THE (RELATIVE) UNIMPORTANCE OF CASE LAW

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I. The Law-Politics Divide

Both legal academics and political scientists study the behaviors of courts. But there are stark differences in their approaches to doing so. Classical legal scholarship involves the careful parsing of the texts of judicial opinions, particularly those emanating from the appellate courts. The nuances of the language in appellate opinions are interpreted and used to predict what future courts will do, particularly when those future courts are legally obligated to follow the law set out in prior opinions. Political scientists, and specifically those doing empirical work on the courts, have limited interest in the careful parsing of judicial texts. Their interest is in modeling courts as political institutions. The primary tools used to test these models are case outcomes. Many of those working in this vein view the lengthy explanations that appellate courts provide for their decisions as nothing but ex post facto justifications. In their models, what matters most in determining court decisions are the policy preferences of the judges, typically proxied by their political affiliations.¹ In more complex models, judges are viewed as constrained by outside factors such as the desire for approval from various audiences they care about, the likely responses of other political actors such as the legislature and the executive branch and so on. This latter set of models, for example, recognizes that judges themselves frequently care about the language in cases; indeed, they sometimes exert effort to gain control over the language—suggesting that at least they think that the impact of a case occurs through both reasoning and outcome.² Indeed, at some point, if the

¹ Faculty at Vanderbilt, Duke and UNLV, respectively. Thanks to Devon Carbado, Catherine Fisk, Jack Knight, Kim Krawiec, David Levi, Leticia Saucedo and Jeff Stempel for conversations about this project. Special thanks to Kate Bartlett for her encouragement.
² For discussions of these competing models, see e.g., Richard A. Posner, How Judges Think (2008); Frank B. Cross, Decision Making in the U.S. Courts of Appeals (2007); Tracey E. George, Developing a Positive Theory of Decisionmaking on the U.S. Courts of Appeals, 58 Ohio St. L. J. 1635 (1998); Frank B. Cross, Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance, 92 Nw. U. L. Rev. 251, 315 (1997).
specified range of constraints in the complex political science models is expanded enough, for example, to view judges as highly constrained by well-established precedent, the law and political science produce the same predictions. The key, therefore, is to identify circumstances where the two models produce different predictions. Areas where the prior case law is ambiguous and where judges are likely to hold strong policy preferences are prime candidates for comparing the predictions of the different models.\(^3\)

Oversimplifying, legal academics believe in the careful parsing of judicial opinions, with little interest in the aggregation of raw outcomes, and political scientists pay little attention to legal texts, focusing their attention on large aggregations of outcomes. The primary goal, with both approaches is to predict future court behavior. Neither approach, though, has much to say about the mechanics by which the law in appellate opinions, whether in terms of nuanced language or outcome, is transmitted into the behavior of actors on the ground. Yet, in theory, the reason why both legal academics and political scientists are exert effort in modeling and predicting court behavior is because court behavior influences the operation of law in society. The assumption must be that the dictates of courts are important determinants of the behavior of local actors.

In particular, the dictates of appellate opinions are important because they influence and alter the behavior of actors on the ground such as judges, administrative agencies, private lawyers and potential litigants. That is so because those on the ground will seek to predict future court behavior and act in anticipation of those predictions. If, for example, a case comes down from a high court, finding for the defendant, but with language that suggests that plaintiffs will find it easier to win in the future, then potential plaintiffs should be more willing to sue under the law model that attaches primary importance to the parsing of language in opinions. In other words, there should be more litigation under the law model. If, however, outcomes alone matter and the outcome in that same case, with the good language for future plaintiffs, went against the plaintiffs,

\(^3\) See Jack Knight, Are Empiricists Asking the Right Questions About Judicial Decisionmaking, 58 Duke L. J. (2009).
then the message that potential plaintiffs might take is that they will lose in the future. Following the political science model, the amount of litigation would likely fall. The two approaches share a common foundation stone though. At the center of both is the judge. He or she is either operating under the strict constraints of precedent or is giving rein to policy preferences.

The question that interested us at the outset of this project was: How does case law translate into the understandings and behaviors of actors on the ground? What all three of us authors took for granted though was that case law was important; especially when it came from a high enough court. Where we differed was in terms of our predictions of whether local actors, such as the defense bar, would give greater importance to the language in appellate opinions or their outcomes. Put differently, we took for granted the centrality of the judge in the ultimate narrative.\(^5\) Our research findings, however, question the centrality of the judge in influencing behavior on the ground. We found little evidence that either the language of case law or its outcomes mattered much for local actors (outcomes mattered a bit more).

A 2006 decision of the Ninth Circuit Court of Appeals, sitting en banc, provided us with a vehicle to ask our questions. The case, Jespersen v. Harrah’s Operating Co., involved a claim under Title VII, the federal antidiscrimination law.\(^6\) The plaintiff, Darlene Jespersen, a bartender at Harrah’s Reno Hotel & Casino for nearly twenty years, had challenged her employer’s policy that mandated that female employees wear makeup. When she refused to comply with the policy, Harrah’s fired her. Given that the same requirement was not imposed on men, but men were required to shave and keep their hair cut relatively short, Harrah’s policy and Jespersen’s dismissal set up a classic case of gender discrimination.

Darlene Jespersen lost before each court she brought her claim, the federal district court, a Ninth Circuit panel on appeal, and the Ninth Circuit, reviewing the panel’s

\(^5\) Cf. Cass Sunstein & Thomas J. Miles, The New Legal Realism (ssrn id. 1008989) (articulating this judge centrality).
\(^6\) 444 F.3d 1104 (9th Cir. 2006) (No. CV-N-01-0401-ECR-VPC), 2002 WL 32980097
decision en banc. The case generated considerable attention in the press, both before and after the decision, for at least three reasons. First, the issue was straightforward and understandable: Is it gender discrimination for an employer to mandate that its female employees wear makeup? For some, cases like this undermine anti-discrimination laws because of the triviality of the issue involved. After all, most women working in the casinos would voluntarily wear makeup. For others, mandating that women wear makeup, with no similar restriction on men, demonstrated the willingness of employers and society more generally to constrain and discipline women while allowing men wider latitude in their workplace choices. Second, the case involved a casino. Las Vegas casinos provide a highly sexualized make-believe environment. If a casino employer could not require its female bartenders to wear makeup, did that mean that these employers couldn’t require their female cocktail servers to wear skimpy outfits, high heels, and so on? Restricting the casinos’ ability to dictate sexualized costumes for female cocktail servers, some would say, would undermine the very idea behind the Las Vegas casino industry, which is to provide a fantasy experience. Third, there was the undercurrent of conflict between the interests of the gay community and the women’s rights movement. The case was litigated by LAMBDA Legal, a preeminent gay rights organization. There were also numerous suggestions that the plaintiff, Darlene Jespersen, was likely gay. The prominent women’s rights groups, by contrast, were not playing a visible role either in the litigation or in the debates in the press. Finally, when the case came down, after months of deliberation by the en banc panel, the majority opinion was written by then chief-judge Mary Schroeder, a well-respected liberal woman judge. We suspect that many had expected Judge Schroeder to be a definite vote in favor of Darlene Jespersen, not only given Schroeder’s liberal credentials but also because she had been the author of the Ninth Circuit’s case in Gerdon v. Continental Airlines, that had struck down weight restrictions for women flight attendants some two decades earlier. Just as surprising, was that the loudest and most articulate (in addition to humorous) voice in dissent, was prominent conservative judge, Alex Kozinski, not someone known for his

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7 See Carbado et al., infra note __.
8 692 F. 2. 602 (9th Cir. 1982) (en banc).
sensitivity on gender issues. In sum, the case made for great theatre. The opinion immediately made its way into the major casebooks on employment discrimination and gender issues. And many hundreds of pages were written in the law reviews analyzing the issues described above.

For purposes of our article though, it is the aftermath of the case that is most relevant. The case was particularly interesting because the predictions under the caricatured political science and law models were likely to be different. For purposes of the political science model, Jespersen lost and the casino won. This was simply one more case in which the big employer won against the little employee. Assuming there were many more cases where the casino won (and there were), this case was nothing special. There might have been something interesting to talk about regarding the conservative-liberal and male-female switches in terms of who the prominent voices were in the majority and dissents, but the case did not generate heated discussion in the political science community that studies courts.

