 J. APPLIED SOC. PSYCHOL. 1109, 1110–11 (2008) (discussing how “perceptions of discrimination are influenced by individuals’ prototypes” and “individuals are highly sensitive to stimuli that fit their prototypes of discrimination”); Avery et al., *supra* note 263, at 236 (“Prior research has shown individuals are more likely to detect discriminatory treatment when it is consistent with their expectations.” (citations omitted)); Mary L. Inman & Robert S. Baron, *Influence of Prototypes on Perceptions of Prejudice*, 70 J. PERSONALITY & SOC. PSYCHOL. 727, 732 (1996) (“[O]ur expectancies (i.e., stereotypes) regarding prejudice influence our tendency to describe potentially biased behavior as an instance of prejudice.”); Stefanie Simon et al., *Prototypes of Discrimination: How Status Asymmetry and Stereotype Asymmetry Affect Judgments of Racial Discrimination*, 35 BASIC & APPLIED SOC. PSYCHOL. 525, 530–31 (2013) [hereinafter Simon et al., *Status Asymmetry and Stereotype Asymmetry*] (discussing how prototypes impact attributions to discrimination differently among White and Black Americans).

²⁷³ Laurie T. O’Brien et al., *How Status and Stereotypes Impact Attributions to Discrimination: The Stereotype-Asymmetry Hypothesis*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 405, 405 (2008); Simon et al., *Status Asymmetry and Stereotype Asymmetry*, *supra* note 272, at 531.

²⁷⁴ See, for example, three psychological studies addressing discrimination and beliefs about the controllability of weight: Bruce Blaine & Zoe Williams, *Belief in the Controllability of Weight and Attributions to Prejudice Among Heavyweight Women*, 51 SEX ROLES 79, 83 (2004); Jennifer Crocker et al., *The Stigma of Overweight: Affective Consequences of Attributional Ambiguity*, 64 J. PERSONALITY & SOC. PSYCHOL. 60, 67 (1993); Brenda Major et al., *Antecedents and Consequences of Attributions to Discrimination: Theoretical and Empirical Advances*, 34 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 251, 288–89 (2002).

²⁷⁵ Eyer, *supra* note 263, at 1314.

²⁷⁶ See *supra* note 270 (listing research addressing the role of intent in our understanding of discrimination).

²⁷⁷ See *supra* notes 206–07 and accompanying text (describing the requirement to show intent in employment discrimination disparate treatment claims).

²⁷⁸ See *supra* notes 74–79 and accompanying text (discussing the evolutionary and biological reasons for height preference).

hired, denying their promotion, or cutting their pay.²⁷⁹ They do not intend these consequences—they just act this way.²⁸⁰ With no intent on the side of the discriminating employer, an employee has difficulties in “naming” the height discrimination, and he may not even realize he was rejected or not promoted because of his height.²⁸¹

The second feature of our mental template is harm.²⁸² Here actually, height discrimination seems to fit the bill. As we have seen, empirical evidence suggests that every inch of height is worth about 2.5% of wages, and this can amount to thousands of dollars a year.²⁸³ In addition, short individuals are sometimes not hired due to their height, and when they are hired they are not promoted as well as their taller peers.²⁸⁴ This can definitely be considered a concrete and tangible harm.

The problem with height discrimination in this respect is that, as opposed to the more recognized (traditional) forms of discrimination, there is no one apparent reference point against which we can measure the harm. Usually we infer discrimination when two similarly situated persons are different in one characteristic, *X*, and are treated differently because of that characteristic (*X* being irrelevant to the situation, like gender, race, ethnicity, etc.). We then look at how a person with *X* is treated vis-à-vis a person with no-*X*, and we can measure the harm the discrimination causes.²⁸⁵ With height discrimination, however, there is no one binary characteristic that one person has and the other does not. We are all placed along a height continuum, and we cannot divide employees into distinct separate groups of short/tall (as we do with men/women, white/black, Muslim/Christians, Latin/Anglo-Americans, etc.). With no distinct groups, there also is no clear benchmark (population with no-*X* character) against which the harm from height discrimination can be measured.²⁸⁶ To whom should an employee compare himself—a person one inch taller, an average height person, a

²⁷⁹ Rosenberg, *supra* note 35, at 925. In very few occasions do we see a formal policy discriminating against short people. Employers do not formally state that they will accept employees only above a certain height, or that employees above 5’8” will earn a bonus salary.

