¡VIVA LA EVOLUCION!: RECOGNIZING UNCONSCIOUS MOTIVE IN TITLE VII

Ann C. McGinley†

TABLE OF CONTENTS

---

† Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. J.D., University of Pennsylvania, 1982; M.A., University of Deleware, 1974; B.A., Rosemont College, 1973.

I wish to thank the James E. Rogers Research Grant Fund, which provided financial support for this project, Dean Richard Morgan and my new colleagues at UNLV, who provided emotional and intellectual support, Jeff Stempel and Jean Sternlight, who made valuable comments on an earlier draft, Mary McCormick and Trish Simonds, whose excellent library work made this article possible, and finally, Bruce Fraser and Tommy Sheridan who provided valuable research and clerical support.

INTRODUCTION: DEFINING INTENT

Intent lies at the heart of employment discrimination law. For the vast majority of cases brought under Title VII of the Civil Rights Acts of 1964 and 1991, intent alone determines whether a violation has occurred.[1] Interpretation of the intent requirement, however, has created enormous difficulties, distorting the very meaning of "discrimination" itself.[2]

---

[1] There are two basic models of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994). One model covers disparate treatment, which require a showing of intentional discrimination. The second model covers claims that a neutral policy has had a disparate impact on a protected group. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 93-94 (4th ed. 1997). The large majority of cases brought under Title VII follow the disparate treatment model. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (stating that in 1989 only 101 of the 7,613 employment discrimination cases brought were disparate impact).

[2] *See, e.g.*, Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991) (describing the debate among the courts over the quantity of proof sufficient to hold the employer liable); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 220 n.64 (1993) (describing the debate over sufficiency of proof to withstand a defense motion for summary judgment).

There are four sections of Title VII that are relevant to the meaning of intent in employment discrimination. Section 2000e-2(a), which imposes liability for job discrimination against individuals, states:

> (a) It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994) (emphasis added).

The remedial portion of the Act states in relevant part:

Although scholars have struggled with the meaning of discriminatory intent, the courts have settled on a simplistic definition.[3] According to the courts, an employer intentionally discriminates only if he[4] acts with a *conscious* discriminatory intent or motive. That is, the employer must be aware that he is motivated by the protected characteristic – race, color, gender, national origin or religion – at the time he makes the adverse employment decision. As Justice Brennan stated in *Price Waterhouse v. Hopkins*:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[5]

Although appealing in its simplicity, this explanation reflects a misunderstanding of the current nature of prejudice and how it results in

---

(1) If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,. . . with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1)(1994) (emphasis added).

Section 2000e-6(a), which applies to a pattern and practice of discrimination clearly requires an intent to discriminate:

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is *intended to* deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States. . .

42 U.S.C. § 2000e-6(a)(1994) (emphasis added).

Finally, the 1991 amendments to the Act provide for recovery of compensatory and punitive damages under Title VII, limiting recovery of damages to actions of intentional discrimination, as opposed to cases alleging disparate impact. *See.* 42 U.S.C. § 1981a (a)(1)(1994).

[3] Justice Stewart explained:

'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

International Bhd. of Teamsters v United States, 431 U.S. 324, 335 n.15 (1977).

[4] I use the term "he" for simplification because most employers are still male. Of course, an employer can also be a woman.

[5] U.S. 228, 250 (1989).

discriminatory behavior.[6] Social science research demonstrates that the nature of discrimination has changed since the passage of the Civil Rights Act in 1964.[7] In 1964 racially and sexually discriminatory acts and attitudes were overt and even condoned by society, but education efforts since 1964 have succeeded in eliminating from the general populace approval of overt discriminatory acts and attitudes.[8] Racial and gender discrimination have gone underground. Social Science research demonstrates beyond debate that discriminatory attitudes and behavior still exist today and a large percentage of bias and prejudice and the resultant discriminatory behavior is due to *unconscious* factors.[9]

The first problem with the intent requirement is that as defined by the courts, "discriminatory intent" represents an outdated view of human behavior, a view contradicted by overwhelming scientific evidence. Persons whose acts result from bias and prejudice are often unaware of their subconscious motivations. Thus, it is likely that differential treatment of a female or minority employee in the workplace is because of his race or her gender, even though the employer is unaware that race or gender

---

[6] *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

[7] *See* discussion *infra* Part I. The historical circumstances leading up to the passage of the Civil Rights Act of 1964 inform our understanding of the original meaning of the intent requirement of Title VII. The Act resulted from years of racial and political unrest, racial violence stemming from the assertion of the rights of blacks in the South, the Civil Rights Movement, non-violent marches led by the Reverend Martin Luther King, and violent treatment of African American children who participated in civil rights marches in Birmingham in May, 1963. *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 17-20 (1985).

Because race discrimination resulted, at that time, from an overt invidious animus against persons of color, an animus that was obvious to all viewing historical events from their living rooms, the Congressional debate leading up to the passage of the law focused on the immorality of overt racism. In this climate, Congress never discussed, and may never have even considered, the possibility of unconscious discrimination. Congress appears to have assumed that discrimination "because of" race is equivalent to conscious, intentional, and perhaps invidious discrimination.

[8] *See* discussion *infra* Part I.

[9] *See infra* Part I. Much of the Congressional debate paralleled the thought process prevalent in the field of psychology. In *Psychology and Prejudice: A Historical Analysis and Integrative Framework*, 47 AMER. PSYCHOL. 1182 (1992), Professor John Duckitt explains that in the 1950's a new paradigm for viewing prejudice developed in the field of Psychology that explained prejudice as being caused by pathological personality structures. *See id.* at 1186. According to Duckitt, this paradigm was a reaction to the Hitler regime and atrocities committed against the Jews in Europe. *See id.*

In the 1960's Psychology shifted its theory of the origins of prejudice from abnormal individual psychology to societal causes. This shift was due largely to the need to explain the prevalence of prejudice in the South. *See id.* at 1187. During the early stage of this theory, psychologists opined that prejudice was embedded in the social environment, primarily as a result of socialization and a need to conform. They theorized that once desegregation occurred, blacks and whites would live harmoniously. *See id.* The primary goal, therefore, was integration.

motivated the differential treatment. A rule limiting the definition of discrimination to cases where the employer consciously treated an employee differently because of membership in a protected class ignores the social science evidence and narrows the effectiveness of the statute.

A second failure exacerbates the problems with the intent requirement. Based on the erroneous assumption that discriminatory intent is necessarily conscious, the Supreme Court created artificial proof constructs designed to ascertain whether discriminatory intent exists.[10] The purpose of these constructs is to determine, in the absence of direct evidence of discriminatory intent, whether the employer relied on the employee's protected characteristic in making the employment decision. In fact, these proof constructs, as originally designed and interpreted, were generally effective in separating discriminatory decisions, both conscious and unconscious, from non-discriminatory ones.[11] That is, *the proof mechanisms serve the role of determining causation rather than conscious intent,* assuring that the underlying employment decision is made because of the employee's protected characteristic, either with or without the employer's conscious awareness. Ironically, however, courts originally applying these proof constructs erroneously assumed that the constructs identified an employer's *conscious* intent to discriminate.

There was, in sum, a dislocation between the theoretical justification for the proof mechanisms designed to identify conscious discriminatory intent and the reality that these mechanisms could also identify unconscious discrimination. This dislocation caused the emergence of a critique, which I term the "counter-evolution," often resulting in a conservative shift in proof and evidentiary standards. In some circumstances, the critique focuses on the proof mechanisms, demonstrating that basic assumptions underlying them were erroneous;[12] in others, it limits the statute by holding irrelevant important evidence of discrimination. In either case, the counter-evolution is based on a concept of discrimination narrowly limited to consciously discriminatory acts. Accepting this basic concept, the critique itself is often theoretically sound.

---

10 In some cases, Congress has explicitly adapted these constructs as subsequent amendments to the statute. *See, e.g.*, 42 U.S.C. § 2000e-2 (k) (1994) (codifying the disparate impact model). In others, Congress has left the evolution of the proof constructs to the courts. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) *and* Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000) (cases discussing the relative burdens of proof and production in a disparate treatment case).

11 *See* discussion *infra* Part I.

12 *See, e.g.*, Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229 (1994).

The underlying concept, however, is flawed because it defines discrimination in the narrowest of terms, looking only to the conscious thought process of the employer rather than to the treatment of the employee or to its effect on the employee. A more comprehensive definition of discrimination that would include differential treatment of members of protected classes, whether caused by conscious or unconscious motivation, would more appropriately further the goal of the statute to create equal opportunity for all qualified workers.

This article analyzes the different proof mechanisms developed under Title VII discriminatory treatment doctrine, demonstrating their ability to identify unconscious, as well as conscious, discriminatory behavior. It demonstrates that soon after its enactment Title VII began to evolve,[13] expanding its reach to unconscious discrimination. Although in many instances courts were unaware of this expansion, courts appear to have followed their intuition to further the broad remedial and preventive purposes of the statute. In response to the evolution and to the courts' failure to articulate a justification for their decisions, a counter-evolution is currently occurring, with many courts attempting rigidly to adhere to the narrowest definition of discrimination.

I argue that courts and legislatures should reject the new critique by openly providing a theoretical justification for existing methodologies that explicitly incorporates into the law the psychological and sociological evidence demonstrating that discriminatory behavior results from both conscious *and* unconscious bias, prejudice and stereotyping.

---

[13] Professor Michael Selmi disputes that there has been any change in Supreme Court jurisprudence concerning discrimination law. According to Professor Selmi, the Court has consistently recognized only the most overt forms of discrimination. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997). Although apparently diametrically opposed to Professor Selmi's position, my point is not really the exact opposite of Selmi's. I agree that the Court's decisions have most often required a showing of overt discrimination in order to hold a defendant liable; that the Court's anti-discrimination rhetoric has masked more conservative results; and that the evidentiary constructs developed by the Court are applied in a manner that denies the existence of subtle discrimination.

This article demonstrates, however, that these constructs are capable of holding liable employers who discriminated unconsciously and that in the early days of their existence they actually *did* hold liable employers who may have discriminated unconsciously. The evolution I see is a movement from a narrow definition of intentional discrimination to a broader definition that encompasses conscious and unconscious discrimination. This movement was not made express. In fact, most courts were likely unaware of the possible use of the constructs to hold employers liable for unconscious discrimination. A counter-evolution is occurring in which many lower courts narrow the evidentiary constructs, limiting findings of discrimination to the most overt and direct evidence of discriminatory motive.

I. SCIENTIFIC RESEARCH DEMONSTRATING THE UNCONSCIOUS CAUSES OF DISCRIMINATORY ATTITUDES AND BEHAVIOR

A number of legal scholars have written extensively about the unconscious nature of discrimination.[14] Professor Charles Lawrence first identified unconscious racism as the source of much discriminatory behavior.[15] Relying on studies demonstrating unconscious stereotyping, Professor David Benjamin Oppenheimer proposed that employers should have a duty to eliminate unconscious stereotypes from their decisionmaking process and should be liable for negligently breaching that duty.[16] Professor Linda Hamilton Krieger agreed with Professor Lawrence about the unconscious nature of discrimination but disagreed that the source of discrimination was primarily unconscious motivation.[17] Instead, Professor Krieger applied social cognition theory to employment discrimination law and argued that discrimination law is fundamentally flawed because it does not take into consideration how decisionmaking occurs.[18] According to Krieger, discriminatory stereotypes result from the normal cognitive process of categorization rather than the invidious intent presumed by the law.[19] While the law focuses on the moment that the decision is made, Krieger demonstrates that cognitive theory emphasizes the manner in which information about ingroups and outgroups is processed and retrieved.[20] According to cognitive theory, the normal process of categorization distorts the decisionmaker's perception, memory and recall, leading to a biased decision even though the employer is unaware of his or her bias.[21] Krieger hesitated to make a proposal for determining liability of the decision maker because psychology had not established a means for reducing cognitive errors in assessing employees.[22]

Krieger's work is immensely important because it confirms the unconscious nature of stereotype-based decisionmaking, it extends the analysis of Professors Lawrence and Oppenheimer and it creates a deeper understanding of the intractibility of stereotypes due to their cognitive

---

14 *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Linda Hamilton Krieger, *supra* note 6.