By contrast, for legal academics, the case was special. It was decided by the Ninth Circuit, ruling en banc, a relatively rare occurrence. The case was also likely to be important for lawyers in the employment discrimination area. In the area of appearance discrimination, given that the plaintiffs were not petitioning for certiorari, this was likely to be the most authoritative ruling for many years to come. Most important, for the

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9 Judge Kozinski recently got himself into a bit of a pickle over pornographic images. See Catherine Price, Judge Alex Kozinski Regrets Posting Those Pictures, Broadsheet: Salon.com (June 12, 2008 (available at http://www.salon.com/mwt/broadsheet/2008/06/12/kozinski_porn/)


12 The most discussed prior case in the appearance area is probably the Fifth Circuit’s 1975 decision in a gender discrimination case involving differential hair length requirements, where the court held that Title
employment lawyers working for casinos, the case could easily be read as predicting a string of future losses for the casinos. Darlene Jespersen ultimately lost her case, but the court seemed to say that she might have won relatively easily if she had simply presented some evidence that the burden, in terms of cost and time, of purchasing and applying makeup (the quantity and quality had been specified by a makeup consultant in the case itself) was more than the corresponding requirement on the men of keeping their hair neat. 13 Further, and more ominous for the casinos, was language in Chief Judge Mary Schroeder’s majority opinion that suggested that part of the reason why the makeup requirement did not violate Title VII was that the key part of the bartender uniform at issue was not unduly sexualized (it was a full tuxedo with rubber-soled shoes for both men and women), and, therefore, did not put female employees at heightened risk of harassment. 14 The opinion suggested that a costume that unduly stereotyped women as sexual beings would likely violate Title VII. That discussion, of course, raised the question of how the hypothetical casino cocktail server case would be decided. There, the uniforms are explicitly meant to be sexualized and to attract attention. Putting on our lawyer hats, reading the text of the opinion, this case appeared to have changed the rules of the game, increasing the risk of litigation losses for casinos, specifically vis-à-vis a future of unequal burdens and stating that plaintiffs can and should make this showing); Jennifer C. Pizer, Facial Discrimination: Darlene Jespersen’s Fight Against Barbie-fication of Bartenders, 14 Duke J. Gender L. & Pol’y 285, 313 (2007) (stating that the majority presented an evidentiary roadmap for future challenges to gender-based dress codes and that the dissenting opinions and the majority opinions taken together “moved the law forward in ways that may make future challenges to stereotypical dress and grooming rules easier to win”). 14 E.g., Pizer, supra note __, who points to the language in the case and concludes that there may exist a good cause of action for discrimination by female cocktail servers wearing skimpy outfits under Title VII after Jespersen; Ann C. McGinley, Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes, 14 Duke J. Gender L. & Pol’y 257, 270-80 (2007) (concluding that hiring exclusively women cocktail servers and dressing them in sexually-explicit costumes likely violates Title VII after Jespersen). Pizer, Jespersen’s lawyer, also goes on to explain in her article that, for the first time, Jespersen held that the sex-stereotyping theory applies to gender-specific dress codes. She also argues that the Price Waterhouse “catch 22” does not limit the Price Waterhouse sex stereotyping theory. In other words it is not necessary that a woman be in a man’s job in order to challenge sex stereotyping.

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13 E.g., Note, Ninth Circuit Holds That Women Can Be Fired for Refusing to Wear Makeup, 120 Harv. L. Rev. 651, 654 (2006) (noting that the Ninth Circuit suggests that a showing can be made in the future of unequal burdens and stating that plaintiffs can and should make this showing); Jennifer C. Pizer, Facial Discrimination: Darlene Jespersen’s Fight Against Barbie-fication of Bartenders, 14 Duke J. Gender L. & Pol’y 285, 313 (2007) (stating that the majority presented an evidentiary roadmap for future challenges to gender-based dress codes and that the dissenting opinions and the majority opinions taken together “moved the law forward in ways that may make future challenges to stereotypical dress and grooming rules easier to win”).

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categories of employees such as cocktail servers, the regulation of whose appearance was more important to them than the regulation of the appearance of female bartenders.  

Along these lines, Professor Dianne Avery writes, in the section of her paper on “The Potential Impact of Jespersen” that these cases should be “easy”:

   Even the Ninth Circuit is not likely to tolerate under Title VII an employer policy that makes baristas wear negligees in order to have the job of selling steamed coffee at a roadside stand. Such a policy, assuming the employer meets the numerosity requirements of Title VII, would signal an intent to make the employee “sexually provocative, and tending to stereotype women as sex objects.” Dress codes mandating that female employees wear sexy, revealing tops, short skirts, and high heels should be the “easy” cases under existing Title VII doctrine, whether the theory is that such dress rules demean and objectify women or that they expose women to sexual harassment from supervisors, co-workers, and customers.

The three of us, the authors of this paper, come from different points along the legal academic-political scientist spectrum and have differing amounts of expertise in employment discrimination law. In addition, one of us has lived in Las Vegas for ten years, while the other two have visited the city infrequently. Unsurprisingly perhaps, we had different predictions regarding the local effects of the case. That is, the effects the case would have on the actors in the casino industry in Las Vegas. Moreover, in some instances, we had different interpretations of and reactions to our interviews (we note those, where they occurred).

In reporting our findings, we do not claim to be testing the validity of the political science or legal academic models. Those models are primarily about predicting future case outcomes and, at least in the case of the law model, about giving lawyers and judges guidance in how to decide the next set of cases. The models say little about how players on the ground will react to a case or talk about it, although there are implicit assumptions embedded in the models.

15 At a conference held by the Duke Journal of Gender, Law and Sexuality, soon after the release of the final Jespersen opinion, a senior casino lawyer told us that the he and others in the casino industry were concerned about the implications of case for categories of employees other than bartenders, given certain language in Chief Judge Schroeder’s opinion. Apparently, these questions were the subject of much discussion at a conference of entertainment industry managers and lawyers that occurred soon after the case came down. [Need to reconfirm and perhaps included quote]

There is a small body of scholarship that looks at how the law “on the books” translates locally. Following in the footsteps of Stuart Macaulay’s classic work on how Wisconsin lawyers understood the role of formal contracts, scholars such as Lauren Edelman have examined the dynamics of how lawyers translate law for their clients. What Edelman and a number of others have suggested, including specifically in the employment discrimination area, is that lawyers and other legal professionals often exaggerate the risks of future litigation suggested by ambiguous language in cases. This, in turn, helps justify more work for these lawyers and human resource specialists. From our initial conversations with appellate lawyers close to the case and our analysis of the opinion itself, we all expected to find lawyers spinning the ambiguous language in the case to create more work for themselves and ultimately enhance their importance to their casino clients.

II. Methodology and Data

A. The Interviews

Over roughly a twelve month period in 2008-09, we conducted roughly [sixty-five] interviews in the Las Vegas area. The goal was to talk to people at three different levels of the legal hierarchy: employees (potential litigants), lawyers (on both the casino and plaintiff side) and judges (in both state and federal courts). We also spoke to government officials and Human Resources personnel.


Our initial attempts at asking for interviews from casino employees met with little success. No one was willing to talk to us; the immediate reaction was that we were trouble. One female bartender who we attempted to interview at an early stage (in the mid afternoon) was kind enough to tell one of us:

Honey, let me give you some advice. You aren’t going to get anyone to talk to you unless you are spending money gambling. Otherwise, even if one of us wants to talk to you, it looks suspicious. And another thing. You can’t find out anything coming here in the afternoon. You need to be out at night and that too at the clubs at places like the Hard Rock. That is where the action is. It isn’t here.

Given that we possessed neither the expertise nor income to make ourselves interesting as customers, to say nothing of our struggle to stay up late enough to go to the clubs at the appropriate hours, the enterprise seemed doomed to failure. Plus, our deans were skeptical that the trips to Las Vegas were for “research”.

As part of the research project, we had planned to teach a class at UNLV on “Dress and Appearance Regulation in the Casino Industry”. We had thought it might be interesting to discuss the findings from our research with our students at UNLV, many of whom would be familiar with the industry. We didn’t have much in the way of findings, when it came to casino employees’ views, but decided to go ahead with the class; it would simply be a theory class instead of an “on the ground realities” class.

The class unexpectedly turned out to provide us with the window into the ground realities that we had been unable to access otherwise. The class was made up of twenty-five students, many of whom had worked in the industry as dancers, models, servers, managers, executives, and auditors. The rest had a high degree of familiarity with the workings of the casino business. Everyday, as we taught our intense one-week class, which met for five hours a day, the students would bring their experiences to bear on our discussions of the theory; usually, to show us our understandings of the industry were flawed in light of their personal experiences and those of their friends. In addition, since part of the assignment for the class involved the students’ observations of employment practices in two contrasting settings (e.g., a local casino versus a strip casino), they sometimes invited us to go along on their observation trips.
We also found that local lawyers and others working in the business were more than willing to come to our class to talk to the students about realities on the ground. That in turn, gave us increased access to these lawyers and their contacts that, once they realized that the issues we were interested in were innocuous from their perspective, were generally willing to help us. As we discuss later, a fairly common starting point to our interviews in Las Vegas has been for interviewees to tell us how useless the project seemed: “Is this really the kind of research you get paid for?” was a question that one skeptical federal judge put to us (it was a rhetorical question that one of us mistakenly attempted to answer).

Our interviews ranged from roughly an hour to two hours each. All but a handful of our interviews were done with either two or three of us present. Given that the three of us had different perspectives, our initial goal had been to do all the interviews in person with at least two of us there. We decided at the outset, given the initial reluctance and suspicion we were met with, not to tape any of the interviews. Instead, we took notes. This means that, even though we have at least two sets of notes for most of the interviews, our quotes are not perfect. Plus, there were portions of the interviews, such as the skepticism about our work that many respondents expressed, for which our notes were not as good (we didn’t realize how systematic the expression of skepticism would be).