²⁸⁰ See *id.* at 914–15 (describing ways employers exhibit “[h]eight-based prejudice” in hiring, firing, and promotion absent formal rules).

²⁸¹ See Kappen & Branscombe, *supra* note 270, at 310–11 (describing how, without “explicit causal information,” disadvantaged individuals may assume personal causes for differential treatment).

²⁸² Eyer, *supra* note 263, at 1314.

²⁸³ See *supra* notes 129–46 and accompanying text (discussing research studies that show the relationship between height and income).

²⁸⁴ See *supra* notes 55–128 and accompanying text (listing research related to the relationship between height and hiring and promotion).

²⁸⁵ Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 744 (2011) (“If an employer has two employees who are similar but for *X* characteristic, and the employer treats Employee *X* worse than Employee Not-*X*, we are generally comfortable inferring that *X* is the basis, or cause, for the different treatment.” (footnote omitted)).

²⁸⁶ Cf. Rhode, *supra* note 36, at 1068 (discussing the continuum which attractiveness and grooming standards fall under).

really tall employee? The height comparator is elusive, and so the harm heightism inflicts is less observable.

Moreover, let us hypothetically assume we have concrete evidence showing that a certain employer compensates employees according to their height. Although all employees perform the same job, the employer awards taller employees a higher salary. Just as described in the empirical data, for every inch of height, the employer increases the salary by 2.5%. Based on this information, who should be allowed to make a height discrimination claim? Should an average height employee (of 5'8") be allowed to assert a discrimination claim vis-à-vis a taller employee (of 6'2"), or should height discrimination claims only be available to employees below a certain height? If we allow a height discrimination claim to all employees, then, relying on the empirical research presented earlier, most of us are entitled to a remedy. Height discrimination is continuous, and so average height employees are also harmed when compared to above average height employees. But giving average (or even above average) height employees a right of action obviously makes little sense. It cannot be that almost everybody is discriminated against on the basis of height, because then there is no real discrimination. On the other hand, if we do not allow such claim, then below what height should we allow discrimination claims, and why? A 5'3" person is only slightly more discriminated against than a 5'5" person. Is there any logic in allowing the former a legal remedy while denying a remedy from the latter? Can we justify any certain threshold of height below which legal action may be pursued, when every threshold seems equally arbitrary?

These questions make height discrimination more evasive than other forms of discrimination. Although it clearly exists and it clearly harms short individuals, the harm is not as lucid as in other forms of discrimination. As a result, it does not fit our cognitive template, and so we tend not to perceive it as discrimination—certainly not as an actionable form of discrimination.

The third and perhaps most important feature of our mental discrimination template is that the discrimination should be associated with the "classic disparate treatment dyad."²⁸⁷ People perceive discrimination when a man is discriminating against a woman or when a white person is discriminating against a black person, but when discrimination is manifested in other forms—women against men, or men against men—we find it hard to grasp.²⁸⁸ By and large, the psychological literature explains this relatively rigid view of discrimination in two connected ways.²⁸⁹ The first explanation

²⁸⁷ Eyer, *supra* note 263, at 1301, 1313–14.

²⁸⁸ *Id.* at 1313–15; Avery et al., *supra* note 263, at 236; Inman & Baron, *supra* note 272, at 737; Krumm & Corning, *supra* note 272, at 1109, 1122–23; Simon et al., *Status Asymmetry and Stereotype Asymmetry*, *supra* note 272, at 406, 410.

²⁸⁹ See Inman & Baron, *supra* note 272, at 728 (offering three possible explanations—the third explanation being that we expect certain types of people (men, white, wealthy) to be generally intolerant

connects to our vision of the “classic perpetrator” vis-à-vis “the classic victim.”²⁹⁰ According to this explanation, we imagine the perpetrator of the discrimination to be from a strong socioeconomic group and the victim to be from a weak one. In gender-based discrimination, the perpetrator is expected to be male and the victim female; in racial discrimination, the perpetrator must be white and the victim black, and so on. When the actual perpetrator and the actual victim do not fit these initial stereotypes, we tend not to attribute the behavior to discrimination.²⁹¹ A second explanation does not concern the identity of the perpetrator/victim per se, but rather the question of whether they belong to the same social “group.”²⁹² According to this explanation, embedded in our mental template of discrimination is the notion that discrimination takes place between members of two distinct social groups rather than between members of the same group. The more racial/ethnic/gender dissimilarity there is between the perpetrator and the victim, the more likely we are to perceive the discrimination.²⁹³ Using the results of a national survey of employees, for example, Derek Avery and his team show that perceived racial/ethnic discrimination was less prevalent among those with same race/ethnicity supervisors than among those with distinct race/ethnicity.²⁹⁴