15 *See* Lawrence, *supra* note 14.

16 *See* Oppenheimer, *supra* note 14.

17 *See* Krieger, *supra* note 6, at 1164 n.11.

18 *See id.* at 1167.

19 *See id.* at 1187-90.

20 *See id.* at 1191-92.

21 *See id.* at 1199.

22 *See id.* at 1247.

origin. Krieger's article, however, focuses almost exclusively on cognitive processing mistakes that cause bias.

This article's analysis of the social science research goes one step further. First, it includes very recent psychological studies, some of which challenge the view that cognitive theory alone accounts for unconscious discrimination. This newer research presents a more nuanced view of the important contribution of motivation and affect to stereotype formation, activation and inhibition, while simultaneously confirming the unconscious nature of stereotyping and the behavior it produces. Second, it includes sociological studies of organizational behavior in the workforce that enhance our understanding of the operation of stereotypes and how they become socially activated. The sociological studies play a vital complementary role in understanding the nature of bias and prejudice and how it is acted out in the workforce.[23] Finally, this article considers scientific evidence concerning the effectiveness of ameliorating biased responses, as conducted in individual laboratory test, meta-analyses and observational field study work. Although bias and prejudice are enduring phenomena, these latter studies suggest that there are important specific behaviors that employers can use in order to reduce bias resulting from unconscious factors.

Scientific research concerning the nature and origins of prejudice and its influence on discriminatory behavior is vast and complicated. Early in the twentieth century psychologists attributed stereotyping and discrimination to the affect[24] of the discriminator toward members of the outgroup.[25] Generally, this body of science held that intergroup contact created affective responses or feelings, which were often negative.[26] These feelings, according to this view, created consciously-held attitudes of ingroup members toward members of the outgroup and vice versa.[27] At the time of the passage of Title VII in 1964, these views dominated the psychological literature.

---

23 In fact, sociological studies may be even more relevant to the workforce since psychological studies tend to focus on the reaction of individuals to controlled stimulus in laboratory environments.

24 The term "affect" has a number of meanings in the psychological literature, "spanning the range of generalized arousal, specific emotions, transient mood states, and evaluative reactions." David L. Hamilton et al., *The Influence of Affect on Stereotyping: The Case of Illusory Correlation, in* AFFECT, COGNITION AND STEREOTYPING 39, 40 (Diane M. Mackie & David L. Hamilton eds., 1993). The term "affect" is used herein to mean the mood state of the person.

25 *See* Galen V. Bodenhausen, *Emotions, Arousal, and Stereotypic Judgments: A Heuristic Model of Affect and Stereotyping, in* AFFECT, COGNITION, AND STEREOTYPING 13, 14 (Diane M. Mackie & David L. Hamilton eds., 1993).

26 *See* Steven J. Stroessner & Diane M. Mackie, *Affect and Perceived Group Variability: Implications for Stereotyping and Prejudice, in* AFFECT, COGNITION, AND STEREOTYPING 63 (Diane M. Mackie & David L. Hamilton eds., 1993).

27 *See id.*

In the 1970's, however, psychologists began to reevaluate the causes of prejudice and discrimination. During the next fifteen to twenty years, psychologists have focused on cognition instead of affect as the cause of attitudes that group members hold about members of other groups.[28] Cognitive theory identifies common human information processing mechanisms as responsible for creating stereotypes and the resulting discrimination.[29] This cognitive approach theorizes that stereotypes and discriminatory attitudes result from humans' natural cognitive processing system which allows persons to know the world through categorization. Unfortunately, once formed in the individual, stereotypes will distort the perception, memory and recall with reference to outgroup members. The evaluator will view a member of an outgroup consistent with the stereotype whether it applies in fact to the individual or not. Psychologists are beginning to discover, however, that the nature of prejudice and stereotypes is more complex than scientists previously believed. Neither affective response nor cognitive theory, standing alone, can account for the presence of stereotypes and prejudicial attitudes.[30]

Instead, whites' prejudicial attitudes and behaviors toward blacks result from a complex interaction of motivational, cognitive and cultural factors.[31] Motivational factors include a need for self-esteem and status, which can result in justifying harmful behavior toward blacks by blaming or denigrating the black person harmed.[32] As explained above, cognitive factors deal with the automatic categorization and processing of information about different groups of people.[33] Research demonstrates, for example, that the mere categorization of persons into groups causes intergroup bias.[34] Socio-cultural factors contributing to prejudices include cultural stereotypes, portrayals by mass media, institutional racism and historical and contemporary differences in power and prestige.[35] As one psychologist described:

Any particular form of stereotyping or prejudice. . . is in all likelihood determined by cognitive, motivational, and social learning

---

28 *See* David L. Hamilton & Diane M. Mackie, *Cognitive and Affective Processes in Intergroup Perception: The Developing Interface, in* AFFECT, COGNITION, AND STEREOTYPING 1 (Diane M. Mackie & David L. Hamilton eds., 1993).

29 *See id.*; *see also* Krieger, *supra* note 6, at 1187-88.

30 *See* Hamilton & Mackie, *supra* note 28, at 4-5.

31 *See* David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach, in* PREJUDICE, DISCRIMINATION, AND RACISM 127, 153 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

32 *See* Irwin Katz et al., *Racial Ambivalence, Value Duality, and Behavior in* PREJUDICE, DISCRIMINATION, AND RACISM 35, 45 (John L. Dovidio & Samuel L. Gaertner eds., 1986).

33 *See* John L. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice in* OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA 128 (H. Knopke, J. Norrell, & R. Rogers eds., 1991) [hereinafter *Changes*].

34 *See id.* at 128.

35 *See id.* at 129.

processes, whose effects combine in a given social context to produce specific judgmental and behavioral manifestations. Therefore, any attempt to understand such phenomena as a product of one process alone is probably misguided.[36]

While the new psychological literature continues to demonstrate the key role that cognitive processing plays in prejudice and discrimination, it also demonstrates that affect or mood likely impacts a person's ability and/or motivation[37] to process information about a member of an outgroup efficiently, often inhibiting processing of new information.[38] If the person has already formed a stereotype, affect may inhibit the processing of information that is inconsistent with the stereotype, leading to attitudes more aligned with the stereotype.[39]

In the case of race prejudice, culturally transmitted stereotypes have already formed in the individual's mind. The question then becomes whether and under what conditions an evaluator can consider information that is inconsistent with the stereotype. Research shows that stereotypes are enduring and intransigent. Even when faced with evidence contradicting the stereotype, subjects often ignore the contradictory evidence and resort to the stereotype.[40]

A person's affect or mood may affect his ability to reject the stereotype and to consider new information. Studies show that persons who have positive affect – those in a happy mood – process new information less and rely more heavily on previously-formed stereotypes than persons who have a neutral affect.[41] Thus, in the employment setting, a happy white manager may rely more on stereotypes in judging his black employee than a manager who is in a neutral mood.[42] Positive mood states create more reliance on stereotyping because they inhibit the evaluator's ability to process information that differentiates from the so-

---

36 Hamilton & Trolier, *supra* note 31, at 153.

37 *See* Bodenhausen, *supra* note 25, *at* 13, 24 (concluding that it was unclear whether the mood affected the subject's ability to process information or his motivation to process information.); *see also*, Hamilton et al. *supra* note 24, at 56 (concluding that the happy and sad moods more likely affected the ability to process information, rather than the motivation).

38 Because a particular affect or mood can inhibit cognitive processing of information, affect or mood can cause different results depending on whether the mood occurs before or after stereotype formation.

39 *See* Bodenhausen, *supra* note 25, at 25-29. If, however, the individual has not yet formed a stereotype, affect, by inhibiting processing of stereotypical information, will impede the formation of stereotypes.

40 *See* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERS. & SOC. PSYCHOL. BULL. 1139, 1147-1148 (1995).

41 *See id.*

42 This result is counter-intuitive because one would assume that a happy person would be less judgmental and more open to judging a person of another race charitably.

cial stereotype.[43] Thus, the individual relies on the stereotype in making its judgments.[44]

Although nuanced and apparently contradictory, this research has one conclusion in common: these moods do not seem to create a conscious understanding of their effect on the evaluator's judgment. Instead, the affect contributes or detracts from the evaluator's ability or motivation to process the inconsistent information, unconsciously influencing the evaluation by creating either more or less reliance on the stereotype.[45]

No matter how the interaction of cognitive, affective and motivational factors occurs, social science research demonstrates that race and gender bias and prejudice resulting in discriminatory behavior are the result of unconscious, as well as conscious, phenomena.[46] As one group of psychologists stated:

The truth of the matter is that events and operations that completely evade conscious apprehension frequently trigger our evaluations, impressions and behavioral responses. Tugged in one direction, or pulled in another, our actions are often driven by a multitude of cognitively impenetrable mental processes.[47]

A. RACE DATA[48]

Relying on cognitive, motivational and socio-cultural factors, a number of current theories account for discriminatory attitudes and be-

---

[43] *See* Bodenhausen, *supra* note 25, at 24-25.

[44] The results for persons in sad moods are contradictory. Some studies suggest that persons in sad moods tend to spend more time processing information that deviates from the stereotype, thus inhibiting the evaluator's reliance on stereotypes. *See id.* at 19. Other researchers have found that in some instances, a sad mood, like happy moods, can create reliance on stereotypes. *See* Hamilton et al., *supra* note 24, at 55.

[45] *See, e.g.*, David A. Wilder, *The Role of Anxiety in Facilitating Stereotypic Judgments of Outgroup Behavior in* AFFECT, COGNITION, AND STEREOTYPING 87, 106 (Diane M. Mackie & David L. Hamilton eds., 1993) (concluding that anxiety unconsciously created more reliance on stereotypes of outgroups).

[46] *Compare* Margo J. Monteith, Self-Regulation of Stereotypic Responses: Implications for Prejudice Reduction Efforts, 92-96 (1991) (unpublished Ph.D. dissertation, University of Wisconsin - Madison) (suggesting that although stereotypes occur as a result of unconscious processes, at least low-prejudiced individuals are aware of their stereotypic responses and may be able to control them with training).

[47] C. Neil Macrae et al., *On Activating Exemplars*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 330, 344 (1998) (citations omitted).

[48] By discussing race and gender social science data separately, I do not intend to ignore the very real problem of intersectionality. This concept, of particular importance to women of color, demonstrates that a woman of color is not subject only to sex discrimination or to race discrimination. Nor is the discrimination she suffers the sum of sex and race discrimination. Instead, intersectionality demonstrates that women of color suffer a different quality and type of discrimination, formed at the intersection of membership in two underclasses. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and*

haviors: ambivalence,[49] modern racism/symbolic racism[50] and aversive racism.[51] While these theories differ slightly, they share the common notion that racist behavior and/or attitudes are often rooted in unconscious factors.[52]

In PREJUDICE, DISCRIMINATION AND RACISM, leading psychologists describe experiments examining the "causes and consequences of contemporary forms of prejudice, discrimination, and racism",[53] demonstrating that racism and prejudice have changed fundamentally since the passage of the 1964 Civil Rights Act. While earlier, "old fashioned" racism was overt and accepted, prejudicial attitudes and behavior have become unacceptable in mainstream white America.[54] Although the percentage of whites with overt racist prejudices against blacks dropped precipitously between 1933 and 1988,[55] Dovidio and Gaertner demonstrate in *Changes in the Expression and Assessment of Racial Prejudice*,[56] that even whites who consider themselves to be liberal and egalitarian on race issues harbor unconscious racist attitudes and behave in racist fashion toward blacks,[57] often unaware that their responses are race-based.[58] According to Dovidio and Gaertner, this form of racism, identified as "aversive racism," results from whites' assimilation of an egalitarian value system with "impressions derived from human cognitive mechanisms that contribute to the development of stereotypes and prejudice, and . . . feelings and beliefs derived from historical and contemporary cultural racist contexts."[59] Simply put, whites demonstrate an ambivalence toward blacks. While consciously holding egalitarian val-

---

Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991). Unfortunately, most of the social science research deals with either sex or with race.