In what follows, we report on the common themes we perceived in the narratives. Our impressions are necessarily subjective. Our interest is in reporting patterns in the ways in which these various individuals in the industry talk about law and specifically, how they talk about a case that legal academics consider extremely important. It is possible that some of our interviewees were not being candid with us – some of the lawyers, for example, may have been spinning us. Even so, our interest was in whether there were likely common themes in the spinning. In addition, we were interested in

19 For methodology, we draw from the work of the legal anthropologist, John Conley. See, e.g., John M. Conley, Tales of Diversity: Lawyers Narratives of Racial Equity in Law Firms, 31 L. & Soc. Inquiry 831
whether there were common myths, stories or vignettes that the various respondents would tell. Stories about Dennis Rodman’s visits to Las Vegas and his misbehavior were among those that we heard most often; these Rodman stories were used repeatedly to illustrate the boundaries of what was considered acceptable behavior. Mr. Rodman’s antics were not considered acceptable (even some of our cab drivers told stories about him).

Almost all of our interviews were focused on the implications of the *Jespersen* case for the casino industry in Las Vegas. Las Vegas has the largest casino industry in the world and is directly under the jurisdiction of the Ninth Circuit, hence the impact of the case was most likely to be felt there. In the next stage of this project, we plan to extend our inquiry to two other settings, the casino industry in Atlantic City and the riverboat casinos along the Mississippi River. Those locations have significantly different legal cultures, political cultures and industry structures from those in Las Vegas, and we expect that a comparison will yield insights. For now, however, we report only on our findings in Las Vegas.

A handful of idiosyncrasies about the Las Vegas legal market are noteworthy. The legal market is relatively underdeveloped. For the most part, the big national firms do not have branch offices there (until recently, the code of professional responsibility made it difficult, although not impossible, for branch offices to be opened in Nevada). Most of the local law firms are small; twenty-five lawyers would be a big firm. This stands in stark contrast to almost any other major U.S. city. The plaintiffs’ bar is also small, and composed mainly of solo practitioners. There appeared to be little in the way of major class action practice, at least in the employment law area. Part of this is perhaps because the single law school in the state, UNLV, opened shop in 1998, a little more than a decade ago, and its first class did not graduate until 2001 (it is named after one of the

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major casino owners, Bill Boyd). Part also may be a function of the quality of local schools and colleges. Until the economy recently slowed considerably, the Las Vegas economy and population were growing at an exponential rate. While the legal community worked to keep up with this growth and the local schools and colleges have worked to improve the education provided, Las Vegas is still a developing community, unlike many other cities of its size. Perhaps the most sophisticated lawyers in the Nevada legal community are those who practice before the Nevada Gaming Commission. The Gaming Commission has the power to grant and revoke gaming licenses. The Gaming Control Board is an enforcement agency that conducts investigations and brings charges before the Nevada Gaming Commission.21 The Commission strictly regulates entities with gaming licenses.

In terms of the judiciary and the background legal system, the state judiciary is elected and the casinos are rumored to be important contributors for any candidate who hopes to be elected. Unlike the neighboring state of California, where state remedies in employment discrimination cases can often be more attractive than those provided by federal law, the state remedies in Nevada are not considered favorable for plaintiffs in employment discrimination cases. Forty percent of the Las Vegas federal judiciary belongs to the Church of the Latter Day Saints (LDS), even though members of the LDS church make up less than 15% of the population of the city.22 Much of the employment practice in the federal courts is channeled through an innovative pre-litigation magistrate-supervised mediation process where a federal magistrate judge sits down with the parties, evaluates evidence and provides the litigants with the magistrate’s sense of how their case is likely to fare.

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21 Gaming is tightly regulated in Nevada. The Nevada Gaming Control Board is an administrative agency of the State organized and existing under chapter 463 of the Nevada Revised Statutes. See generally Nev. Rev. Stat. § 463 (2001). It is charged with the administration and enforcement of the gaming laws of Nevada. The gaming laws are set forth in Nevada Revised Statutes, title 41, and Regulations of the Nevada Gaming Commission. The Nevada Gaming Commission has the power to limit, condition, suspend, or revoke a gaming license or fine anyone for a cause deemed reasonable. Id. § 463.310(4)(a)-(d). The Nevada Gaming Control Board is authorized by statute to observe the conduct of licensees to ensure that gaming operations are not conducted in an unsuitable manner, id. § 463.1405(1); Nev. Gaming Comm'n Reg. 5.040 (2006), and to conduct appropriate investigations to determine whether there have been violations of the gaming laws. Nev. Rev. Stat. § 463.310(1).

22 http://www.onlinenevada.org/Las_Vegas_Mormon_Temple
There is some gender diversity on both the federal and state courts (more on the state side), but, despite the presence of one African American Nevada Supreme Court Justice and one African American woman judge sitting on the Ninth Circuit in Las Vegas, there has historically been little in the way of racial diversity at the higher levels of the court hierarchies. In terms of government lawyers and legal reform organizations who might have an interest in employment cases, particularly those seeking widespread changes in industry practices, the EEOC has had little or no presence in Las Vegas until very recently (and even then, only a minimal presence) while most of the national legal reform organizations such as NOW, LAMBDA and the ACLU have the main regional offices in Los Angeles or San Francisco. While the ACLU has grown rapidly over the past ten or fifteen years, it still has only a few paid lawyers and is the only organization of its type that focuses on civil rights and civil liberties in Nevada.

Finally, the unions play a significant role in many of the Las Vegas casinos. The Culinary Workers of America is particularly prominent. Unions play a more significant role in Las Vegas than in any other major U.S. metropolitan area. Most of the major casinos have unions and the industry and the unions appear to have learned to cooperate on major issues. Some of our employee-respondents mentioned the importance of the unions in looking out for employee rights.

As noted, we interviewed roughly [sixty-five] individuals for this project. Approximately thirty of them were employees or managers and the other [thirty-five] were lawyers and judges. All the interviewees were promised that we would keep their identities confidential. To generate the sixty-five interviews, we used the snowball method where our initial contacts yielded subsequent contacts. That produces a potential sample selection problem. Given the relatively small size of the legal market, we are confident, however, that we have a representative sample there. But we cannot say that on the employee side; especially given that our access to employee interviews was primarily through our law students who were perhaps slightly younger and more educated than the general population of casino employees in Las Vegas.
B. Academic Attention

_Jespersen_ garnered substantial attention from academics. It is easily one of the most discussed federal appeals court decisions of recent years.\(^\text{23}\) It has quickly moved to form part of the standard teaching materials in courses tackling gender discrimination in the workplace. This is not surprising; questions of appearance discrimination have long fascinated academics and the case law on the question has been sparse. As the nature of employment discrimination has changed over the years from a focus on explicit and overt animus to more subtle forms of hostility, appearance issues have provided fertile ground for broader debates about the directions that discrimination law should take. In particular, the questions of whether the law protects against stereotyping and discrimination based on so-called mutable characteristics have taken center stage, to say nothing of the connection between these issues and the increasingly salient debates over whether there should be protections against sexual orientation discrimination.\(^\text{24}\) In some form or the other, _Jespersen_ brought aspects of all of these issues in front of one of the most important courts in the country. Academics reacted with great interest, right from filing of the lawsuit.\(^\text{25}\) Concretely, an examination of all the published appeals court decisions for the fifteen of the most prominent federal appeals court judges for the period 2004-06 showed that _Jespersen_ was one of the three most cited cases in the law review literature.\(^\text{26}\) In terms of the academic interest it garnered, it outdid many cases on abortion, the death penalty, gay marriage and so on. We suspect that it was easily the most prominent employment discrimination case coming out of a federal court of appeals during the three-year period 2004-06.

\(^{23}\) As of August 28, 2009, approximately 125 articles on Westlaw’s Journals and Law Review database discussed _Jespersen_.

\(^{24}\) [Cites]

\(^{25}\) Among the early articles tackling the case was David B. Cruz, Making Up Women: Casinos, Cosmetics and Title VII, 5 Nev. L. J. 240 (2004).

\(^{26}\) Data on these fifteen judges was collected for a different project analyzing Judge Sonia Sotomayor’s publication and citation records during the 2004-06 period. The other judges in the group were all those rumored to be on President Obama’s short list and all those who had been rumored to have been in President Bush’s short list. In other words, these were among the most prominent federal appellate judges in the nation. See Eric Posner, More Data and a New Conclusions (2009) (available at http://www.volokh.com/posts/1243482653.shtml).
But the fact that an employment case garners academic attention does not necessarily mean that it will have an effect on the behavior of employment lawyers and employment practices. We expected, however, that the decision would garner significant attention in the legal community in Las Vegas, though. Appearance discrimination issues may be considered trivial in many settings. But that is not the case in Las Vegas. The casino industry there is all about appearance; and particularly, gender differentiated and highly sexualized appearance. Further, this case squarely tackled appearance discrimination in the casino setting. For lawyers interacting with the casino industry, therefore, it was on point. Finally, in terms of the hierarchy of authority, this was a decision from a high level; the Ninth Circuit, sitting en banc. This is the highest court in any jurisdiction to have tackled the appearance discrimination question. In sum, this was not a case whose dictates could be easily ignored.

More salient, we expected lawyers to embrace this case and hype its importance. The literature on lawyer behavior suggests that lawyers look for opportunities to emphasize their importance to clients. Either because of risk aversion or the desire to generate work for themselves, lawyers emphasize legal risk, according to a variety of scholars’ studies. In particular, being able to read judicial opinions and parse their nuanced language is one of the special skills that lawyers supposedly have (this is what our law schools emphasize). Even if the Ninth Circuit had done nothing other than clarify the existing law, the release of this case, with its multiple opinions, should have given lawyers an opening to write numerous client memos, provide legal updates, run training sessions for human resources officials, help revise training manuals, and prepare for litigation offense and defense. Even if all the lawyering activity constituted no more than cosmetic compliance, we expected to see lots of lawyering activity generating billable hours.