Height discrimination, though, fits neither the classic perpetrator-victim dyads nor the in-out group distinctions. Height discrimination is usually

of others; later literature meshed this third explanation into the first explanation (the “prototype” explanation)); see, e.g., Avery et al., *supra* note 263, at 236–37 (discussing the reasons those outside of the white male prototype are more likely to perceive discrimination).

²⁹⁰ Inman & Baron, *supra* note 272, at 728.

²⁹¹ Inman and Baron conducted an experiment that demonstrates this tendency. They presented to participants identical set of events, but changed the identities of the perpetrators and victims (male/female or white/black). They found that, although the facts were exactly the same, participants were much more likely to view behavior as prejudice in the classical dyad (male discriminating female or white discriminating black) than in all other combinations (woman discriminating man, man-man or woman-woman; black discriminating white, white-white or black-black). See *id.* at 728; see also Michael M. Harris et al., “I Think They Discriminated Against Me”: Using Prototype Theory and Organizational Justice Theory for Understanding Perceived Discrimination in Selection and Promotion Situations, 12 INT’L J. SELECTION & ASSESSMENT 54, 56 (2004) (applying the prototype model to discrimination between different groups); Miriam J. Rodin et al., *Asymmetry in Prejudice Attribution*, 26 J. EXPERIMENTAL SOC. PSYCHOL. 481, 503 (1990) (discussing whether discriminatory behavior directed by the weak toward the strong is seen as more indicative of prejudice than by the strong towards the weak).

²⁹² Inman & Baron, *supra* note 272, at 728.

²⁹³ Christine M. Riordan et al., *Relational Demography Within Groups: Through the Lens of Discrimination*, in DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES 37, 53 (Robert L. Dipboye & Adrienne Colella eds., 2005).

²⁹⁴ See generally Avery et al., *supra* note 263; see also Tamar Saguy & Lily Chernyak-Hai, *Intergroup Contact Can Undermine Disadvantaged Group Members’ Attributions to Discrimination*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 714, 715 (2012) (showing that a focus on communalities between groups can decrease the tendency of the disadvantaged group members to attribute experienced negative outcomes to discrimination).

directed against men, sometimes white men, by their employers (males or females). This definitely does not fit the classic (prototypical) model of discrimination. Since the victims of height discrimination are often members of a class that is perceived as privileged and dominant (males), our brain fails to conceive maltreatment that they suffer as discrimination.²⁹⁵ We imagine the victims of discrimination as members of the weaker classes of society (females or racial or religious minorities), and when the victims are white males, the facts just do not fit the discrimination template. Moreover, in the case of heightism the perpetrator and the victim often belong to the same social “group.” Both can be men, both can be Caucasians, both can come from the same socioeconomic background. The victim and the perpetrator see themselves as equal in many social attributes (except for height), and so discrimination seems less conceivable. The idea that someone with the same social/demographic characteristics discriminates “within-group” seems unreasonable, and the victim is more likely to explain the perpetrator’s behavior through other reasons.²⁹⁶

This connects to the fourth feature of the mental template—the domain in which the discrimination takes place. Research shows that our perception of discrimination is connected not only to the behaviors and identities of the perpetrator and victim, but also to the context in which the behavior occurs.²⁹⁷ People tend to perceive discrimination in domains where the victim’s group is negatively stereotyped, rather than in domains where the victim’s group is positively or neutrally stereotyped.²⁹⁸ Laurie O’Brien and her team show that the likelihood that people perceive a rejection of a female applicant as discrimination increases as the stereo-typicality of the required job skills are more masculine.²⁹⁹ Studies participants have also been shown to be more likely to attribute the rejection of a black person to discrimination when the victim was rejected in a stereotypically white domain.³⁰⁰ In height discrimination, however, most of the victims are males. Usually, the workplace is not a domain where we would expect to see discrimination against males because males, especially white males, are advantaged in employment spheres. They earn more money, they are the top executives, and they are the “dominant” gender/race. To perceive discrimination against a white male, even if he is short, is difficult, because we do not expect this to occur in a working environment.³⁰¹ Thus, although short men are hired,

²⁹⁵ Simon et al., *Status Asymmetry and Stereotype Asymmetry*, *supra* note 272, at 531.