[49] *See* Katz et al., *supra* note 32 *at* 56.

[50] *See* John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale in* PREJUDICE, DISCRIMINATION AND RACISM 91, 92 (Dovidio & Gaertner eds., 1986).

[51] *See* John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination and Racism: Historical Trends and Contemporary Approaches in* PREJUDICE, DISCRIMINATION, AND RACISM 1, 21 (Dovidio & Gaertner eds., 1986) [hereinafter *Historical Trends*].

[52] *See id.* at 21; *see also* Katz, *supra* note 32, at 47.

[53] *See Historical Trends, supra* note 51, at 18.

[54] *See Changes, supra* note 33, at 120.

[55] Dovidio and Gaertner note that when asked the question, "Do you think Negroes are as intelligent as white people – that is, can they learn things just as well if they are given the same education and training?" in 1942, 47% of whites responded affirmatively while in 1968 80% said yes. *See Changes, supra* note 33, at 120.

There has been a dramatic shift in attitudes of whites toward desegregation. Whereas in 1942, 2% of Southerners and 40% of Northerners believed that blacks and whites should attend school together, by 1982, over 90% of all white respondents said that blacks and whites should attend school together. *See id.* at 124.

[56] *See Changes, supra* note 33.

[57] *See id.*

[58] *See, e.g.*, PREJUDICE, DISCRIMINATION AND RACISM (John F. Dovidio & Samuel L. Gaertner, eds., 1986).

[59] *See Changes supra* note 33, at 131.

ues, whites simultaneously harbor unconscious negative feelings towards blacks as a result of cognitive and motivational biases combined with socialization into a racist culture.[60]

In tests revealing white attitudes toward blacks,[61] Dovidio and Gaertner found that there was a difference between whites' conscious and unconscious attitudes:

> Even unconsciously, positive characteristics were associated more with whites than with blacks. For negative traits, however, there was a discrepancy between unconscious and conscious responding. Specifically, negative characteristics were responded to significantly faster following a black prime than following a white prime. Thus, even though at a conscious level whites reject negative attributions of blacks, at an unconscious level they do have negative associations. This study therefore provides direct support for our assumption that people who consciously and genuinely embrace egalitarian ideals may, *outside of their awareness*, still harbor negative feelings toward blacks.[62]

Dovidio and Gaertner's research strongly suggests that whites act on these unconscious negative feelings when they are able to justify their actions. For example, in one experiment Dovidio and Gaertner created an "emergency" situation in which black and white victims asked white bystanders for help. They found that whites normally helped black vic-

---

60 *See id*; *see also*, John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 534 (1997) (supporting the aversive racism theory of Dovidio and Gaertner by offering evidence that Whites reporting nonprejudiced attitudes on traditional measures of prejudice harbor unconscious negative attitudes toward Blacks).

61 Dovidio and Gaertner studied liberal whites' attitudes toward blacks. White subjects, when asked to evaluate blacks and whites on a scale, rated both positively, but rated whites more positively than blacks. *See Changes*, *supra* note 33, at 134-135. Although the bias in attitudes was subtle, it was clearly present. Dovidio and Gaertner followed up these self-report studies with reaction time experiments demonstrating that while whites did not associate negative characteristics more frequently with blacks than with whites, they did associate positive characteristics more with whites than with blacks. *See id.* at 136.

Concerned that liberal whites may have mediated their evaluation of blacks consciously to avoid appearing biased, the authors of the study then adopted a method for studying unconscious processes. White subjects were exposed subliminally to the words "black" or "white" before exposure to other words. White subjects responded more positively to the words following the white subliminal message than those following the black subliminal message. *See id.* at 137-138.

The results of these and other experiments confirm Dovidio and Gaertner's hypothesis that even white persons who believe in racial equality have unconscious prejudicial attitudes toward blacks and behave in a discriminatory fashion toward blacks without being aware of the discrimination.

62 *Id.* at 138.

tims slightly more than white victims if there was no one else present to help. Whites' helping behavior toward black victims dropped dramatically, however, in situations where another potential helper was present.[63] Where others were present, whites helped black victims only about half as often as white victims.[64] The authors concluded that the whites were able to maintain their self-esteem in spite of their failure to help blacks because others were there to help. Thus, whites were able to maintain their egalitarian self-image while simultaneously discriminating against blacks without being consciously aware of the discrimination. Where there were no others present, whites could generally not refuse to help blacks without damaging their egalitarian self-image because there was no non-discriminatory reason for the failure to help.[65]

Similar results occurred in tests conducted by Professors Katz, Wackenhutt and Glass.[66] Their experiments demonstrated that white subjects reacted more strongly toward blacks than toward whites depending on the situation. For example, Katz instructed white male college students to give electric shocks[67] for errors made by white or black students working at learning a task. White students who administered the shocks could choose between administering a mild or a severe shock. While explaining their reasons for selecting the more severe shock, white students described the black students receiving the severe shock in a much more derogatory fashion than they rated their white counterparts. This more salient reaction results from an ambivalence produced by a tension in American values between equality and individualism.[68] White students experiencing ambivalent attitudes of prejudice and sympathy toward blacks needed to justify the harm done through shocking the black

---

63 *See id.* at 134.

64 *See id.*

65 *See id.* In a more recent experiment simulating jury duty where white college students acted as jurors, the students favored imposing the death penalty on a white defendant more frequently than on a black defendant who had committed the identical crime where all of the other jurors were white and they all spoke in favor of the death penalty. Curiously, this dynamic changed dramatically when the jury included a black member who spoke in favor of the death penalty for the defendant. Under these circumstances, white jurors favored the death penalty for the black defendant more frequently than for the white defendant. *See* John F. Dovidio et al., *Racial Attitudes and the Death Penalty*, 27 J. APP. SOC. PSYCHOL. 1468, 1480-81 (1997). This study is consistent with the theory of aversive racism developed by Dovidio and Gaertner. The students originally did not want to appear prejudiced so they imposed a harsher judgment on the white defendant. But when a black juror favored the death penalty, white jurors were free to act out their unconscious racism by imposing the death penalty more frequently on the black defendant, maintaining their self-esteem and belief that they are not racist. All of this "decision making" took place at an unconscious level. *See id.* at 1480-81.

66 *See generally* Katz et al., *supra* note 32.

67 The subjects were not really administering electric shocks, but they believed that they were. *See id.* at 47.

68 *See id.* at 43-44.

victims by denigrating the black victim even more than the white victim shocked.

Katz, Wackenhutt and Glass interpreted their results slightly differently than did Dovidio and Gaertner. Whereas Katz and his colleagues assume that the white subjects actually possess pro-black feelings that conflict with their view of the Protestant work ethic, Dovidio and Gaertner interpret their results to demonstrate that even liberal whites possess strong unconscious anti-Black biases. In either case, however, both groups of psychologists concluded that whites reacted to blacks differently than to whites, unaware that they were doing so.[69]

The research demonstrates that although negative stereotypes persist, the personal beliefs of many individuals often conflict with the negative stereotype.[70] Personal beliefs of low prejudiced[71] white individuals tend to view blacks in a more positive light than the stereotype.[72] Ironically, however, there is often a discrepancy between these individuals' behavior and their personal beliefs.[73] Unless the low prejudiced individuals have the time and the cognitive capacity necessary to engage in controlled processing, they will most frequently unconsciously endorse the stereotype.[74] This discrepancy is attributed to the endurance of stereotypes in memory, and the high accessibility of stereotypes for easy, automatic unconscious retrieval.[75] In *Automaticity of Social Behaviors: Direct Effects of Trait Construct and Stereotype Activation on Action*,[76] Professors Bargh, Chen and Burrows conclude that unconscious stereotypes lead to automatic, unconscious behavior:

> [S]ocial behavior can be triggered automatically by features of the environment. . . . [T]he same trait-priming manipulations that have exerted a non-conscious in-

---

69 There is also some research that suggests that blacks, when placed in positions of competition with whites, may experience stereotype threat, which in turn impedes the performance of blacks vis a vis whites. *See* Claudia M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips, eds., 1998).

70 *See* Devine & Elliot, *supra* note 40, at 1146.

71 Psychologists use the terms "low prejudiced" and "high prejudiced" to apply to individuals depending on their scores on established attitudinal measures of prejudice. *See* Julia R. Zuwerink et al., *Prejudice Toward Blacks: With and Without Compunction?* 18 BASIC & APPLIED SOC. PSYCHOL. 131, 132 (1996).

72 *See* Devine & Elliot, *supra* note 40, at 1146.

73 *See, e.g.*, Margo J. Monteith, *Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice Reduction Efforts*, 65 J. PERSONALITY & SOCIAL PSYCH. 469 (1993); Margo J. Monteith et al., *Self-Directed and Other-Directed Affect as a Consequence of Prejudice-Related Discrepancies*, 64 J. PERSONALITY & SOC. PSYCHOL. 198 (1993).

74 *See* Devine & Elliot *supra* note 40, at 1147.

75 *See id.* at 1146-48.

76 John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996).

> fluence over social perceptual processes in previous research were shown to produce traitlike behavior as well. . . . [T]raitlike behavior is also produced via automatic stereotype activation if that trait participates in the stereotype. The major implications of the findings are, first, the apparent degree to which social behavior occurs unintentionally and without conscious involvement in the production of that behavior. Second, the findings point to the possibility that the automatic activation of one's stereotypes of social groups, by the mere presence of group features . . . can cause one to behave in line with the stereotype without realizing it.[77]

Recognizing that stereotypic responses are automatic, unconscious, and persistent, psychologists have begun to focus on experimenting with methods of inhibiting the automatic stereotypic response by use of intentional processes.[78]

Professors C. Neil Macrae, Galen Bodenhausen and Alan B. Milne have demonstrated that heightened self-focus[79] of an evaluator whose personal standards conflict with negative cultural stereotypes[80] will permit the evaluator to inhibit the activation of the stereotype and to make decisions based on his or her more egalitarian personal standards.[81]

---

77 *Id.* at 242.

78 *See, e.g.*, Samuel L. Gaertner et al., *Reducing Intergroup Bias: Elements of Intergroup Cooperation*, 76 J. PERSONALITY AND SOC. PSYCHOL. 388 (1999); E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY AND SOC. PSYCHOL. 811 (1998); C. Neil Macrae et al., *Saying No to Unwanted Thoughts: Self-Focus and the Regulation of Mental Life*, 74 J. PERSONALITY & SOC. PSYCHOL. 578 (1998); John F. Dovidio et al., *Intergroup Bias: Status, Differentiation, and a Common In-Group Identity*, 75 J. PERSONALITY & SOC. PSYCHOL. 109 (1998); C. Neil Macrae et al., *On Resisting the Temptation for Simplification: Counterintentional Effects of Stereotype Suppression on Social Memory*, 14 SOCIAL COGNITION 1 (1996).