C. General Impressions

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27 See supra note __ (citing materials).
The impact of the case on the casino community in Las Vegas appeared to be close to zero. No more than a handful of lawyers we spoke to – all of whom spent significant portions of their time tackling employment issues – were familiar with the specifics of the case and the nuances of the language. Our impression was that most of these lawyers had barely skimmed the decision (and often that was in preparation for their meetings with us). At least a couple of the plaintiff-side lawyers did not seem to realize that the case had been decided at the en banc level. On the defense side, there were some client update memos that were circulated immediately after the case. But no one we talked to gave us the impression that the case had generated any significant new work, in terms of designing new techniques of compliance or litigation protection. We also found, from the lawyers, judges and government officials, no indication that anyone had seen an increase in litigation against the casinos building on the guidance provided by Jespersen. There didn’t seem to be a single Las Vegas case involving appearance discrimination that anyone pointed us to in the three years between the en banc decision in Jespersen and the last of our interviews. That said, our findings are not inconsistent with the possibility that lawyers representing casinos had advised their clients before Jesperson was decided about possible strategies and tactics to avoid litigation based on appearance and dress codes. We discuss some of the strategies below. One of us believed that some of the defense lawyers were not totally honest with us about their seeming lack of concern with the language in Jespersen.

As for whether there had been on-the-ground reactions to the case, in terms of training sessions or alterations in instruction manuals or incentive schemes, our questions were generally met with puzzlement from non-lawyer employees we spoke to. In effect, we got a “Why would you expect any reaction from the industry?” From the thirty-plus employee interviews, we did not have one single respondent who thought that there had been any perceptible response to the case. More than a few of our respondents, however, asked, typically as the interview was winding down: “Didn’t the casino win the case?”

What follows are the broad themes we discerned in our interviews. These syntheses of the narratives of the various respondents are necessarily interpretive in that
we have each read through our interview notes and come up with basic themes. From what our respondents reported, we got a uniform starting point for our discussions (with some caveats having to do with bevertainers and model-servers that we describe later), which was that there had been little on-the-ground reaction to Jespersen. The narratives therefore are stories about why there wasn’t a reaction.

The narratives are reported in the next two sections. The first section reports on the reactions from employees at the various casinos. These are primarily interviews with women working as servers and bartenders, although we also spoke to some executives and managers. The second section reports on our interviews with lawyers and judges who work with the industry.

III. The Employees/Non-Lawyers

A. Assumption of Risk (“We would choose to wear makeup”)

For our non-lawyers respondents, we began conversations by describing the basics of Jespersen. After that, we explained what we were interested in learning about through the lens of this case; that is, how the law in judicial opinions translates into behavior on the ground. In response to our introductions, even though we never asked anyone whether they had heard about the case, a number of respondents professed to having at least heard about the Jespersen case (typically, they referred to it as the “makeup case”). No one had a clear memory of the issues, but many remembered that the case had been in the news. The ones who did remember something about the case would frequently mention that they knew that the case had occurred out of Reno. This mention of Reno appeared to be significant in that the respondents were explaining that Reno was different. We heard statements along the lines of: “Reno is different; the casino industry there is older; something like this would not have happened here.”

The theme of Las Vegas being different from Reno and, in effect, special, came up frequently. The perception appeared to be that the Las Vegas casino industry was
younger, hipper, more attractive, and more sexualized. We heard, for example, multiple versions of: “Las Vegas does not just sell gambling; it sells a fantasy life.” Statements to that effect would generally lead to the punch line, which was that employees in Las Vegas know that they are signing up for a job that is different from the types of jobs in Reno. The portrait of the Reno jobs that was painted for us was that they were less glamorous – almost depressing. Las Vegas casino workers were not as likely to bring suit, because they understood the requirements of the job included being part of the construction of a fantasy experience for customers. Some employee-respondents used the term “assumption of risk” to describe their point. The other explanation that we frequently got was that Nevada was a “right to work” state.

Perhaps because the three of us are trained as lawyers, we found the invocations of these legal terms by non lawyers (and at times, lawyers as well) fascinating. Not only are “assumption of risk” and “right to work” legal terms of art, they didn’t fit the context. When someone would invoke those terms, we would typically follow up by trying to clarify that because Title VII, the federal anti-discrimination law, was mandatory, the casino defendant could not use the excuse that the employee had assumed the risk. Often, the example we used to illustrate our point was along the lines of: “The employer cannot escape liability for race discrimination by telling all its racial minority employees ahead of time that it plans to give them lower salaries and plans not to promote them. The same applies here. Employers cannot impose greater burdens on female employees simply because they warn the women ahead of time.” On the invocation of the “Nevada is a ‘right to work’ state” argument, we were initially confused as to what the term even meant because our understanding of the term, “right to work” was that it referred to legislation regarding union membership (essentially, anti-union legislation). Here though, while invoking this term, respondents seemed to be talking about another legal concept, “employment at will.” However, again, the idea of employment at will, which is about how employers, absent an explicit employment contract stating otherwise, can fire employees without any need to show cause, is again inapplicable to federal anti-discrimination law. In sum, these employees perceived that they were restricted in their ability to sue in ways that they were actually not.
This consistent underestimation of legal rights was not what we were expecting. Prior scholarship on employee perceptions suggested that employees often think that they have more rights than they do. Indeed, Pauline Kim’s now classic study on employee perceptions about “employment at will” showed that employees often think they have more rights than they do (in that case, the majority of employees thought that they could be fired only for cause). In Las Vegas, we were seeing something different. There was something more as well, and this connects back to the distinction our respondents were drawing between Las Vegas and Reno. They seemed to be saying that the rules that applied in Las Vegas were different, particularly for this special category of younger and more attractive employees.

If we were expecting that our respondents (mostly young women working in various jobs in the casinos) would react in relief to the news that they had more legal rights to bring gender discrimination claims than they had believed, we would have been disappointed. It seemed not to matter that we had explained that bringing suit was actually a lot easier. The bottom line was still that these employees did not expect suits to be brought, which takes us to the next explanation we were invariably given.

B. Bigger Tips for Bigger Breasts

Even before we had begun our interview with one union officer, after we had finished with introductions, he said: “You should know. I’ve had women members tell me that they get bigger tips if they have bigger boobs. I’m not going to do anything that hurts my members”. The themes of breast size, and particularly breast augmentation surgery, were ones that our employee-respondents frequently brought up. Indeed, to the discomfort of at least one of us, students brought these matters up in our meetings with

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28 Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World, 83 Cornell L. Rev. 105, 106 (1997) (“Workers appear to systematically overestimate the protections afforded by law, believing that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract.”).
them; specifically to raise questions of about whether certain casino employers were paying for these and other surgeries and whether the expenditures were tax deductible.

Generally, the transition in the conversation toward breast size occurred in the following fashion. Jespersen involved a female bartender who refused to comply with the casino’s mandatory makeup requirement. Our conversations with casino employees though quickly turned from the bartenders to the implications of the case for cocktail servers. This appears to be the job that has the biggest gender differences in that there are hardly any men in any of the major casinos who work as servers. The women, for their part, wear high heels, sexualized costumes, and makeup – to say nothing of requirements regarding their hair and other aspects of their appearance. Things like high heels and skimpy outfits can have negative health effects. Carrying heavy trays of drinks for multiple hours in high heels is not good for one’s ankles, nor is wearing minimal clothing in relatively cold settings. The women working in these jobs are often slender in build, suggesting that the long-term costs of carrying heavy drinks trays and low temperatures might be especially problematic.

Our respondents had no problems whatsoever in understanding and articulating to us what the gendered burdens imposed on female cocktail servers were; especially with respect to the low temperatures and high heels. But even while articulating these burdens, they didn’t perceive gender discrimination. They saw themselves as privileged vis-à-vis both men (who couldn’t get these jobs) and older and less attractive women. The frequent refrain, to put it in the words of one cocktail server, was: “We earn more in tips because we wear makeup, short skirts, and have bigger . . . you know . . . breasts [laugh]. Men cannot get these jobs.”

29 Cf. Marc Linder, Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees, J. Corp. L. 295, 296 (Winter 1997) (“seventy-five percent of the problems eventuating in [the foot] corrections performed annually in the United States either result from or are greatly aggravated by the use of high-fashion footwear.”). Then, there is also the symbolism associated with heels, which in Veblen’s words (somewhat ironically, given the context here), are a symbol of “the wearer’s abstinence from productive employment”? Thorstein Veblen, The Theory of the Leisure Class: An Economic Study of Institutions 121 (1899).
We were told that women cocktail servers, with the better shifts at the upscale casinos, could earn upwards of $150,000-200,000, including tips, a year. With those numbers, many of our respondents felt, there was little reason to sue. They had jobs that were hard to get; they were not going to upset the apple cart. We kept hearing that, if anything, it was the men who should be arguing that they were being discriminated against by not being given these jobs. But customers would not like male cocktail servers and would not tip them as well. In fact, one interviewee explained that there are male cocktail servers working at the pools, but they do not work in the “more formal” casino floor.