²⁹⁶ Avery et al., *supra* note 263, at 243–44.

²⁹⁷ Simon et al., *Status Asymmetry and Stereotype Asymmetry*, *supra* note 272, at 531.

²⁹⁸ *Id.* at 526.

²⁹⁹ O’Brien et al., *supra* note 273, at 407.

³⁰⁰ Simon et al., *Status Asymmetry and Stereotype Asymmetry*, *supra* note 272, at 531.

³⁰¹ We do expect discrimination against short men in the social sphere. Short men know that women prefer men who are taller than they are, and it may not come as a surprise when a short man has less success in dating sites than his taller friends. For the social aspects of heightism see sources cited *supra* note 80.

promoted, and compensated less than their taller peers, their gender overshadows the discrimination they suffer and we tend to overlook it.

All these combined features of height discrimination—the perpetrator’s lack of intent, the imperceptible harm, the unconventional form (in terms of perpetrator/victim), and the unlikely domain—render height discrimination hard to perceive. We fail to see the maltreatment short people often receive, and when we do, we attribute it to other causes (such as lack of talent, misfortune, or character flaws). Although, as clearly demonstrated in the first part of this Article, heightism is at least as common and pervasive as other forms of discrimination, society does not recognize (“name”) the biases against short people as discrimination, and it fails to address them. Indeed, scholars have pointed out, “naming” an injurious experience is perhaps the most difficult stage in the transformation of such an experience to a legal dispute,³⁰² and in height discrimination the “naming” stage does not take place.

IV. ADDRESSING HEIGHT DISCRIMINATION

So, should the legal system give up on height discrimination? Should society accept height biases as a given and allow the mistreatment of short individuals to continue without providing a remedy?

Despite the “negative” experiences in Michigan and other jurisdictions,³⁰³ I maintain that height discrimination should be addressed. As I have argued, heightism is morally wrong, and it should not be dismissed as just a funny anecdote. Like the current protected forms of discrimination, it demeans its victims, it regards them as unequal, and it harms their wellbeing—all due to no fault of their own. Given this moral standpoint, the legal system cannot ignore heightism. It should offer victims of height discrimination a remedy and pave way to social change. The way I suggest height discrimination should be addressed, however, is different from the model adopted in Michigan and in other places. I suggest focusing on the naming of heightism, rather than just providing a potential cause of action, which is hardly used anyway.

The importance of “naming” as an initial step to social change can be demonstrated through the experience of women’s battle against sexual harassment.³⁰⁴ The practice of sexual harassment is hardly a recent phenomenon. Women have suffered unwanted sexual advances from their male superiors for centuries, but the practice has become a basis for legal

³⁰² Felstiner et al., *supra* note 245, at 635.

³⁰³ See text accompanying notes 223–43 (emphasizing that even in jurisdictions that provide a remedy for height discrimination, it is often not utilized).

³⁰⁴ See Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 1–3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (discussing the importance of unifying women’s experiences with sexual harassment and naming it discrimination).

action (sexual harassment law) only since the 1970s.³⁰⁵ As Wendy Pollack describes, prior to the 1970s, “sexual harassment simply happened to women.”³⁰⁶ Each event was isolated, and the phenomenon did not even have a proper name. The unwelcome sexual advances were considered each victim’s personal matter, and there was no connection between the harassments and the broader phenomenon of gender hierarchy.³⁰⁷ This perception changed with the rise of the modern women’s liberation movements. With the advent of these movements, women started sharing their experiences.³⁰⁸ They discovered that the unwelcomed sexual advances they suffer in the work place are common, and that the supposedly individual and isolated incidents of harassment are actually a broad and in many senses political phenomenon.³⁰⁹ They began developing a sense of community (“sisterhood”), and raised women’s and society’s awareness to the fact that women should not have to put up with such behavior. As Catharine MacKinnon explains: “Through consciousness raising, women grasp[ed] the collective reality of women’s condition”³¹⁰ The consciousness raising, or in other words the “naming” of sexual harassment as a sociopolitical phenomenon, in turn led to a social change.³¹¹ Sexual harassment was labeled an illegal sex discrimination act, and the practice of subjecting an employee to unwelcomed sexual advances became prohibited under Title VII.³¹²