79 In one experiment, for example, researchers heightened self-focus of participants by placing a full length mirror on the wall as the participants answered questions about judging persons according to the group they belong. The results demonstrated that the participants who answered the questions with the mirror on the wall found stereotyping more objectionable than the participants who did not have the mirror on the wall. *See* Macrae et al., *Saying No to Unwanted Thoughts, supra* note 78, at 580. In a follow-up study, participants were shown a picture of a construction worker and were asked to describe the person. Those who had their self-focus heightened by presence of the mirror produced fewer stereotypical responses. *See id.* at 581. Researchers concluded that the findings confirmed previous research "demonstrating that when self-focus is high, perceivers tend to behave in accordance with normative standards and principles, such as it is inappropriate to stereotype others." *Id.*

80 Their work demonstrated that self-focus of high prejudiced individuals whose personal standards accorded with the stereotypes may have actually increased reliance on the stereotype. *See id.* at 586. Where the social norms are less stereotypical than conflicting personal standards of a high prejudiced individual, it is unclear whether self-focus would increase reliance on the more stereotypical personal standard. *See id.* at 586-587.

81 *See* Macrae et al., *supra* note 78, at 581 (1998).

Thus, a heightened self-focus increased the efficiency of the perceiver to regulate cognitive processing.[82] Even more interesting is the researchers' ability to reduce the stereotypic response through subliminal cues that heighten the self-focus of the perceiver outside of the perceiver's conscious awareness.[83] MacRae, Bodenheiser and Milne proved across a series of experiments that self-focus increases the efficiency of stereotype regulation and that the self-regulation of stereotypes can be activated automatically – without the perceiver's intent or awareness.[84] Unfortunately, the studies also show that after exposure to a high self-focus situation, subjects whose self-focus decreased produced a "rebound effect," increasing reliance on stereotypes in making judgments.[85]

Focusing on how motivation affects cognitive processing, Professors Plant and Devine have demonstrated that the source of the motivation will influence whether the evaluator is able to inhibit the activation of the stereotype.[86] For example, if the motivation of a white subject is internal, caused by a personal standard or belief that blacks deserve equal treatment to whites, knowledge that the evaluator is not acting consistently with this belief but is relying on stereotypic information leads to feelings of guilt and self-criticism.[87] If the motivation is an expectation that is external to the evaluator, a failure to conform leads to a threatened feeling.[88] According to these researchers, whether the motivation is internal or external will likely affect the ability and/or the motivation of the subject to inhibit the resort to stereotypes.[89] Persons who are made aware that their judgments, in violation of their personal standards, are unconsciously based on stereotypes, may be more motivated to make a conscious attempt to inhibit the activation of stereotypes.

This research is important to the understanding of how to prevent the reliance on stereotypes in workplace situations. Although researchers have not yet applied all of the research to the workplace and have not yet

---

82 *See id.*

83 To do this researchers placed a short subliminal cue on a video screen that included the person's name. The control group's subliminal cue included the names of other persons, not those of the subject. They observed that the subject whose name was subliminally presented on the screen described the person to be judged in less stereotypical terms than did the control group. Researchers concluded that self-focus can be automatically and unconsciously stimulated and will still result in increased inhibition of the stereotype. *See id.* at 582-583.

84 *See id.* at 587.

85 *See id.* at 584-586; *see also* C. Neil Macrae et al. *Out of Mind But Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 813-816 (1994) (describing the "rebound effect" caused by inhibiting activation of stereotypes).

86 *See generally*, E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCHOL. 811 (1998).

87 *See id.* at 823.

88 *See id.* at 825.

89 *See id.* at 825-26.

solved the "rebound effect," this work clearly demonstrates the persistence of unconscious stereotyping in evaluating group members, but it also provides hope that stereotyping is not inevitable.

As Professors Dovidio, Kawakami, Johnson, Johnson and Howard state:

> The work of Devine suggests that implicit prejudice is like a 'bad habit.' It is an overlearned response that can be unlearned. An important first step is making people aware of discrepancies between their conscious ideals and automatic negative responses. By making these nonconscious negative responses conscious, it may be possible to take advantage of the genuinely good intentions of aversive racists to motivate them to gain the experiences they need to unlearn one set of responses and learn the new set that they desire.***
>
> Although implicit negative racial attitudes among Whites may be generally unconscious and automatic, these responses are not inevitable.[90]

Sociological research also supports the conclusion that whites are often unaware of their biases and prejudices toward blacks. In *White Women, Race Matters: The Social Construct of Gender*,[91] Dr. Ruth Frankenburg describes a sociological study in which she extensively interviewed thirty white women, ages twenty to ninety-three.[92] She found that white women, although describing themselves as feminists, were unaware of the importance of race in their lives.[93] They tended to think of whiteness as the norm, and saw racism as a distant phenomenon for which they bore no responsibility. Although they did not want to be identified as racist, they harbored racist fears and stereotypes.[94]

In *Shaping the Organizational Context for Black Inclusion*,[95] social psychologists Pettigrew and Martin discuss the problems African-Americans face at the recruitment, entry and promotional stages of employment. According to the authors, the problems arise from two sources: the structure of the situations themselves and overt and unconscious anti-black prejudices.[96] According to Pettigrew and Martin, biased and

---

90 John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 535-536 (1997).

91 *See generally* RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993).

92 *See id.* at 25.

93 *See id.* at 46-47.

94 *See id.* at 39, 54, 55, 77, 81, 83, 88.

95 *See* Thomas F. Pettigrew & Joanne Martin, *Shaping the Organizational Context for Black American Inclusion*, 43 J. SOC. ISSUES 41 (1987).

96 *See id.* at 41-43.

stressful interviews[97] can cause ambivalence in blacks toward the job.[98] Once hired, blacks will often suffer from exaggerated job expectations and extreme evaluations, triggered by cognitive biases.[99] These occur in three forms: racial stereotyping, the "solo" role, and the token role of the "presumedly 'incompetent' affirmative action employee."[100] Blacks who enter organizations are often found in the solo role. When in "solo" roles they usually encounter low expectations which can affect their self-worth and future performance.[101] Experiments show that solos tend to be judged as having a stronger presence than non-solos engaged in the same organizational behavior.[102] More importantly, a contribution made by a solo is judged as less creative and effective than the same contribution made by a non-solo.[103] At times, however, the solo is greeted with extraordinarily high expectations. If the solo lives up to the expectations, the good evaluations follow. The solo, however, runs into trouble if his or her work runs to average.[104]

A third problem is the "token" problem. Pettigrew defines a token as a person who has gotten the job merely through affirmative actions efforts. Others surrounding the "token" will presume him to be incompetent and that he got the job only through preferential treatment.[105]

Professor Pettigrew recommends macro as well as micro changes to improve the workplace for black workers. The key problem is the small numbers of blacks in the workplace, leading to their solo and token statuses. Pettigrew recommends hiring a critical mass of minorities.[106] An "accumulation of members of a variety of minority groups"[107] with only a few representatives of each, according to Pettigrew, does not work. To combat tokenism and soloism, there must be a critical mass of any given minority group.[108] Even when blacks are scarce in the organization, Pet-

---

97 Experiments demonstrate that whites who interview both blacks and whites will respond much differently to the black candidate than to the white candidate. *See id.* at 53. Black applicants received less eye contact, less forward body lean and shorter interviews and the white interviewers sat further away from the black applicants. Interestingly, when faced with similar interview conditions in another experiment, white applicants performed significantly worse than white applicants who had been faced with a "friendly" or "high immediacy" interview. *See id.* at 54. Thus, it appears that unconscious behaviors of the interviewer can affect the performance of the interviewee.

98 *See id.* at 43.

99 *See id.*

100 *See id.* at 43.

101 *See id.* at 55-56.

102 *See id.*

103 *See id.*

104 *See id.* at 56-57.

105 *See id.* at 57-58.

106 *See id.* at 71.

107 *Id.*

108 *See id.*

tigrew recommends they be clustered with caution not to create low-status.[109]

B. GENDER DATA

Social science researchers have examined prevalent attitudes toward women and how they affect women in the workplace. In *Why So Slow?: The Advancement of Women*,[110] Professor Virgina Valian analyzes and synthesizes the results of these studies.[111] She explains that "gender schemas" are responsible for undervaluation of women in the workplace.[112] She defines "schema" as:

> a mental construct that, as the name suggests, contains in schematic or abbreviated form someone's concept about an individual or event, or a group of people or events. It includes the person's or group's main characteristics, from the perceiver's point of view and the relationship among those features . . . . The term *schema* is broader and more neutral than the term *stereotype* which tends to connote an inaccurate and negative view of a social group. Schemas may be accurate or inaccurate, and they may be positive, negative, or neutral.[113]

As Professor Valian explains, although sometimes inaccurate, schemas are a "cognitive necessity" for persons to survive in the world, permitting us to process information quickly, to recognize people at a glance, to perceive and categorize persons we have just met, and to predict others' future actions.[114]

The schemas that are most relevant to perceptions of the professional competence of women and men are *role schemas* which predict the role a person plays professionally, in the family, or in society in general.[115] If someone's actions contradict the schema, the holder of the schema either ignores the contradictory evidence or attributes the difference to an exception.[116] By doing this, the holder of the schema maintains the schema and does not re-examine its validity.[117]

---

109 *See id.*

110 VIRGINIA VALIAN, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN (1998).

111 For a thorough discussion of the psychological research on gender stereotyping, see Brief for Amicus Curiae American Psychological Association, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167) (listing extensive psychological research on sex stereotyping).

112 *See* VALIAN, *supra* note 110, at 303.

113 *Id.* at 103-4.

114 *See id.* at 104.

115 *See id.*

116 *See id.* at 105-6.

117 *See id.*

The origin of gender schemas is unclear.[118] However, there is widespread agreement among psychologists that they unconsciously affect how employers evaluate women's work.[119]

There are scores of studies supporting this proposition.[120] One study conducted in 1973 demonstrates that male managers rated men as having more of the characteristics of successful managers than women.[121] Even more telling, this same study repeated in 1989 produced the same results.[122] A recent study by Professor Martha Foschi uses "expectation theory" to demonstrate that male group members evaluate women as less competent than equally competent men. Foshi terms this the "double standard" which can be a "subtle mechanism through which the status quo can be maintained."[123]

In another study, fictitious summaries of resumes of PhD's in Psychology were circulated to heads of Psychology departments who were asked at what rank the professors should be hired. Some of the resumes had women's names and others had men's. The resumes of the men were ranked at the associate professor level whereas the same resumes with women's names on them were ranked at the assistant professor level.[124] A recent empirical study appearing in the Columbia Law Re-

---

118 Observable sex differences could cause gender schemas, could be created by the schemas or, more likely, there could be an interaction between the two. *See id.* at 112. Some scientists believe that gender schemas originated in order to rationalize the sexual division of labor. *See* Curt Hoffman & Nancy Hurst, *Gender Stereotypes: Perception or Rationalization?*, 58 J. PERSONALITY & SOC. PSYCHOL. 197, 199, 206-207 (1990). Dr. Valian hypothesizes that the role of mother causes cognitive groupings that do not divide the roles of physical and psychological nurturing. Thus, women are responsible, because of their biological physical nurturing role, for nurturing that goes well beyond the physical. This cognitive grouping is actually a mistake, according to Dr. Valian, but one that, absent informative data, humans would be bound to repeat. *See* VALIAN, *supra* note 110, at 116-118.

119 *See* VALIAN, *supra* note 110, at 126-44.

120 Although I have read these studies independently, I owe Dr. Valian the credit for finding these studies for me. *See* VALIAN, *supra* note 110, at 126-44.

121 *See* Madeline E. Heilman et al., *Has Anything Changed? Current Characterizations of Men, Women and Managers*, 74 J. APPLIED PSYCHOL. 935, 939 (1989); *see also* Paul R. Sackett et al., *Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences in Performance Ratings*, 76 J. APPLIED PSYCHOL. 263(1973) (examining ratings in a wide variety of jobs and industries).