The foregoing puzzled us for multiple reasons. The first had to do with the tips. Why did our respondents think that attractive appearance translated into bigger tips? We were not aware of any evidence to the contrary, but many of our respondents themselves made the point that tips were often a function of their being nice to the customers (“flirting” was the word used). Ironically though, as one former server observed: “It is much harder to flirt with male customers when one is basically naked; one has to keep a distance otherwise some of these men very quickly get the wrong idea and that means trouble.” And then there was the question about male servers. Many of the customers in Las Vegas are straight women and gay men. Even assuming that physical appearance was the key factor in determining tips, wasn’t there a customer base that would prefer men (at least attractive men) or that women have somewhat more clothing? Often, while we were talking about the issue of tips and appearance, the respondents themselves would point out that not all the cocktail servers, especially at older casinos with powerful unions, were thin and young. We were advised to go to casinos such as Caesar’s Palace and observe servers working the afternoon shifts; apparently the disjunction between the outfits and the people wearing them was extreme, according to our (generally younger) respondents. The point seemed to be that even these women who were older and perhaps heavier were required to wear the high heels and skimpy outfits.30 In the end, tips

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30 Some interviewees also suggested that the costumes in the older casinos with the older waitresses who were represented by the union had more modest uniforms. Based on what we could tell, the uniforms were still skimpy, but less so relative to some of the newer casinos. And at least one HR executive though that the outfits at places like the Mirage and Caesar’s were more modest because you didn’t want to put the
appeared to be only part of the equation and that having the attractive female cocktail servers was key to the casino’s image

As a technical matter, there are a couple of points here. First, our respondents brought up an interesting and difficult legal question. That is, whether an employer who refuses to hire men for a job then gets carte blanche to impose whatever restrictions it wants on the women, including imposing stereotyped images? Our instincts here are that it is unlikely that a federal judge will have much sympathy for the argument that employers can opt out of gender discrimination law by engaging in a different kind of discrimination against men. But this also raises a different question. If these cocktail server jobs are so good, why are no men suing to get them (especially today, when Las Vegas is reeling from the financial crisis)? Do the men in Vegas who might be potential cocktail servers also believe that even if they got these jobs that they would not be able to earn tips? Given that many of the casinos have tip sharing arrangements, it is not clear why the men would be worried about their individual tips. Or, are the men who would apply for these jobs deterred by their efforts to maintain their dignity and their masculinity?

Masculinities theory posits that men are driven by a need to prove their masculinity and to demonstrate that they are different from women and that which they perceive as feminine.31 The job of cocktail server is definitely considered a woman’s job by employees and employers, and it would take a brave man to apply for a job that is traditionally associated with female sexuality. Furthermore, there may be encouragement from the casinos for a man’s hesitation to apply for a cocktail server job. One HR executive told us that she had anticipated the “problem” of a man’s applying for a cocktail server job. She considered it a problem because she believed customers prefer to really skimpy costumes on the older women servers. We were also told that there are some casinos where there is a choice of costumes (all pretty much the same, but some longer, etc).

31 See Michael S. Kimmel, Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in Feminism & Masculinities 185-86 (Peter F. Murphy ed., 2004); Joseph H. Pleck, Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis, in Feminism & Masculinities, id, at 57, 61-62.
see women as cocktail servers. In order to avoid a lawsuit and deter men from applying for the job, she had a very skimpy costume to show to male applicants that they would be asked to wear. Interestingly, there is only one major casino that has male cocktail servers on the casino floor. The male and female cocktail servers are called “bevertainers.” The women are dressed in lace teddies, while the men wear a costume that appears to be like pajamas with long pants and short sleeve shirts with a v-neck. There is a clear difference in the amount of flesh displayed between the male and female costumes.

The second point, which was reinforced by the HR executive described above, has to do with customer preferences. Respondents frequently made the point that the casinos had to employ female cocktail servers who fit a certain mould because this was what customers wanted. More specifically, they would emphasize that the cocktail servers were a key element in creating the special and unique Las Vegas image. But, as a matter of discrimination law, employers are not allowed to justify discriminatory practices on the basis of customer preferences. The exception here is a narrow set of cases that fit within the category of Bone Fide Occupational Qualifications (BFOQ). But commentators, the courts, and the EEOC all seem to agree that entry into the BFOQ category is highly restricted; it applies to narrow sets of jobs where sex or gender is essential; playboy bunnies and private nurses being frequently invoked examples. Airline attendants, for example, do not fit the category. Assuming that neither the lack of men in the job nor the BFOQ exception poses barriers to women bringing a case there, the cocktail servers in Las Vegas casinos would likely have a case of unequal burdens on

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32 Along a similar vein, a male blackjack dealer complained that when he applied for his job at a local casino, he was told that the casino wanted to hire female dealers because the clientele liked attractive women. For a number of years, the management "kicked all of the men (dealers) out of the high limit pit." Recently, the dealer noted, the casino has moved more men into the high limit pit because the women complained about the clientele acting up. See also Brooks v. Hilton Casinos, Inc., 714 F. Supp. 1115 (D. Nev. 1989) (holding that defendant Hilton Casinos, Inc. had violated Title VII by firing thirty-seven former male dealers and floor men and replacing them with twenty-four women and fourteen men, a disproportionate number of women compared to the hiring pool).


34 Southwest Airlines famously lost its argument that it needed to be able to do gender specific hiring so as to maintain its image as the “love airline”; the judge found that sexual titillation was tangential to the business in question. Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981); see also Kimberly Yuracko, Sameness, Subordination, and Perfectionism 43 San Diego L. Rev. 857 (2006) (discussing Southwest)
men and women and also a claim for sex stereotyping that created vulnerability to sex harassment. In other words, precisely the type of case that Jespersen seemed to be saying would result in victory for the plaintiffs. Our respondents saw matters differently. They saw us as failing to understand the casino industry, and especially the culture of Las Vegas. And they seemed invested in making the Vegas “fantasy” model work.

C. Looking in all the Wrong Places

A persistent theme in the narratives was that makeup issues were simply not that important. Our respondents were also readily able to indentify the areas where they thought the casinos were concerned about legal regulation. First and foremost, was the issue of weight. Casino executives, especially those in the high-end places, care desperately about the weight of the women servers. Our respondents were convinced that the casino lawyers and managers were constantly thinking of ways to get around anti-discrimination laws that might restrict employers from imposing weight restrictions. Relatedly, we were also told that the casino management worried about dealing with pregnancy; not only what to do (“how to hide them”, according to one executive) with the pregnant women, but what to do to get them back to their original weights once they returned to the job. Third – although this did not come up as often as we thought it might – was the question of how to tackle the problem of these cocktail servers getting older (and, the implication was, less attractive and heavier).

A number of our respondents were convinced that some of the casinos had come up with strategies to get around the law. Among the strategies we heard about included some casinos changing the definition of the jobs from cocktail servers to dancers or entertainers. The theory being that dancers could be required to be young and thin because they had to be fit to be able to dance; because they were dancers, the management could put them through fitness trials and weigh them (according to some of our respondents). Another example we were given was of certain casinos defining their server jobs as a combination of model and server – the model part of it, the respondents who brought it up explained, made it okay to impose even more stringent weight
restrictions than those for the cocktail waitress job. A third strategy was the use of subcontractors and independent contractors. Apparently, for some of the female dancers at the high end clubs, the casinos prefer to subcontract out the work (and the subcontracting firm, in turn, hired independent contractors). A final strategy is the recent opening of private clubs within the casinos that are open to adults only. These clubs, which are often operated by companies other than the casinos, advertise an atmosphere of heightened female sexuality, with women bartenders and cocktail servers wearing skimpy outfits and with admission advertised as free for women in an effort to attract male customers. Because these clubs are open to adults only, the casinos would have a better argument that imposing a sexy dress code on female employees is a BFOQ. We confess that we weren’t clear on how well any of the other strategies would work to bypass legal requirements, but a number of our respondents pointed to the independent contractor phenomenon and wondered whether it was part of a strategy to impose greater restrictions on the employees. Our guess is that most federal courts would be skeptical about, if not downright hostile toward, these strategies. What our respondents emphasized, though, was that, with the exception of the growth of the club culture, none of these strategies or concerns on the part of the employers was new. They had predated Jespersen.

IV. Judges and Lawyers

This section reports on our impressions from talking to [35] judges and lawyers in the Las Vegas area. The [25] lawyers were roughly equally divided between those on the plaintiff side and those on the casino defense side. The judges were primarily federal judges, although we spoke to a handful of state judges as well. The vast majority of our respondents among the judges and the defense bar was male. On the plaintiff side, the gender balance was more even.

35 One respondent speculated that the independent-contractor technique might be a method of getting particular jobs, where the casinos wanted the dancers or servers to be especially young and attractive, out of the ambit of the union’s collective bargaining agreements. In other words, that it was not about avoiding Title VII liability at all.
We used the snowball method of identifying respondents; beginning with our personal contacts and asking them to put us in touch with others who might shed light on the questions we were asking. In theory, the method of identifying respondents presents a risk of selection bias. However, the small size of the pool of lawyers and judges in Las Vegas who might be able to talk about the impact of Jespersen means that we are likely to have talked to at least 30% of the population of those who might be meaningfully studied.