If we want heightist practices also to be eliminated, or at least reduced, the same pattern should be adopted.³¹³ Society must first raise the awareness and recognize heightism as a problem (be conscious about height discrimination), and only then, either through market practices³¹⁴ or, as in

³⁰⁵ Prior to the 1970s, courts did not view sexual harassment in the workplace as an employment issue or a sex issue. It was perceived as a personal matter and was dealt, in the rare cases where women had the courage to complain, as part of rape law or tort law. *See id.* at 4–8 (explaining how many lawyers and activists began a movement against sexual harassment).

³⁰⁶ Wendy Pollack, *Sexual Harassment: Women’s Experience vs. Legal Definitions*, 13 HARV. WOMEN’S L.J. 35, 41 (1990).

³⁰⁷ *Id.*

³⁰⁸ Elvia R. Arriola, “What’s the Big Deal?” *Women in the New York City Construction Industry and Sexual Harassment Law, 1970–85*, 22 COLUM. HUM. RTS. L. REV. 21, 30 (1990).

³⁰⁹ *Id.* at 30; Pollack, *supra* note 306, at 39.

³¹⁰ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 J. WOMEN CULTURE & SOC’Y 515, 536 (1982). Even the term “sexual harassment” itself is the product of a “consciousness-raising session” conducted in Cornell University. *See Siegel, supra* note 304, at 8.

³¹¹ Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227, 1234–35 (1993).

³¹² Siegel, *supra* note 304, at 8–11.

³¹³ Felstiner and his team demonstrate the importance of naming through the example of asbestos litigation. Felstiner et al., *supra* note 245, at 635. They explain that asbestosis has become a recognized disease and a basis for compensation claims only “when shipyard workers stopped taking for granted that they would have trouble breathing after ten years . . . and came to view their condition as a problem.”

³¹⁴ *See* sources cited *supra* note 190 (discussing economic debate regarding the desirability of anti-discrimination legislation).

the case of sexual harassment, through legal remedies, can we begin a move towards a change.

Recognizing heightism as a social problem (naming height discrimination), however, may be challenging due to the special features of height discrimination. It is difficult for three reasons. First, as previously explained, heightism does not fit the behavioral patterns our brain is accustomed to identify as discrimination.³¹⁵ We easily attribute height discriminatory behaviors to benign factors, such as the victim's lack of talent, misfortune, or character flaws, and we perceive or ascribe nothing wrong with the employer's behavior.³¹⁶ But, if there is nothing wrong with the employer's behavior, then there is also no reason to initiate a change. A short person's rejection or reduced pay is not a social problem, but rather an isolated personal experience—not even necessarily associated with the victim's height. Second, as opposed to gender or racial and religious groups, short people are unorganized.³¹⁷ The short statured do not see themselves as a community, and there is no "brotherhood" among them. Since short people are uncoordinated, they are also unaware that the discrimination they suffer (even when perceived) is common to other short individuals. Injurious discrimination patterns are not shared, and heightism is viewed as a unique and sporadic experience, rather than as the widespread and pervasive social phenomenon that it actually is. As we know from the feminist movements (with regard to sexual harassment), sharing common experiences is key to understanding and naming a phenomenon as a social problem,³¹⁸ and with respect to heightism it is simply not done. Third, with respect to height discrimination, there are no interest groups that raise the public's awareness to the phenomenon.³¹⁹ Although there are dozens of empirical academic studies proving that heightism exists,³²⁰ these studies are rarely brought to the general public's attention. There is no underlying force, such as the women's movements in the 1970s, that brings the data to public attention, and that points out that short people are discriminated against just like other protected groups. As a result, heightism remains unnoticed, and a short

³¹⁵ See sources cited *supra* notes 263–66 (describing the psychological underpinnings of discrimination).

³¹⁶ *Id.*

³¹⁷ See Riordan et al., *supra* note 293, at 37, 43 (discussing demographic distinctions of ingroup/outgroup differentiation but failing to mention height as a possible basis on which groups could be formed).

³¹⁸ See MacKinnon, *supra* note 310, at 536 (describing the feminist movement as dependent on a collective understanding and rejection of objectification).

³¹⁹ See *Interest Groups*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/> (last visited Apr. 15, 2020) (displaying a list of all registered interest groups that lobby the federal government, which includes no interest groups that advocate for short-statured individuals).