122 Professor Heilman's study included an additional question in the 1989 study. She had the subjects compare male managers and female managers with the requirements for being a good manager and found that although a significant and troubling difference still existed between the perception of male and female managers, the difference was reduced. Unfortunately, however, women managers were still rated as having fewer of the skills and personal requirements necessary to be a good manager. *See* Heilman, *supra* note 121, at 939-941.

123 Martha Foschi et al., *Gender and Double Standards in Assessment of Job Applicants*, 57 SOC. PSYCHOL. Q. 326, 337 (1994).

124 *See* VALIAN, *supra* note 110, at 127-129 (*citing* L.S. Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology in* WOMAN: DEPENDENT OR INDEPENDENT VARIABLE? 774-782 (R.K. Unger & F.L. Denmark, eds., 1975)).

view confirms these results with respect to law school hiring.[125] Law professor Deborah Jones Merritt and sociologist Dr. Barbara Reskin, using multiple regression analysis,[126] found that there exists a significant gender bias in favor of males in course assignment and rank. Male law professors teach more high status courses, such as constitutional law,[127] and receive initial appointments at higher ranks than equally qualified women.[128] Just this year, Charles M. Vest, President of the Massachusetts Institute of Technology, revealed that decades of discrimination against senior women faculty, although unconscious, have had a deleterious effect on women at the institution.[129]

In *Gender Gaps: Who Needs To Be Explained?*[130] Professors Miller, Taylor and Buck may help explain the persistence of stereotypes and their potential harm when directed at women. They observe a tendency to consider males and male traits the "norm" in all situations other than those in which women predominate.[131] Thus, men are considered to be the "norm" in voting patterns, as well as in professions where there are fewer women than men. Seeing men as the "norm" leads to the need to explain why women deviate from the "norm," a tendency which in turn stigmatizes women as "the other".[132]

Gender stereotyping also contributes to sex-segregated workplaces.[133] Because work that is considered to be predominately for women or minorities is less valued and lower paid, sex and race segregation contributes significantly to inequities in the workplace.[134]

Studies also show that women in positions of leadership receive more negative responses for assertiveness than men do, even from per-

---

125 *See generally* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

126 Multiple regression analysis is a statistical technique that allows the expert to study the influence of more than one factor on a result. Its use has been accepted in the employment discrimination context. *See* MICHAEL J. ZIMMER ET AL., *supra* note 1, at 293-298.

127 *See* Merritt & Reskin, *supra* note 125, at 275.

128 *See id.* at 274.

129 *See* A Study on the Status of Women Faculty in Science, at MIT, Massachusetts Institute of Technology 2 (1999) (unpublished study on file with the author).

130 *See* Dale T. Miller et al., *Gender Gaps: Who Needs To Be Explained?*, 61 J. PERSONALITY AND SOC. PSYCHOL. 5 (1991).

131 *See id.* at 11.

132 *See id.*

133 *See* Barbara F. Reskin & Irene Padavic, *Supervisors as Gatekeepers: Male Supervisors' Response to Women's Integration In Plant Jobs*, 35 SOC. PROBS 536, 537 (1988).

134 *See* Barbara F. Reskin & Irene Padavic, *Sex, Race, and Ethnic Inequality in United States Workplaces*, *in* HANDBOOK OF THE SOCIOLOGY OF GENDER 343 (Janet Chafetz ed., 1999).

sons who believe in equality of the sexes.[135] Women receive less attention for the same idea expressed the same way as men.[136] Women who are very assertive are viewed particularly negatively.[137] As Dr. Valian summarizes:

> When women attempt to be leaders they lose, relative to men, in three steps. First, they are attended to less; they have more difficulty than men do in gaining and keeping the floor. Second, when women do speak and behave like leaders, they receive negative reactions from their cohorts, even when the content and manner of their presentations are identical to men's. Men are encouraged to be leaders by the reactions of those around them, and women are discouraged from being leaders by the reactions of those same people. Third, even observers with no overt bias are affected by negative reactions to women leaders and tend to go along with the group judgment.[138]

In *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*,[139] Professors Butler and Geis found that identical behavior of speaking at a meeting will engender different reactions depending on whether the speaker is a woman or a man. Women who speak at mixed-gender meetings receive more negative nonverbal cues than do men.[140] These non-verbal, visible responses can occur automatically "without conscious awareness" of the person providing the cue.[141] According to Butler and Geis, the study:

> supports a more social interpretation of the devaluation of female leaders than earlier ones based on private bias. It does not diminish the importance of private stereotypes; rather, it provides evidence for their translation into affect cues that serve as a social-situational mechanism capable of arbitrarily raising or lowering the perceived value of identical performances. If affect cues serve as a nonverbal communication of group consensus about the quality of a contribution, they could create or

---

135 *See* Dore Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 J. PERSONALITY & SOC. PSYCHOL. 48 (1990).

136 *See* VALIAN, *supra* note 110, at 131.

137 *See* Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3, 16-18 (1992).

138 VALIAN, *supra* note 110, at 131-32.

139 *See* Butler & Geis, *supra* note 135.

140 *See id.* at 54.

141 *See id.* at 57.

> eliminate biased evaluations regardless of evaluators' private biases. This would create a self-fulfilling prophecy. Biased expectations of the majority cause the behavior affective responses, which then produce the differential evaluations of men's and women's contributions to support the initial expectations.[142]

Women experience a double bind. If they are viewed as masculine, they will be perceived negatively even if the job calls for "masculine" characteristics.[143] On the other hand, if they are perceived as too feminine, they are viewed as less competent. This was exactly the bind experienced by Ann Hopkins in *Price Waterhouse v. Hopkins*.[144] Hopkins, a brilliant accountant and business-getter, was perceived as too masculine and was counseled by her mentor to dress and act in a more feminine way.[145] The Court held that this perception should not govern the firm's decision as to her candidacy for partnership.

Ironically, had Ann Hopkins been viewed as too feminine and attractive, she would likely have been judged less competent, even though she may have been welcomed into the partnership. Studies demonstrate that attractive men are viewed as more competent than unattractive men whereas women who are more attractive are considered less competent than unattractive women.[146] But, there is a twist. Even though a more attractive woman is viewed as less competent, men in positions of power may give attractive women special consideration because men like to be surrounded by attractive women.[147]

In *Gender Trials*,[148] sociology professor Jennifer Pierce examines the relationship between men and women working as lawyers and paralegals in a large law firm and in the legal department of a large corporation. Professor Pierce found that women are expected to engage in a much larger percentage of emotional labor than men. Women paralegals, for example, were expected to act deferentially to the lawyers and to take care of them, much as the traditional wife is expected to act.[149] Male lawyers treated their female paralegals as "interruptible"[150] and "invisi-

---

142 *Id.* at 55.

143 *See* VALIAN, *supra* note 110, at 136.

144 490 U.S. 228 (1989).

145 *See Price Waterhouse*, 490 U.S. at 235 (*citing* 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

146 *See* VALIAN, *supra* note 110, at 137-38; Madeleine E. Heilman & Melanie H. Stopek, *Attractiveness and Corporate Success: Different Causal Attributions for Males and Females*, 70 J. APPLIED PSYCHOL. 379, 385-87 (1985).

147 *See* VALIAN, *supra* note 110, at 138.

148 JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS (1995).

149 *See id.* at 89-102.

150 *Id.* at 95-96.

ble."[151] They expected female paralegals uncritically to absorb the lawyer's criticism and aggressive behavior without complaining, without demonstrating anger, all the while soothing him.[152] Female paralegals who broke with the established norm were sanctioned.[153] As Professor Pierce states:

> Paralegals are expected to utilize certain feminized components of emotional labor: deference and caretaking. These emotional requirements reflect the traditional roles of wife and mother. Much like the traditional wife in relation to her husband, the paralegal defers to the attorney's authority and affirms his status by submitting to and smoothing over his angry outbursts, being non-critical vis-a-vis his written work and professional habits, submitting to constant interruptions, and being treated as if she were invisible. And like the "perfect mother" who tends to the needs of the family while suppressing her own, the legal assistant is expected to be pleasant, cheerful, and reassuring, to express gratitude to others for her boss, and to serve as an arbiter of his feelings to others. While many people of both sexes may harbor a "fantasy of the perfect mother," what is distinctive here is that the fantasy itself is embedded in the culture of working relations within law firms. It is male litigators who can expect to receive nurturing and support from women paralegals and not the reverse.[154]

Professor Pierce further notes that female and male paralegals are treated differently and there are different expectations of them:

> Being a paralegal is not the same job for men as it is for women. Women, and not men, face a double bind in selecting coping mechanisms. If they are nice, they are overworked and unappreciated, but if they fail to be nice, they are viewed as uncooperative. Men, on the other hand, can get away with failing to be nice and can pass themselves off as attorneys, thus utilizing the informal "old boys" network to their advantage. Also, men

---

151 *Id.* at 96.

152 *See id.* at 90-93.

153 *See id.* at 93-94.

154 *Id.* at 102. Interestingly, female paralegals engage in coping strategies that resemble those of wives. Professor Pierce found that paralegals employ one or more of the following strategies: (1) infantilization of the attorney; (2) personalizing their relationships with the attorney; (3) being "nice"; (4) defining oneself as "occupationally transient;" and (5) rationalizing one's career goals and lifestyle choices. *See id.* at 161.

> could luxuriate in the privilege of defining themselves as occupationally transient and free from familial obligations. And finally, by virtue of being male they can and must distance themselves from the paralegal role.[155]

Male and female lawyers in law firms also have very different jobs. Pierce states:

> In litigation, women lawyers face a number of obstacles that render it more difficult for them to be successful in their profession, while male paralegals luxuriate in 'special' treatment. Women litigators, as token members of the legal profession, are excluded from the old-boy network, making it more difficult for them to bring clients into firms. They are subjected to sexual harassment and receive no institutional forms of support to aid the balance between family and career. They also encounter a constant double-bind in the performance of emotional labor – if they are intimidating and aggressive, they are dismissed as 'shrill' and 'unladylike,' but if they are not aggressive, they are considered not tough enough to be good litigators. By contrast, male paralegals as token members of a feminized occupation simply do not encounter these problems and instead accrue a number of advantages by virtue of being male. They are assumed to be more qualified than female paralegals for positions of authority within their occupation and in fact are considered more intelligent, simply because they are men. Because their male status gives them the privilege of socializing informally with male attorneys, they are able to obtain more interesting work assignments as well as personal recognition and affirmation for their work. And finally, as men they are able to get away with doing different kinds of emotional labor than women paralegals do (e.g., playing the role of "political advisor" rather than nurturing mother).[156]

In her groundbreaking work on male behavior in the workplace, Professor Patricia Martin observes that men "mobilize masculinities" in their evaluation of women (and men) at work.[157] Professor Martin iden-

---

155 *Id.* at 175.

156 *Id.* at 176-77.