Since there were systematic differences in the narratives of the judges and lawyers, we report their narratives in that fashion.

i. The Judges

A. Not Remunerative Enough

The explanation most often given by the judges mirrored one that we received also from the lawyers. It was that the set of cases that might be generated by the roadmap laid out in Jespersen – high heels, sexualized outfits, makeup, etc. – were not profitable enough for plaintiff-side lawyers to take them on. This explanation intrigued us because, elsewhere in the country, federal employment discrimination litigation has been one of the highest growing areas over the past few decades. Yet, at least in the area of appearance discrimination, with the casino industry, an area with well heeled defendants and (to our mind) potentially winnable cases, there looked to be little or no litigation.

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One concern we had, as we began to discern that there had been little reaction to *Jespersen*, was that we were somehow misreading the case. That may well be, but none of our judicial respondents raised significant issues with our reading of *Jespersen*. At least a couple of them pointed out that, despite the dicta we were pointing to, *Jespersen* had lost and that might be the lesson lawyers and litigants would take out of the case. But the judges themselves seemed to indicate that they would be guided by the direction provided by the Ninth Circuit’s en banc panel. Perhaps they were humoring us or being polite, but they seemed to recognize that the language in the Ninth Circuit’s en banc decision potentially opened the gates wider for litigation against the casinos.

What we were missing, the judges explained, was an understanding of financial dynamics of these cases. The hypothetical plaintiff suing a casino on an employment discrimination claim is unlikely to generate a significant dollar amount of damages, so as to make the case worth investing in for a plaintiff’s lawyer. Assuming the plaintiff was fired, she could at best hope to receive lost wages for a short period of time. Further, if she were someone who was working in the industry, it is likely that she would be already working at a new job and, if so, her damages would be even smaller (plus, she would probably be required to wear the same outfits, or something similar) to what she had had to wear at the prior job.

The next explanation was that the casinos were unlikely to easily settle a case attacking something basic to their image, such as the appearance rules governing cocktail server outfits. The plaintiff-side lawyers in Las Vegas, typically solo practitioners with limited assets, could not afford drawn out litigation against the casinos. In the words of one senior judge, they would get “buried”, if they tried to fight the casinos on an issue like this.

In addition, this was a “one industry town”. If an employee developed a reputation as a troublemaker, she would get blacklisted. Once one was blacklisted in the casino industry, it was very difficult to get hired. These were scarce jobs; employees who wanted to keep working in the industry were unlikely to sue. Our respondents
emphasized that the information sharing mechanisms in this industry were likely superior to those in most other settings. The simple reason is that Las Vegas attracts more than its share of those with an inclination to misbehave; and that in turn means that casinos spend significant resources in trying to identify troublemakers ahead of time. Casinos are also willing to cooperate with each other in policing problematic customers and employees even though there is a state law prohibiting blacklisting. Apparently, the security experts at the casinos have a network and regularly share information with each other about misbehaving guests and employees.

B. The Missing Class Action Bar

The foregoing story about the high costs of these cases got us asking: What precisely was so costly about bringing this type of a case (especially given the possibility of recovering generous attorney’s fees under Title VII)? As we conceptualized the hypothetical case, the facts were going to be simple: e.g., female servers are required to wear heels and short outfits that expose them to higher risks of foot injury and respiratory infection; whereas the men are not. Alternatively, the case might involve female cocktail servers who had had unreasonable weight restrictions imposed on them. With a large enough number of cocktail servers as plaintiffs, this case should be relatively easy – getting experts to testify as to the health burdens on the women should be not difficult at all. Our judicial respondents pointed out that our assumptions were wrong on multiple grounds. First, we were thinking in terms of class actions. Local employment lawyers in Las Vegas brought individual cases, not class actions. There was no meaningful class action practice in the employment discrimination area. Second, these employees valued their jobs too much. With a minimal education, they could generate the kind of income that few other jobs could provide; they were unlikely to get together to form a class.

A couple of things puzzled us about the absence of a significant class action bar in Las Vegas. If there were profitable cases to be brought, why wouldn’t a sophisticated class action firm from, for example, nearby California, show up to take on the case? As for the story about casino workers being unwilling to sue because their jobs were so
remunerative, that also had some holes in it. Even if the jobs were paid well, they also tended to be short lived in many cases. Going back to the cocktail server context, the most remunerative of these jobs are reserved for the young and attractive. When these employees are no longer young and attractive and in danger of losing their jobs, shouldn’t there be an incentive to sue? We frequently raised these questions, but didn’t come away with clear answers. At the end of the day, it bears mentioning that the explanation about employees being reluctant to sue because they considered themselves to be fortunate to have highly remunerative jobs in the casino industry was consistent with what we heard from the employees themselves.

**C. The EEOC’s (Non) Role**

Absent an adequate class action bar, why not the EEOC, the federal agency charged with policing anti discrimination law? The EEOC, unlike the Las Vegas plaintiffs’ bar, is not limited by either money or expertise. Our judicial respondents noted, however, that while one might ordinarily expect the EEOC to step in, it didn’t have a significant presence in Las Vegas. That led us to ask why not. Perhaps there was an interesting story here? For example, had the casinos exerted their influence in Washington D.C. to make sure that the EEOC left the casino industry alone? The facts were that the local EEOC office had opened only a few years ago and had been staffed by an extremely junior lawyer; a recent graduate of UNLV.37 And even that attorney quit relatively soon, leaving, for nearly a year, the Las Vegas office with no on-site attorneys. During that time period, Las Vegas matters were being handled out of the Los Angeles office.

As best we could tell, there was no sinister story behind the EEOC’s limited presence in Las Vegas. It turns out that the Los Angeles office is responsible for a large geographic area, with a minimal staff. Moreover, with the limited staff available to the EEOC, the agency had brought a number of significant cases against the casinos for

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37 The announcement of the opening of the office was made on 08-09-06. [http://www.eeoc.gov/press/8-9-06.html](http://www.eeoc.gov/press/8-9-06.html)
harassment occurring “in the back” of the casinos. The harassment alleged in these cases was very severe, often constituting rape, and the EEOC believed that handling these cases first was a priority. We also heard that Washington D.C. had not shown any great enthusiasm for the aggressive policing of employment discrimination cases during the time of the two Bush administrations, but there was nothing specific about the casino industry.

That said, the EEOC has made choices regarding what kinds of cases to pursue in Las Vegas. And appearance discrimination cases that might have followed in the wake of Jespersen have not been on its agenda. The EEOC has been involved in investigations of the casinos, but its primary interest has been in sex harassment cases. The impression we got was that the EEOC’s agenda was at least in part driven by the kinds of cases that came in the door, as opposed to a broader strategy that attempted to fill gaps in the litigation landscape. Not one of our respondents appeared to be laying blame at the feet of the EEOC, however. Most thought that the EEOC’s presence in Las Vegas has improved matters on the anti-discrimination front, given that the state equal rights offices had been doing precious little.

D. Judicial Hostility

Given the rates at which federal judges grant motions for summary judgment in Title VII cases, we expected judges to treat our project with skepticism if not hostility. The high rates of grants of summary judgment must suggest that judges perceived there to be a high likelihood that employment discrimination cases were baseless. If our assumptions were right, then the last thing judges would be interested in was a project asking why there weren’t even more cases being brought. With respect to the judges in Las Vegas, we authors had different reactions to and perceptions of the interviews. At least one of us was more skeptical of the judges’ openness to the concept of an appearance discrimination class action claim against the casinos. On the other end of the spectrum, at least one of us believed that the judges were totally honest with us when
they appeared to believe that a lawsuit brought under the *Jespersen* language would have merit.

What we all agree upon is that the judges demonstrated no open hostility to either the broad category of Title VII cases or the sub category of appearance discrimination cases, although, as mentioned above, they questioned the value of our project. Indeed, the judges did not indicate that they perceived there to be an excess of cases in this area. Nor did they evince any unwillingness to follow the dictates of the Ninth Circuit. They recognized the same passages in *Jespersen* that we had flagged as potentially opening the doors to increased litigation in the appearance discrimination area. That said, unlike us, they were not surprised that there had been little on-the-ground reaction to *Jespersen*. The bottom line for these judicial actors was that appearance discrimination cases were simply not being brought. The judges we spoke to may have been socially conservative (they appeared that way), but they indicated interest in our puzzle and seemed willing to give us their time and intellectual energy to help figure out why *Jespersen* had had so little impact. In hindsight, it is not surprising that these judges displayed no hostility to *Jespersen*-type cases; they don’t see enough of them to be hostile. As to Title VII cases generally, while we perceived no hostility, the plaintiffs’ bar certainly believes, and statistics support their belief to a certain extent, that the judges, if not hostile, are very aggressive in granting summary judgment.

The federal magistrate judges saw enough employment discrimination cases to understand their dynamics especially well. The federal courts in Nevada run a mediation program called “early neutral evaluation” where all employment discrimination cases go through a preliminary screening by a magistrate judge. The magistrate judge evaluates the complaint, sits down with the parties, and tries to give them a realistic picture of the strengths and weaknesses of their cases. If there had been even the smallest spike in employment litigation as a result of *Jespersen*, these magistrate judges would have seen it. The magistrates judges with whom we spoke saw no effect; not even in terms of preliminary mediations. As one judge observed, it was hardly surprising that the casinos
had not reacted to *JesperSEN* by altering their behavior. The litigation risk landscape had not changed as a result of the case, so why should they alter their behavior? 38

**E. Dennis Rodman and the Wild Wild West**

Like the various casino employees we spoke to, our judicial respondents took pains to try to explain to us the unique nature of the Las Vegas casino industry. This was a one-industry town, and one grown into a major metropolis only relatively recently. The legal market was relatively thin and nowhere near as sophisticated as in most other major U.S. cities. An illustration of that was the fact that it was only a decade ago that the state got its first law school, at UNLV. We also heard on multiple occasions that, as a cultural matter, people in Las Vegas did not like regulation. Most of them were attracted to it because it was the “Wild West”.