³²⁰ See Scott Griffiths et al., *The Tall and the Short of It: An Investigation of Height Ideals, Height Preferences, Height Dissatisfaction, Heightism, and Height-Related Quality of Life Impairment Among Sexual Minority Men*, 23 BODY IMAGE 146, 147 (2017) (chronicling the history of empirical interest in heightism).

individual does not know the phenomenon exists (cannot name the problem), even if he directly suffers from it.

This is where I believe the law needs to step in. It should collectivize the individual experiences of the short-statured, and through the collectivization process, the gravity and pervasiveness of the problem will be recognized. It should bring height discrimination to our collective legal consciousness and make employers and employees aware that they are liable to discriminate or to be discriminated against on the basis of height. This should be done through the provision of information. If the individual stories are added up to create a statistical database, which will be published and readily available to the public, the naming of height discrimination will more likely take place. Short employees will be able to perceive the discrimination, because they will know what to look for.

My suggestion is, therefore, as follows: employees in public organizations or in large firms will indicate their height to their employer at the start of their employment. The employer will collect the information and will be obligated to calculate the correlation between the employees' height and various variables. The employer will then publish an annual report, which will provide information on the following issues: the number of employees in the organization/firm below average height,³²¹ the distribution of height in each rank in the organization/firm (what is the height of employees in each rank),³²² and the connection between employees' salaries and their height—whether taller employees indeed earn more. The report shall not include names or any other details on individual employees, but will include anonymous statistical information. It will be distributed to employees and included in the firm's financial reports (to the extent the firm is obligated to publish such reports). If the reports indicate that height discrimination exists in the organization, then education and training for managers and employees about height discrimination should accompany the reports. The training will increase awareness to heightism and will help managers and employees to change their behavior.

This mechanism for reducing height discrimination is supported by research.³²³ Psychological literature indicates that awareness of implicit biases can go a long way towards reducing those biases, because awareness

³²¹ This piece of data will show whether there is discrimination in hiring.

³²² This piece of data will show the connection between height and promotions.

³²³ For a survey on the research on the reduction of implicit biases, see PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012) [hereinafter RESOURCES FOR EDUCATION], <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.259.1089&rep=rep1&type=pdf>. For a summary of strategies designed to reduce implicit biases, see NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS (2012), <http://www.iowanebraskanaacp.org/wp-content/uploads/2017/09/implicitbias.pdf> [hereinafter STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS].

motivates an inner change.³²⁴ When people realize that they have acted prejudicially, and if the values they hold oppose such prejudiced conduct, then they feel motivated to engage in prejudice-reducing practices.³²⁵ They tend to feel guilty about their biased responses, and their guilt prompts a shift in their behavioral patterns. In one study, for example, white subjects were presented a multiracial series of faces. After the presentation, the subjects were told (falsely)—that they reacted very positively to white faces, moderately positively to Asian faces, and negatively to black faces.³²⁶ After being given the bogus responses, most subjects reported an elevated feeling of guilt.³²⁷ These subjects were subsequently more willing to engage in prejudice-reducing behaviors and to change their supposedly racial practices.³²⁸ Correspondingly, Margo Monteith shows that people who generally condemn racial behaviors (“low prejudiced”) have self-regulatory mechanisms that facilitate the inhibition of prejudiced responses.³²⁹ When low prejudiced people are presented with evidence that they have engaged in prejudiced practices (of which they were unaware), they are willing to undertake self-regulatory efforts in order to prevent future prejudiced responses.³³⁰ Devine and her team view implicit biases as a habit.³³¹ They developed a habit-breaking intervention which included feedback, education, and training to help people eliminate their biases.³³² Their study showed using these practices succeeds in reduction of implicit biases and produces long term positive effects.³³³ Nilanjana Dasgupta summarizes the research on awareness to implicit biases as follows:

[E]ven when stereotypes and prejudices are automatically activated, whether or not they will bias behavior depends on how *aware* people are of the possibility of bias, how *motivated*

³²⁴ STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS, *supra* note 323, at 5 (explaining that awareness is crucial to combatting implicit bias).

³²⁵ Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268 (2012).

³²⁶ David M. Amodio et al., *A Dynamic Model of Guilt: Implications for Motivation and Self-Regulation in the Context of Prejudice*, 18 PSYCHOL. SCI. 524, 526–27 (2007).