157 *See* Patricia Y. Martin, *Gendering and Evaluating Dynamics: Men, Masculinities, and Managements*, *in* MEN AS MANAGERS, MANAGERS AS MEN 186, 190 (David L. Collinson & Jeff Hearn eds., 1996).

tifies a number of ways that men, perhaps unconsciously, establish and maintain their dominance over equally qualified women in the workplace by conflating masculinity with social relations at work and with work performance.[158] Professor Martin identifies three gender-based evaluational frames (or lenses) through which males evaluate female workers: (1) potential; (2) legitimacy; and (3) performance.[159] For example, in evaluating potential, male managers typically see women and men workers as different. These frames, according to Professor Martin, are used generally without the manager's awareness. Male managers tend to judge men's talents and abilities as "more *consonant with more valued* jobs and opportunities."[160] With respect to legitimacy, men "framed women as lacking legitimacy to hold powerful positions."[161] This was apparent, for example, when a group of men on a search committee for a university president, missed the formal job presentation of the only woman candidate, while attending the presentations of all of the male candidates. This action was a public enactment of masculinity, according to Martin, "declaring for all to see their assumption that men are better (more important) than women."[162] Finally, men observe women's performance through a "gender lens," frequently devaluing women's performance relative to men's.[163] Even when men evaluate women positively, they still actively favor men by promoting them over women.[164]

Martin's studies suggest that men have different interactive styles than women that give them benefits women do not have. First, men are self-promotional, a style that elevates not only the particular self-promoter, but all men over women.[165] Men, especially the younger ones, ask for help from powerful supporters based on "need," whereas women do not ask for help but expect to be treated fairly according to the merits of their work.[166] Finally, because they see women's performance through a gender-biased lens of which they are unaware, some men publicly criticize women's performance, whereas women do not do the same to men.[167] According to Martin, "[M]en's interactional practice of disparaging women at work demeans all women and places them in a defen-

---

158 *See id.* at 190.
159 See id. at 200-1.
160 *Id.* at 201.
161 *Id.*
162 *Id.* at 205.
163 *See id.* at 202.
164 *See id.*
165 *See id.* at 203.
166 *See id.*
167 *See id.* at 203-4.

sive posture relative to the men who engage in such behavior and to other women who, through this practice, are collectively devalued."[168]

Although Professor Martin does not suggest that all men act in this fashion, "masculinist" behavior in the workplace is often invisible to men, affects women's daily work lives and their long-term careers. Professor Martin identifies four basic "masculinist" behaviors: "contesting masculinities," "aligning masculinities," "ingroup and outgroup masculinities" and "intersecting masculinities."[169]

"Contesting masculinities" according to Martin, are competitive efforts between men to establish superior standing and/or resources.[170] They include: (1) "peacocking," or vying for attention in official meetings which tend to "exhaust" women and make them feel like outsiders;[171] (2) self-promoting, or openly alleging one's superior skills or talent, a form of "contesting" that many women are not comfortable doing for themselves[172]; (3) dominating, or efforts to control others; and (4) expropriating others' labor by using others' work to one's benefit or by taking credit for the work of others.[173]

"Aligning masculinities" are behaviors men use to affiliate with other men. They include visiting with other men in the halls and offices, and at lunch, deferring to more powerful men, protecting other men from the consequences of their incompetence or poor job performance, supporting associates, decision making based on whom they like, and expressing affinity for other men by talking about sports or other types of "male" activities at work.[174] "Ingroup masculinities" refer to men's behavior directed at other men, treating other men as insiders and women as outsiders, confirming men's, but not women's, "membership in the community of work."[175] "Outgroup masculinities" are the opposite side of the coin. They are behaviors directed at women only that confirm their unequal status in the workplace.[176] Professor Martin suggests that: "[M]en's practice of ingroup masculinities *structurally* excludes women

---

168 *Id.*

169 Patricia Y. Martin, Men's Mobilization of Masculinities, at Work: From (Some) Women's Standpoints 27-35 (1999) (unpublished manuscript, on file with the author).

170 *See id.* at 27.

171 *See id.* at 28.

172 *See id.* at 29.

173 *See id.* at 30-31.

174 *See id.* at 32-33. Many of these are the activities Professor Beiner describes as "reindeer games." *See* Theresa M. Beiner, *Do Reindeer Games Count As Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996) (arguing that "reindeer games" alter terms and conditions of employment under Title VII).

175 Martin, *supra* note 169, at 34.

176 *See id.*

by casting them as outsiders and audience, independent of both content and intent."[177]

Martin is careful to note that hers is a study of behaviors and effects, not a study of the intentions of the men.[178] She also notes that not all of the actions of men at work enact masculinities,[179] but she does see a demonstrable effect on the careers of women she has interviewed in her research.[180]

The psychological and sociological research on women in the workplace demonstrates that gender stereotyping and mobilizing masculinities, of which male actors are unaware, persist as barriers to the equal treatment and advancement of women in the workplace. Gender stereotyping apparently differs from race stereotyping in that it is ambivalent, relying both on hostility and on benevolent attitudes toward women.[181] Both hostile and benign attitudes, however, are rooted in patriarchy which establishes men as dominant and superior and women as weaker and inferior.[182] Hostility is directed at the woman who crosses gender lines – the "career woman" or the "feminist."[183] Benevolent attitudes are directed at women in their traditional roles of mother, wife and daughter.[184]

Although attitudes toward women may differ in type from attitudes toward persons of color, the fact is that gendered behavior, whether benevolent or hostile, whether conscious or unconscious, operates to deny women opportunities in the workplace. Often, because these attitudes are so ingrained in our culture, men may make decisions about women's suitability in a particular job on the basis of stereotypes, unaware that they are doing so.

At times, both men and women experience difficulties in perceiving discrimination against women when it occurs.[185] This is especially diffi-

---

177 *See id.*

178 *See id.* at 34.

179 *See* Martin, *supra* note 157, at 205.

180 *See id.* at 205.

181 *See* Peter Glick & Susan T. Fiske, *Hostile and Benevolent Sexism*, 21 PSYCHOL. OF WOMEN Q. 119, 119-121 (1997).

182 *See id.* at 121-22.

183 *See id.* at 129.

184 *See id.*

185 *See* DEBORAH L. RHODE, SPEAKING OF SEX, 141 (1997). Professor Rhode recounts:

> At a recent discussion of diversity in the legal profession, a prominent law school dean expressed skepticism that the 'woman problem' remained a problem. Although he was well aware of persistent issues involving racial and ethnic bias, he was surprised to hear that some of those present also viewed gender inequality as a significant concern. I was equally surprised by his surprise. Law, I noted, is no different from other elite professional settings. Women are substantially underrepresented, at the top and substantially overrepresented, at the bottom of status and reward structures. 'Really?' he asked. 'Are you sure?'

cult when individual stories of women rather than the stories of groups of women are told.[186] "Unconscious gender stereotypes . . . prevent women from breaking through the glass ceiling and . . . prevent men from seeing that any glass ceiling exists."[187]

Behavior that is either subtle or invisible to men and perhaps, even to women, however, has profound effects on women's careers.[188]

The research on unconscious biases, the conformity to gender stereotypes and racially and sexually discriminatory behavior has gained acceptance in the general scientific community. Psychologists have actively studied social stereotypes for over six decades.[189] For example, in 1954 Gordon Allport published his groundbreaking treatise, THE NATURE OF PREJUDICE, stimulating scientific discovery in the areas of cognitive, motivational and behavioral foundations of stereotyping.[190] Psychologists have performed this research conducting empirical studies using valid research methods. The results and methodology have been scrutinized by critical peer review in the relevant scientific community and the research has been published in respected scientific journals. The research is externally valid because it has been repeatedly confirmed over time in many different experiments. Thus, according to the American Psychological Association, this research "satisfies the essential criteria for general scientific acceptance."[191] As Professor Dovidio states:

> The issue of intentionality is fundamental to understanding both the nature of contemporary prejudice and the potential conflict between social scientific and legal evidence. With respect to racial prejudice, much of the current research on racial attitudes demonstrates (consistent

---

Id.

186 Faye J. Crosby et al., *The Denial of Personal Disadvantage Among You, Me and All the Other Ostriches, in* GENDER AND THOUGHT: PSYCHOLOGICAL PERSPECTIVES 79 (Mary Crawford and Margaret Gentry eds., 1989).

187 RHODE, *supra* note 185, at 145.

188 Martin, *supra* note 179, at 190-91, 205 (concluding that "mobilizing masculinities" have a negative effect on women's careers and power in the workplace).

189 *See* Brief for Amicus Curiae American Psychological Association In Support of Respondent, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167). *See, e.g.*, Katz & Braly, *Racial Stereotypes of One Hundred College Students*, 28 J. ABNORMAL & SOC. PSYCHOL. 280 (1933).

190 *See e.g.*, GORDON ALLPORT, THE NATURE OF PREJUDICE (1954); Brief for Amicus Curiae American Psychological Association In Support of Respondent, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167). The American Psychological Association reports that in the psychological literature between 1967 and 1982 there were over 12,600 articles published on sex differences, over 3,600 on sex roles generally and almost 2,000 on sex role attitudes specifically. From 1974 until 1987, there were over 1,500 articles published on stereotypes. *See id.*

191 Brief for Amicus Curiae American Psychological Association In Support of Respondent, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167).

> with a central proposition of the aversive racism framework) that racial biases may be unconscious and thus often occur unintentionally.***
> Although bias may be subtle, its consequences can be significant. From the perspective of the victims of bias, the issue of whether bias is intentional may be secondary to the fundamental issue of whether they are being treated fairly by others and the legal system.***
> Thus, to the degree that intentionality must be demonstrated to prove discrimination legally, subtle and unintentional forms of contemporary bias, such as aversive racism, may continue to exist and persist in disadvantaging Blacks relative to Whites insignificant ways.[192]

The social science research above should play a key role in judicial interpretation of Title VII. Limiting the definition of discriminatory acts to those where the employer possesses a conscious intent to discriminate because of an employee's race or gender ignores the vast scientific research that was not present at the time of the passage of the Act. Moreover, since the nature of racist and sexist attitudes and behavior have changed since 1964, continuing to define discrimination in an outdated mode will underestimate by a large margin the number of racist and sexist decisions.

Given the vast psychological and sociological evidence that unconscious processes account for a great deal of discriminatory attitudes and behavior, the courts and the Congress must recognize the evolution by incorporating the powerful evidence demonstrating that racially and sexually discriminatory behavior results from unconscious as well as conscious prejudice into the law and by explicitly broadening the definition of "intentional" to include unconscious behavior.[193] Although banishing all forms of unintentional discrimination from the workplace is no simple

---

192 John J. Dovidio et al., *Racial Attitudes and the Death Penalty*, 27 J. APPL. SOC. PSYCHOL., 1468, 1483 (1997).

193 *See* Monahan & Walker, *Social Authority: Obtaining Evaluations and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 516-517 (1986). This scientific evidence is admissible under Rule 702 of the Federal Rules of Evidence to prove the unconscious nature of discriminatory stereotyping on decision making. Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

The bulk of the scientific knowledge cited to above: (1) has been tested and subjected to peer review; (2) has been published by peer reviewed journals; and (3) has gained general acceptance in the scientific community. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U. S. 579, 593-594 (1993); Kumho Tire Co. v. Carmichael, 119 S.Ct. 1167, 1175 (1999).

matter, in most areas of Title VII the proof constructs already exist that make it possible to recognize as illegal at least some of the unconscious discrimination that is responsible for unequal treatment of women and minorities in the workplace. Through use of a hypothetical case, *Lopez v. Lowell Printing Co.*, Part II demonstrates that proof concepts originally designed to identify conscious discriminatory intent are also capable of holding employers liable for unconscious discrimination. Part II also demonstrates a clear counter-evolution in Title VII law that narrows the coverage of the Act.

II. DYNAMIC STATUTORY EVOLUTION AND RESPONSIVE CRITIQUE:[194] DEVELOPMENT AND INTERPRETATION OF TITLE VII DOCTRINE

Soon after enactment of Title VII in 1964, there developed two strands of discrimination law: disparate treatment and disparate impact. According to the courts and commentators, disparate treatment theory required a showing of conscious intent to discriminate, or, in other words, a conscious discriminatory motive at the moment the employer

---

194 *See* WILLIAM F. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 69-80 (1994). Professor Eskridge demonstrates that a statute is a living, dynamic entity, interpreted from the "bottom up" rather than from the top down. Eskridge notes that the Supreme Court is not the first body to interpret a statute after its enactment; in fact, a host of others interpret the law before it reaches the Supreme Court, effectively shaping the law by determining which questions to present to the Court and how to pose them. These "others" include individual attorneys who advise their clients of their interpretation of the law, the administrative bodies responsible for interpreting the law, and lower courts. Along the way, advocacy groups may suggest arguments under the law, influencing the arguments lawyers make on behalf of their clients.