Most salient, the reality was that the casino industry was selling a highly sexualized product. Las Vegas had attempted becoming more family friendly about a decade or so ago, but that did not work and no one was pretending that attracting families was the primary goal any longer. The new promotion was, “What happens in Vegas, stays in Vegas,” a motto that was decidedly not directed at filling the casinos with families. According to one respondent: “The industry quickly realized that these families simply did not spend enough, and they certainly did not spend irresponsibly. It is the twenty-three year old from Los Angeles who is going to drop $5,000 sitting at the craps table.” Once the business model and the advertising switched away from families, the packaging changed. While Las Vegas was always known for commodifying sex even as it sold its “family-friendly” image, the new packaging was even more sexual than before. And the outfits of the cocktail servers were a crucial element of the fantasy being sold; the reality of the industry in Las Vegas was that the casinos were not going to alter their

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38 This comment raises the important question of how the casinos handled the risk of litigation under *JesperSEN*. We plan to interview some insurance agents to find out what types of insurance policies the casinos generally use to protect against employment discrimination suits. Do they buy EPI or “go bare?” One interviewee, an expert in insurance law told us that there is nothing in the literature that even hints at appearance and dress codes litigation as a potential risk.
behavior in the ways that the language in Jespersen might have them do. They had tried the family resort model and it had failed; they were not going back.

The foregoing did not mean that there were no limits; our respondents took pains to emphasize. In illustrating these limits, multiple respondents brought up a set of highly publicized incidents involving the infamous former professional basketball player, Dennis Rodman. Apparently, Mr. Rodman used to be a frequent visitor to Las Vegas. He also was legendary for his misbehavior, particularly in terms of sexually harassing employees. In one incident that was recounted to us, he reached across the bar to grab an employee’s breasts. These incidents resulted in legal action by the employees who were harassed, and the casinos themselves were quite unhappy with Mr. Rodman’s behavior.\(^{39}\)

\textit{ii. The Lawyers}

\textbf{A. Real Problems Are Elsewhere}

A frequent refrain from the lawyers was that the real problems were elsewhere. Makeup requirements in particular were not a big concern of the casino clients. If anything, the problem the casinos had with makeup and dress codes was that they had to ensure that the employees did not wear too much makeup and wear clothing that was too sexualized. More than a few of our respondents sought to tell us the “real” story about the Harrah’s litigation. They recounted that the company had been attempting to make its operation, and particularly that in Reno, more “professional”.\(^{40}\) Some casinos believed that their employees were not adequately taking care of their appearance. Harrah’s was trying to impose uniform standards on their employees with the goal of bringing a “professional” look and attitude to the job. If Harrah’s and the other casinos had wanted its employees to be more sexualized, one respondent explained, they only needed to relax their appearance codes. The servers in particular, seeking more tips, would make their outfits even more outrageous and sexualized. People like us were getting the problem

\(^{40}\) This story is consistent with the research reported in Dianne Avery & Marion Crain, Branded: Corporate Image, Sexual Stereotyping and the New Face of Capitalism, 42 U.S.F. L. Rev. 299 (2007).
backwards. The casinos were often in the position of having to desexualize their employees so that they did not harm the reputation of the casinos in the desire to gain more income in tips. As an aside, the adjective “professional” frequently came up in conversations with employees, who appeared to attach significant importance to the professional nature of their jobs. It did not matter that in some cases these were jobs that required minimal clothing, such as serving cocktails or attending customers poolside. If anything, the lower the amount of clothing, the more important it was for the employees in question to describe themselves as professional. As noted, we heard that same language from the casino-side lawyers as well.

The issue that a number of employers cared about, we were told again, was weight gain, particularly with the female cocktail servers and dancers. Employers very much wanted and needed to impose strict weight restrictions, but were concerned about running afoul of anti-discrimination law. The lawyers had all heard about the airline cases from the 1970s and 1980s, where the airlines had lost on multiple occasions in litigation over whether they could impose more stringent weight restrictions on female employees. To the extent counsel for the casinos were thinking about strategies to protect their employees from discrimination cases, their task was to figure out how to avoid suit over weight restrictions. In this context, the strategy used by one casino, where it had redesignated the jobs of its cocktail servers as entertainers (“bevertainers,” to be specific) came up often. As noted, this story had also come up frequently in the employee narratives. That strategy, some lawyers speculated, might have allowed the casino to impose more stringent weight restrictions. After all, everyone knows that dancers have to be thin and fit. We found the bevertainer strategy particularly interesting when we made our own “reconnaissance” trip to the casino in question. We viewed the female bevertainers, dressed in their skimpy lace teddies scurrying around with heavy trays of cocktails. Their few male counterparts, dressed in long pajamas and loose fitting tops, also served drinks. But after waiting for nearly an hour to see any dancing or

41 See, e.g., Laffey v. Northwest Airlines, Inc., 740 F.2d1071 (D.C. Cir. 1984) (holding that weight restrictions on women and not on men was disparate treatment under Title VII); Gerdom v. Continental Airlines, 692 F. 2d (9th Cir. 1982) (holding that employer’s weight restrictions on women that were more severe than those on men constituted discrimination).
entertainment, and asking various employees when the dancing would start, we finally had to ask a bevertainer to entertain us. She got up on a small stage in the middle of the casino floor and lip-synched a song into a microphone. There was no dancing and minimal entertainment value. She then grabbed her tray and ran off to serve more drinks.

**B. Just Like Disney World**

Disney World was often invoked by the lawyer-respondents as an analogy to help explain to us what the casinos were doing in terms of appearance codes. The casinos were like theme parks; they were selling a fantasy to customers, particularly male customers who came to Las Vegas to escape their otherwise humdrum lives. Just like it was a crucial element of the Disney strategy to have employees in cartoon outfits like Mickey Mouse, the casinos needed cocktail servers in skimpy outfits with makeup and high heels and so on.

Our respondents were invoking the narrow exception that Title VII allows for bona fide occupational qualifications ("BFOQs"). As noted, Title VII has been interpreted to allow, in situations where the gender differences are integral to the job (for example, a stripper in a strip club), employers to impose gender specific appearance restrictions. There, the employer can impose gendered restrictions that allow for the effective sale of sex. The question though, as the casino lawyers in particular recognized, was whether the courts would buy the Disney analogy. All of them had heard of the Southwest Airlines case, where the airline had attempted to sell its theme of sexy airline service. The court had rejected the argument on the grounds that the essence of the product being sold was airline travel. The question was whether the casino context was closer to the strip club context or the Southwest airlines case. None of those who brought up the Disney analogy could recollect ever having heard of a casino having had to bring up the argument in a litigation context.

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The BFOQ and Disney discussions surprised us, given our assumptions that the cocktail server cases would clearly be more like the Southwest airlines case than the strip club case; particularly in the handful of casinos where part of the selling point was that they were not only highly sexualized, but also family friendly. But our respondents did not share our views, in part because of their predictions about the local courts. At least one set of attorneys who represented one of the major casinos in Las Vegas, however, admitted to our students in class that they did not think that the casinos could win a BFOQ defense if plaintiffs brought a suit alleging that dress and grooming codes were gender discrimination.

C. The Hostile Judges

Many of our plaintiff-side respondents complained that blame (or credit) for the lack of response to Jespersen should be laid at the feet of the local judges. They accused the local federal bench of hostility to employment discrimination cases and argued that the judges would very infrequently rule against the casinos. Part of the story was that the state judiciary, because it was elected and because the casinos were typically the most important campaign contributors, was not going to do anything to harm the interests of the casinos. But, while the state judiciary was not irrelevant here, given that state remedies for employment discrimination can be important in certain states, the state remedies that Nevada provides in employment discrimination cases are not attractive as compared to the federal system. Action in employment discrimination in Nevada, and specifically, Las Vegas, takes place in federal court. Federal judges are appointed for life terms, not elected for limited terms. It goes to reason, therefore, that the federal judges were not being influenced by the desire to obtain election funding from the casinos. And no one suggested that the casinos had a role to play in the initial appointments of any of these judges.

When pressed, our respondents explained that it wasn’t so much that the federal judges needed funding from the casinos, but that they were conservative. That is, they

43 Cite
were hostile to the kinds of gender discrimination claims we were hypothesizing. What did these respondents mean? Were all the key judges Republican appointees? Apparently not. Not one of our respondents thought that Republican/Democrat distinctions among the judges made a whit of difference. Instead, the demographic factor that was mentioned most often was religion. There are a number of judges on the bench who are members of the Church of Latter Day Saints, and they supposedly exert a disproportionate influence on the character of the local bench. Again, we pressed our respondents to explain. Did not “conservative” here mean socially conservative? At one point, as we understood, the Mormon Church had been quite hostile to the casinos and the lifestyle they were selling. While Mormon judges were considered to be conservative socially in their own personal lives, however, we were told that they did not impose this conservatism on others. They did, however, have a conservative view when it comes to government regulation of business. This view perhaps makes them more reluctant to intrude upon the employer’s prerogatives.