³²⁷ *Id.* at 527.

³²⁸ *Id.*

³²⁹ Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts*, 65 J. PERSONALITY SOC. PSYCHOL. 469, 470 (1993).

³³⁰ *Id.* See also Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231, 1235 (2007) (detailing how the authors studied the effects of implicit racial biases on the treatment physicians suggest to white and black patients, showing that generally, implicit bias had a significant effect on the suggested treatment, but the effect on the treatment dramatically reduced when the physicians were aware that implicit bias was the focus of the research).

³³¹ Devine et al., *supra* note 325, at 1268.

³³² *Id.*

³³³ *Id.* at 1276.

they are to correct potential bias, and how much *control* they have over the specific behavior.³³⁴

According to these parameters, raising awareness to height discrimination may be particularly useful. Perhaps, as opposed to other forms of discrimination (against women, blacks, Jews, or homosexuals), it seems that most people do not want to intentionally harm short people. Usually people do not consciously hate or fear the short-statured, so they will be more inclined to change their heightist practices. As the research indicates, awareness is most efficient in changing a prejudiced behavior when the implicit bias is contrary to the person's explicit values.

Providing information on height discriminatory practices (via reports) can thus have a double positive effect. First, it may reduce height prejudice behaviors. If employers, managers, and co-workers will see the statistics, they will understand the scope of the height discrimination in their organization. They might feel guilty about it, and consciously try to control their automatic preferences for the tall. They may hire more short individuals, promote them more often, and compensate them better. Even if the implicit biases remain, their external manifestations will be moderated. Second, the provided information will raise the consciousness to heightism. From trees of isolated discrimination events, which are usually not even attributed to discrimination, the reports will enable us to see the forest. We will be able to see what the scientific research has already pointed out: that height discrimination is a pervasive social phenomenon; that it harms a large portion of the population; and that it is unjust and should be eradicated.

Raising the awareness to heightism, in turn, could have legal implications. If more people will talk about and fight against height discrimination, legislators in more jurisdictions will join the battle. Additional height discrimination statutes may be legislated, which will give short people more venues to seek remedies. Moreover, and more importantly, unlike the current situation in Michigan and other local jurisdictions, height discrimination statutes will be more effective. Due to the published information in the reports, naming will take place, and when naming occurs, blaming and claiming can follow.

I do not think that height discrimination will vanish due to the published information, nor do I think that people's biases will disappear. I do believe, however, that as people become more aware of this phenomenon, height discrimination may decrease. Heightism will, at least, be a recognized phenomenon, and not something people do without even realizing.

³³⁴ Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 157 (2004).

CONCLUSION

Height discrimination undoubtedly exists. This Article presented dozens of studies that show that people have implicit biases against the short-statured and demonstrates the effects of these biases on short people's lives. From employers who do not want to hire short applicants, to employers who do not promote short employees. From the problems short people experience in dating and in other social interactions, to the decreased wages they receive due to their height. As Natalie Angier points out, heightism "is one of the last accept[ed] prejudices,"³³⁵ and it is severe and pervasive.

Given the proportions of the heightism phenomenon, this Article examined why it is not properly addressed. Why do the Federal System and most states not even view it as discrimination, and why, even in jurisdictions that provide an option for remedy, is the option not used? The answer given in this Article is "naming." Height discriminatory practices are not perceived as illegal disparate treatment discrimination because they do not fit our mental template of discrimination. The characteristics we usually associate with discrimination—intentional behavior, clear harm, specific perpetrator/victim, and specific domains—do not exist in height discrimination, and so we fail to categorize it as discrimination. The victims of a height-discriminatory behavior tend to attribute the behavior and its outcomes to their own character flaws, and the perpetrators and society may not even notice it. To overcome the naming difficulty, this Article suggests the provision of information. Information will raise the public's awareness to heightism and will help short people understand the nature of the injurious experiences they undergo. Conscious employers (and people in general) are less likely to discriminate, and conscious victims are more likely to fight against the discrimination.

I am not sure the battle will be successful. Implicit biases, certainly those so deeply ingrained in our brains, are hard to change. I am sure, however, that the battle is worth fighting. People should not be praised just because they were born tall, and they should not be demeaned simply because they were born short. And it is high time we do something about this.

³³⁵ Angier, *supra* note 37 (emphasis added).