Eskridge notes that at each stage of interpretation, the interpreter considers how the proposed interpretation will fare at the next stage. *See id.* at 74-78. For example, an administrative agency considers whether the courts will uphold its interpretation of the law. The Supreme Court considers whether the legislature will overrule its interpretation by amending the statute. *See id.*

A brief consideration of a few of the many variables considered by parties to a statute's interpretation demonstrates the rich, complicated texture of the process of dynamic interpretation. For example, the Supreme Court is aware that the legislature considering the Court's interpretation differs in politics and composition from the original enacting body. The Court also considers that in order to overrule the Court's interpretation, the legislature must often overcome its institutional reluctance to write far-reaching legislation.

Politics play an important role in interpretations of statutes made by executive agencies as well. As policy changes with newly appointed heads of agencies when new parties come into power, such policy changes will affect the interpretation accorded to statutes within the agency's area of expertise. *See id.* at 78-79.

Although the development of the disparate impact theory in Title VII is an example of dynamic statutory interpretation, the evolution of the proof constructs in disparate treatment cases, equaling "intent" with causation was silent and less obvious, perhaps unconscious itself on the part of the courts. *See id.* at 24.

made an employment decision.[195] Courts use intent synonymously with "motive," assuming that one's intent or motive for an employment decision is necessarily a conscious state of mind. Courts designed different modes of proof to ascertain whether the employer had the requisite state of mind at the time of the employment action. Disparate impact theory, in contrast, did not require a showing of discriminatory intent. Rather, the employer would be held liable for employing neutral employment criteria having a disparate impact on racial minorities and/or women if the employer could not prove that those criteria were business related and necessary.[196]

A closer examination of the different modes of proof under the disparate treatment theory[197] will demonstrate that the courts' theoretical justification for the disparate treatment modes of proof could not be substantiated. Indeed, while courts justified the modes of proof as a means of determining which employers are guilty of conscious intentional discrimination, the proof methods used to establish intent under the disparate treatment theory have one thing in common: *they are all capable of holding liable employers who have discriminated unconsciously as well as those who have done so consciously.*[198] Before embarking on a description of the different modes of proof under Title VII, let us examine a hypothetical case, *Lopez v. Lowell Printing Co.*

A. CASE STUDY: *LOPEZ V. LOWELL PRINTING CO.*

Janet Lopez, a black woman, is discharged from her job at Lowell's Printing Company. Lopez, who worked as the Assistant Manager of Production for 15 years, consistently received good job evaluations from her

---

195 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("The critical inquiry . . . is whether gender was a factor in the employment decision, at the moment it was made.").

196 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that an employer's policies limiting jobs to persons with high school diploma or who have passed a standardized test was illegal because it had a disparate impact on black applicants). This decision, while focusing on the legislative purpose of eliminating discrimination, ignores the Humphrey amendment that seems to clearly state that a plaintiff must prove discriminatory intent in order to prevail. *See* Ann C. McGinley, *Rethinking Civil Rights: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L. J. 1443, 1464-1465 (1996). For a justification of *Griggs*, *see* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 24 (1994).

197 Although disparate impact theory is relevant to the definition of intent in disparate treatment cases, this article will focus on disparate treatment theory, referring as necessary to the disparate impact theory in footnotes.

198 This does not necessarily mean that this was in fact how they have been applied. As this article demonstrates, while originally these constructs were applied to reach unconscious discrimination, a change occurred leading to a narrower application of the constructs. A few other scholars and courts have suggested that disparate treatment does not require a conscious intent to discriminate but is more similar to a causation requirement. *See, e.g.*, Selmi, *supra* note 13, at 287-288; Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 408-409 (1996); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 964-965 (1989).

supervisor, Brandon Bop, a white male, and regular merit raises while Bop was her supervisor. When Bop retired, William Snead, a white male, replaced him.

After Snead began work, things changed for Lopez. Her annual evaluation stated, "Could be more proactive. Does not solve problems well. Doesn't get along with people." Snead rated Lopez's work as "unsatisfactory" and wrote on the bottom of her report, "Janet continues to have problems organizing production. She tends to be scattered, and her fellow employees have trouble getting along with her." A few months later, Snead called Lopez into his office to tell her that she was fired. When Lopez asked Snead why he was firing her, he said, "It just hasn't worked out. I'm sorry." A week later, the company hired John Randall, a 25 year old white male friend of Snead's to take Ms. Lopez's job. Ms. Lopez sues alleging that her employer illegally discriminated against her under Title VII. Because Lopez' case is a disparate treatment case, she must prove that Lowell intentionally discriminated against her because of her race.

B. DISPARATE TREATMENT: PROVING INTENT

Disparate treatment comprises three distinct categories of cases generally defined by the methods of proof available: (1) direct vs. indirect modes of proof; (2) individual vs. pattern and practice cases or class actions; and (3) single motive vs. mixed motives cases.

Disparate treatment plaintiffs with direct evidence of the employer's discriminatory motive generally prove their cases directly through the employer's admission. For example, had Snead told Lopez, "I am firing you because you are black and I don't like blacks," Lopez would have direct proof of discriminatory intent: an admission by the decision maker that his motive for the firing is illegal.

While this type of statement was not uncommon immediately after the passage of the Act, because of employers' increased sophistication today there are few cases where the employer directly admits his illegal motive for the adverse employment decision.[199] Thus, plaintiffs have resorted to proving discrimination through indirect evidence, using the proof methodologies established in *McDonnell Douglas Corp. v. Green*,[200] and clarified in *Furnco Construction Corp. v. Waters, et. al*[201] and *Texas Dept. of Community Affairs v. Burdine*.[202] The *McDonnell*

---

199 *See* Selmi, *supra* note 13, at 290, explaining that after passage of the Civil Rights Act of 1964 discrimination became subtler and overt racism was the exception rather than the rule.

200 411 U.S. 792 (1973).

201 438 U.S. 567 (1978).

202 450 U.S. 248 (1981).

Douglas v. Green/ Burdine[203] mode of proof was designed to provide an indirect alternative to proving intentional discrimination.[204]

1. *The Individual Cases: The Indirect Method: McDonnell Douglas/Burdine—Hicks*

a. Early Interpretation and Evolution

If Lopez sues for race discrimination under Title VII, because there is no direct evidence of intent to discriminate on the basis of her race, she will employ the proof method developed in *McDonnell Douglas/Burdine*. The *McDonnell Douglas/Burdine* construct is a three stage method of allocating plaintiff's burden of persuasion and production.[205]

Under *McDonnell Douglas,* Lopez can make out a *prima facie* case by proving that she is black, was fired from her job for which she was

---

203 Throughout this article I refer to the *McDonnell Douglas* or the *McDonnell Douglas/ Burdine* method of proof to refer to the method adopted by the Supreme Court to analyze individual claims of disparate treatment under Title VII. *McDonnell Douglas/Burdine* established a three-part framework for proving discrimination using the indirect method. Under *McDonnell Douglas/Burdine*, as traditionally applied, the plaintiff has the burden of proving a prima facie case by demonstrating that she was a member of the protected class, she was dismissed from her job, she was qualified for the job and she was replaced by someone not of the protected class. This proof shifts the burden of production to the defendant to articulate a legitimate reason for the firing. Once the defendant meets this burden of production, the burden shifts back to the plaintiff to prove that the defendant's articulated reason is pretextual. Most courts originally held that under *Burdine* if the plaintiff proved that the reason is pretextual, there arose a mandatory presumption that the employer had illegally discriminated against the employee. *See generally* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); *see also* discussion *infra* re mandatory presumption, Part II.B.1.b.

This methodology, which is explicated more fully *infra* in Part II.B.1.a, was modified by *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). This article refers to the new evidentiary construct emerging from *Hicks* as the "*Hicks*" method of proof. The courts have interpreted *Hicks* in a number of ways. For these subsequent interpretations of the *Hicks* method, *see infra*, Part II.B.1.b. Subsequently, the Court clarified *Hicks* in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). *See infra* Part II.B.1.c.

204 *See* Burdine, 450 U.S. at 256 (explaining that, at the third stage of the inquiry, the plaintiff can either prove intentional discrimination directly or indirectly "by showing that the employer's proffered explanation is unworthy of credence."); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the *McDonnell Douglas* prima face case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").

205 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

qualified[206] and was replaced by a white person.[207] This showing would shift the burden of production to the employer to articulate a legitimate non-discriminatory reason for the discharge.[208] The purpose of requiring a defendant to articulate a non-discriminatory reason for the employment decision was to "meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[209] Lowell Printing would offer the testimony of Sam Snead that Lopez was disorganized and did not get along with other employees. It would also introduce into evidence the annual evaluation rating her as "unsatisfactory."

This testimony under *Burdine* would suffice to fulfill the defendant's burden of production, shifting the burden of production back to the plaintiff to demonstrate that the defendant's articulated reason for the discharge is pretextual. The ultimate burden of persuasion would always remain with the plaintiff.

The plaintiff could meet her burden of proving pretext in one of two ways: she could prove that the defendant's articulated reason for her discharge was not true or that, even if true, it was not the real reason for her discharge. In *Burdine*, the Court described the result:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. The burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[210]

---

206 There is some disagreement as to what "qualified" means in the context of an employee who sues an employer for firing or demoting her. A number of courts interpret "qualified" in this context to require a showing that the plaintiff was living up to the employer's reasonable and legitimate expectations. *See* Kizer v. Children's Learning Ctr., 962 F. 2d 608, 611-12 (7th Cir. 1992) (stating that plaintiff must prove that she met the employer's reasonable expectations in order to fulfill the "qualified" requirement of the prima facie case). For a discussion of this requirement and its effect on summary judgment, see Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 230-31 n.125 (1993).

207 Although replacement by a person who is not a member of the protected class is not crucial, it is generally required unless there is other evidence raising an inference of discrimination. *See* Carson v. Bethlehem Steel Corp., 82 F.3d 157 (7th Cir. 1996) (holding that even though a white worker was replaced by another white worker, the plaintiff could still make out a prima facie case of race discrimination under Title VII.).

208 *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

209 *Id.* at 256.

210 *Id.* at 256.

For example, in response to Lowell Printing's evidence, Lopez could prove through documentary and testamentary evidence that she is organized, proactive and easy to get along with. Under *Burdine* and its progeny before *St. Mary's Honor Center*, proof that the defendant's articulated reason for the discharge is not accurate would usually lead to the conclusion that the employer is lying and that the lying is a screen for intentional discrimination.[211]

A second possible strategy for Lopez under *Burdine* would be to agree that some or all of these statements are true, but to present comparator evidence, i.e., evidence demonstrating that although whites possessed the same attitudes and work behaviors, the company did not discharge them. Like the proof that the defendant's defenses were not true, this comparator evidence is also used to prove pretext. Under *Burdine* and its progeny, this evidence apparently raised an irrebuttable presumption that the defendant intentionally discriminated against Lopez when it fired her.

In *Burdine*, the Court justified the *McDonnell Douglas* scheme by reaffirming its presumption that generally employers act in a rational fashion absent discrimination.[212] The Court explained that the prima facie case eliminated the two most common non-discriminatory reasons for a failure to hire: the lack of a job and the candidate's lack of qualifications for the job.[213] The prima facie case, once established, raises a rebuttable inference of discrimination that shifts the burden of production to the defendant.[214] The defendant meets its burden by producing evidence that the employer did not hire the plaintiff for a legitimate non-discriminatory reason.[215] This articulation serves an important function of narrowing the factual inquiry, permitting the plaintiff to meet its burden of proving that the defendant's reason for its behavior was discriminatory.[216] Under *Burdine*, most courts of appeal held that a plaintiff's proof that the reason articulated by the employer was pretextual was sufficient to prove that the employer's act was discriminatory.[217] The courts reached this conclusion by combining the evidence supporting the initial *prima facie* case with the assumption that employers act rationally. Once all legitimate reasons are eliminated for the employment decision, then, the Court concluded, an illegitimate reason must have driven the

---

211 *See* Chippolini v. Spencer Gifts, Inc., 814 F. 2d 893, 898 (3rd Cir. 1987).