But, even if the judges were conservative, we were talking about an en banc decision of the Ninth Circuit here. These judges were obligated to follow the dictates of the Ninth Circuit. If they didn’t, they faced reversal. And judges, regardless of religion, do not like being reversed. More than a few interviewees responded here that the local judges were not that concerned about reversal by the Ninth Circuit. The explanation was that the Ninth Circuit has such a high reversal rate at the Supreme Court that some district judges might actually want to be reversed by the circuit. Slightly incongruous with this explanation, though, was that no one seemed to know whether the Supreme Court has been reversing Ninth Circuit cases arising out of the circuit’s reversal of Nevada district court cases. Plus, the stories about the Ninth Circuit’s high reversal rates had been from more than a decade ago. The supposedly ultra liberal Ninth Circuit from the 1990s looks quite different after two terms of a Republican presidency.

44 Many of these federal appointments were supposedly shepherded through by powerful democratic senator Harry Reid. [Cite numbers]
45 Senator Reid’s ties to the industry came up on a few occasions. Although no one suggested that those ties had anything to do with the views of the federal judges who were appointed.
46 [Cite]
None of this is to say that our respondents are wrong in their view that the local judges are hostile to appearance discrimination cases in particular, and more generally, to all Title VII cases. In fact, plaintiffs’ lawyers nationwide complain about the pro-defendant attitudes of the federal bench. And, it is true that there have recently been a number of employment discrimination cases in which the lower federal courts have interpreted the law to grant narrow protections only to be overturned by the United States Supreme Court. Moreover, lawyers in our interview pool and nationwide complain that federal judges are particularly aggressive in granting summary judgment against plaintiffs in Title VII cases. But these complaints do not explain why, in light of this “judicial hostility” lawyers in Las Vegas would continue to bring other Title VII suits, but shy away from appearance discrimination suits.

D. The Casino Clients

Both the defense and plaintiff-side lawyers suggested the possibility that casino clients were different from those we might find in other industries and that difference might be a confounding factor. In particular, two points were emphasized. First, the casino clients tend to have large in-house legal staffs, with experienced lawyers who do a lot of the legal work themselves. Outside counsel, by contrast, are often relatively small and do what the in-house lawyers tell them to. In New York or Los Angeles, by contrast, the law firms are large, with long histories and established reputations. The power/status relationships are perhaps different. Assuming that this characterization holds, the next question is why. Is there something about the casino business that leads to a different pattern than in, for example, the investment banking business in New York? At a superficial level, our impression was that the outside counsel in Las Vegas were unlikely to take it upon themselves to suggest to their clients that they should alter their appearance policies because of a new Ninth Circuit case. To the extent such a suggestion would come, it would come from the in-house counsel. And maybe, because in-house

47 See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (overturning the Fifth Circuit’s grant of a JMOL to the defendant after the jury found for the plaintiff); Burlington Northern and Santa Fe Railway Co. v. White, 126 S. Ct. 2405 (2006) (rejecting the Sixth Circuit’s holding that Title VII’s anti-retaliation provision forbids only those employer actions and resulting harms that are related to the workplace).
counsel do not bill hours, but have salaries, there are fewer incentives to exaggerate the implications of a case.

The second point we heard was that these clients, because they were in the casino industry, were willing to take more risks that other clients. Specifically, the point was made in terms of these clients perhaps not being as risk averse as ordinary corporate clients. These clients were willing to bet that they would either win in the local courts or that they would be able to force quick settlements. We should note with respect to this point that our respondents were speculating; none of them said that they had heard or seen senior casino executives make risk calculations in ways that were different from executives in other industries.

E. What about Other Cases or Tribunals?

We had expected to find a significant local reaction to Jespersen, but did not. Maybe, however, Jespersen was idiosyncratic? Were there other appellate cases that the industry had reacted to? Once we were beyond our initial set of interviews and realized that we were finding no indications of a reaction to Jespersen, we began asking this question. One set of U.S. Supreme Court cases had had an impact, the lawyers (and Human Resources executives) told us. They also told us that there was a different body, not a court, whose pronouncements were always viewed as important. That was the Nevada Gaming Commission.

The two cases that we were told had created a reaction were Burlington Industries, Inc. v. Ellerth 48 and Faragher v. City of Boca Raton. 49 In those cases, the United States Supreme Court spelled out the requirements for an employer’s liability for a hostile work environment, and created an affirmative defense for employers who had made efforts to prevent and correct sexual harassment in the workplace. As scholars have documented, those cases led to an explosion of lawyer and consultant activity surrounding sexual harassment policies, trainings in employer behavior, and trainings in

investigations of allegations of sexual harassment. The same appears to have happened in Las Vegas. The casinos, like other employers, responded to *Faragher* and *Ellerth* by conducting trainings of their employees in sexual harassment.\(^{50}\) Given this reaction to *Faragher* and *Ellerth*, why, at least in the casino industry in Las Vegas, has *Jespersen* had no effect? The answer we received from a number of respondents was that eliminating sexual harassment may cost the casinos some money, but has minimal adverse effect on the business of the casinos. Sexy dress codes, on the other hand, are core to the identity of the casino industry in Las Vegas. The casinos will risk almost anything to preserve that identity.

A number of our respondents also said that there was one body whose pronouncements every casino would jump to. Apparently, casinos immediately react to an investigation by the Gaming Control Board because they could lose their licenses. Casinos are reportedly also careful about complying with the Gaming Commission’s regulations. If a case were brought in federal district court alleging discrimination based on sexual stereotyping dress codes, in contrast, the casinos would be able to delay, have a colorable defense, and with luck, prevail in the case. Not so, with the Gaming Commission. It acts quickly and can deprive the casino of its license to operate.

### V. The (Relative) Unimportance of Case Law?

Forty years ago, Stuart Macaulay’s classic study of Wisconsin lawyers found that formal contract language played little role in ordering business transactions. Personal relationships, social context, and local reputations were more important.\(^{51}\) In the particular context of the Las Vegas casino industry and the issue of gender discrimination in appearance regulations, we find something similar with respect to case law. *Jespersen*

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\(^{50}\) One of the authors of this paper attended a sexual harassment training of employees at one of the major casinos by its outside counsel, an interviewee for this project. The training included a short film, powerpoints and a lecture by counsel, with a question and answer period.

\(^{51}\) Robert Ellickson’s book, *Order Without Law*, similarly finds that formal law was surprisingly irrelevant to the ordering of day-to-day relationships among cattle ranchers in Shasta County. The communities that Ellickson and others scholars such as Lisa Bernstein studied however, were small, ethnically homogenous and relatively insular. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992). The Las Vegas community of casino employees is far from being small and ethnically homogenous.
is one of the most written about cases in the legal academy; many of these articles talking about how the case has altered the law significantly. However, actors on the ground are barely aware of it. The case has played little role in ordering local relationships and behavior in the casino industry. The factors that are important in ordering behavior within the casino industry have more to do with local economics, reputations and social context than the pronouncements of a federal appeals court, even one sitting en banc.

At first cut, our observations may appear to lend support to the dominant political science model of studying cases that elevates the importance of aggregating case outcomes in multiple cases over the careful parsing of texts of individual cases. And there was some support for this model from our interviews, in that one of the explanations for why there had been no reaction to the nuanced dictates of the case was that the casino had won and, more generally, that the casinos would continue to win. But the relevance of the outcome in this case, even when aggregated with the outcomes of prior cases, constituted but a small part of the narratives we heard. The case itself, both nuanced language and outcome, was relatively unimportant in terms of affecting behaviors of local actors.

This is not to say that the either the nuanced language in the case or the outcome have not changed the predictive calculations for local actors. Our research does not allow us to reach either conclusion. Rather, our point is that these factors are, in the Las Vegas casino employee context, swamped by other factors. Those other factors include the incentives and constraints operating on these local players. For example, with employees, fears of being black balled in the industry and concerns about not earning very much from bringing suit appeared to be important. For the plaintiffs’ lawyers, monetary constraints, limited expertise and calculations about how much energy the casinos were likely to invest in fighting them looked to be important.

At some level, what we are saying is trite. Of course, the incentives and constraints on local actors play an important role in determining how they think and behave. What surprised us though was how unimportant the factors that we spend
enormous energy arguing about in the academy – the relative importance of opinion language versus case outcomes in appellate cases – turned out to be. They were swamped by other, more local, factors. Appellate judges, either in terms of what they said or decided, were not that important.

The element common to almost all the narratives was that Las Vegas was a one-industry city. Whatever was done, by employee, lawyer or judge, it would produce widespread resistance if it were perceived in the community as undermining the industry. And, as we heard repeatedly, sex was a key sustaining force in the industry. Outsiders, including us, the various legal academics writing about the case, and the judges on the Ninth Circuit, simply didn’t understand the economic context. And economic context was a key determinant in whether a certain type of case would succeed.

Our findings might be idiosyncratic to Las Vegas, the casino industry and the issue of appearance discrimination. Even within the Las Vegas casino industry and in the discrimination context, there may be other cases that had more of an impact (although we did not hear of them). The next part of this project is to extend our inquiry to the casinos in Atlantic City and to those on the riverboats in Mississippi.