212 *See* 450 U.S. at 254 (*quoting* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

213 *Id.* at 254.

214 *See id.* at 254-55.

215 *See id.*

216 *See id.* at 255-56.

217 *See id.* at 256; *see also* Lanctot, *supra* note 2, at 65.

decision. Justice Rehnquist had earlier explained the theoretical basis for this reasoning in *Furnco Construction Corp. v. Waters*:[218]

> [W]e are willing to presume [that unexplained acts are more likely the result of consideration of impermissible factors] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.[219]

Initially, many lower courts interpreted *Burdine* to require the court to enter judgment for the plaintiff once the factfinder found that the defendant's articulated non-discriminatory reason for its employment action was pretextual.[220] Their justification was that the plaintiff's prima facie case raised a presumption of discrimination unless rebutted by the defendant's articulation of a non-discriminatory reason for its actions. Once the defendant articulated a non-discriminatory reason, the presumption of discrimination dropped from the case. If however, the plaintiff disproved the veracity of the defendant's articulated reason, the presumption created by the plaintiff's prima facie case was resurrected and the plaintiff was entitled to prevail.[221] I will term the requirement that the plaintiff prevail upon proving that the defendant's reason is unworthy of credence the *Burdine* mandatory presumption.

There eventually grew, however, a number of courts rejecting the mandatory presumption. This rejection resulted, in large part, because *McDonnell Douglas/Burdine* rested on a faulty assumption. In *Burdine*, the Court wrongfully assumes that the employer is deliberately lying if the plaintiff proves that the employer's articulated reason for the adverse employment action is pretextual.[222] This assumption is faulty because

---

218 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

219 *Id.*

220 *See, e.g.*, Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596 (W.D. Tex. 1988) (concluding that in Title VII case alleging national origin discrimination, the plaintiff wins upon showing that the defendant's "articulated non-discriminatory reason" is unworthy of belief).

221 *See id.* For a discussion of the "resurrection rationale" and other rationales for a mandatory presumption, see Lanctot, *supra* note 2, at 107-11.

222 Even the word "pretext" appears to assume a conscious decision by the employer to hide the truth, but courts originally interpreted any showing that the reason given by the employer was not the real reason for the decision as pretextual. Courts seemed to have ignored the possibility that someone could give a pretextual reason unaware that it was not the real reason for the decision.

employers who make discriminatory decisions are not always aware that their decisions are rooted in discrimination.[223] As Part I's explanation of contemporary psychological theory demonstrates, this underlying assumption is not accurate.[224]

Further examination of the *Lopez* hypothetical will demonstrate this point. A finding of pretext in *Lopez* will result from a number of possible factual variations and employer states of mind. Consider the following seven plausible explanations of the discharge:

CASE ONE

Snead[225] dislikes African Americans and does not want to work with them. He knew that Lopez *was not* disorganized and was able to get along with others, but *consciously created a pretext to cover up race discrimination.*

CASE TWO

Snead does not consciously dislike African Americans. He knew that Lopez *was not* disorganized and was able to get along with others, but *consciously created a pretext to cover up some other illegal or legal reason for the dismissal.* Snead could have used this coverup so that he could hire his friend, John Randall, with whom Snead feels more comfortable working.

CASE THREE

Snead *honestly but mistakenly believed* that Lopez was disorganized and unable to get along with others and he fired her as a result of this mistaken belief.

CASE FOUR

Although Lopez *was* disorganized and/or unable to get along with others, Snead did not fire her for these reasons. Rather, Snead would rather work with whites and he *consciously dismissed her because of her race.*

CASE FIVE

---

223 *See supra* Part I for a discussion of contemporary psychological theory on the nature and causes of discriminatory attitudes and behaviors.

224 Moreover, even if an employer is lying, he or she may have an incentive to lie about a decision that is not necessarily discriminatory under Title VII. For example, if the employer fired an employee in order to make room for his lover in the corporation, or because he disagreed with the employee's politics, neither of these decisions would be illegal under a traditional analysis of Title VII law that requires a conscious intent to discriminate based on the protected characteristic of the employee. Ironically, although courts clearly state this conclusion repeatedly, the *McDonnell Douglas* construct as originally interpreted would permit the factfinder to hold an employer liable for unconscious discrimination.

225 Under Title VII, the employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . , and any agent of such a person," 42 U.S.C. § 2000e(b)(1994).

Because Snead is the agent of Lowell's Printing Company, his actions constitute those of the employer for purposes of a lawsuit against the company.

Although Lopez *was* disorganized and/or unable to get along with others, Snead did not fire her for these reasons. Rather, Snead *consciously dismissed her for some other reason that he did not want to reveal to the factfinder.*

CASE SIX

Although Lopez *was* disorganized, Snead *consciously treated Lopez differently from whites* with similar organizational failures because of her race.

CASE SEVEN

Although Lopez' disorganization was similar to the failures of white employees, Snead *honestly but mistakenly believed* that her failures were worse than those of the white employees and that the difference justified the differential treatment.[226]

***

An examination of Cases One through Seven in *Lopez v. Lowell Printing* demonstrates that the mandatory presumption of *McDonnell Douglas* holds liable employer action that has its origins in unconscious prejudice. In Cases One through Seven, a factfinder could find that the employer's articulated reason for Lopez' firing is pretextual, either because the reason itself is not true or because the factfinder does not believe that it is the real reason for the firing. Because many courts interpreted *Burdine* to create a mandatory presumption of illegal discrimination based on a finding of pretext,[227] an employer would be liable in Cases One through Seven, even though the employer entertained a conscious motive to discriminate on the basis of Lopez' race in Cases One, Four and Six only.

The Court's stated rationale for the *McDonnell Douglas/Burdine* construct anticipated the possible findings in Cases One, Four and Six, attributing the incongruence between the articulated reason and the factual finding to the defendant's dishonesty. Thus, according to this view, the defendant's lie must be covering up the real reason for the employment decision: conscious illegal intentional discrimination. The Court's reasoning in *McDonnell Douglas* and its progeny did not, however, anticipate the Second, Third, Fifth or Seventh cases.[228]

---

226 As we have seen in Part I *supra*, this belief could result from mistaken cognitive categorization, combined with a need to justify the employer's actions and ambivalence toward blacks.

227 This interpretation changed in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *See* discussion *infra* Part II.B.1.(b).

228 The *Lopez* case study provides another example of a "non-discriminatory" reason for firing the plaintiff that may be based in racial prejudice. Snead could have decided that he would prefer to work with his 25 year-old crony, John Randall, a white male. Although Snead's decision may not represent invidious animus toward Lopez, his preference tracks a natural tendency to associate with persons of like race. *See* Ann C. McGinley, *The Emerging*

Thus, it appears, the courts employing *McDonnell Douglas* generally believed that the finding of pretext cast a narrower net than it did: it actually went beyond identifying the employers who had consciously intended to discriminate, potentially creating liability for employers who lied about "non-discriminatory" reasons for employment decisions and for employers whose employment decisions resulted from their unconscious prejudice against their employees.[229]

b. The Counter-Evolution Spawned by *Hicks*

Perhaps because courts intuitively, but unconsciously, knew that *McDonnell Douglas* was capable of reaching beyond consciously discriminatory behavior, some circuit courts of appeal questioned whether a finding of pretext mandated a finding of discrimination.[230] By the early 1990's there were at least two views regarding the effect of a showing of pretext.[231] Some maintained the mandatory presumption. These are termed the "pretext only" courts.[232] Others concluded that a finding of pretext alone was insufficient for a finding of discrimination. These were entitled the "pretext-plus" courts.[233]

The Supreme Court decided *St. Mary's Honor Center v. Hicks*[234] in response to this split. Melvin Hicks, a black male, was a security guard at the defendant halfway house operated by the Missouri Department of Corrections. Hicks had performed his job satisfactorily, but after a new

---

Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII, 39 ARIZ. L. REV. 1003, 1024 n.132 (1997) [hereinafter McGinley, *Cronyism*]. This tendency offends the principles of Title VII particularly when a black woman is fired in order to make room for a white male. Because white males traditionally have the power in employment relations, permission to use cronyism as a decision-making technique will generally operate to benefit white males and harm persons of color. *See id.* at 1025 n.136. At the very least, the statute should uphold the "merit principle," not permitting an employer to replace an equally or better qualified black employee with a white applicant. *See id.* at 1011-1117.

229 This is not to say that there were no opportunities under *McDonnell Douglas* to exonerate an employer who consciously or unconsciously made a race-based decision. If an employer honestly believes that his employment decision is not rooted in discrimination or even if it is and he is a convincing witness, the factfinder may conclude that there was no discriminatory decision. An employer is most successful in this enterprise by keeping records of the employee's failures.

230 *See* Lanctot, *supra* note 2, at 65-67, explaining the conflict among the circuits and even within certain circuits.

Courts also grant summary judgment liberally, and arguably, inappropriately, perhaps for the same reason. *See generally,* McGinley, *Credulous Courts, supra* note 2.

231 *See* Lanctot, *supra* note 2, at 65-67, describing the "pretext-only" and "pretext plus" methods of viewing *Burdine*.

232 *See, e.g.*, Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987); Lanctot, *supra* note 2, at 65-67.

233 *See, e.g.*, Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 191 (1st Cir. 1990); Lanctot, *supra* note 2, at 65-67.

234 509 U.S. 502 (1993).

supervisor was assigned, Hicks "became the subject of repeated, and increasingly severe, disciplinary actions"[235] which eventually led to his dismissal. At trial before the federal district court as factfinder, St. Mary's argued that it fired Hicks because he had violated rules. The district court found that this reason for Hicks' dismissal was pretextual because the employer had "either disregarded or treated more leniently"[236] similar or worse violations by Hicks' white counterparts.[237] The district court, however, refused to enter judgment for Hicks, because the plaintiff had not proven that the "crusade to terminate [Hicks] . . . was racially rather than personally motivated."[238] The Court of Appeals for the Eighth Circuit reversed the lower court, ordering it to enter judgment in Hicks' favor, relying on the *Burdine* statement quoted above that once pretext is proven, the plaintiff is entitled to judgment.[239]

Taking a middle-ground between the pretext-only and pretext-plus courts, the Supreme Court overturned the Court of Appeals' determination that a finding of pretext mandated judgment for the plaintiff, concluding that although the factfinder *could* make an ultimate determination of discrimination upon a finding of pretext, it was not *required* to do so.[240] Justice Scalia's opinion states:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is *required*. . . .'[241]

Although this language clearly states that evidence from which a reasonable jury can conclude that the employer's articulated reason for its employment decision "may, together with the elements of the prima

---

235 *Id.* at 505.

236 *Id.* at 508 (*citing* 756 F. Supp. 1244, 1250-51 (E.D. Mo. 1991)).

237 *See Hicks,* 509 U.S. at 508.

238 *Id.* (*citing* 756 F. Supp. 1244, 1252 (E.D. Mo. 1991)).

239 *See Hicks,* 509 U.S. at 508 (*citing* 970 F.2d 487, 492 (8th Cir. 1992)).

240 I have criticized *Hicks* in other articles and will not repeat myself here. *See* Ann C. McGinley, *Rethinking Civil Rights and Employment At Will: Toward a Coherent National Discharge Policy,* 57 OHIO ST. L. J. 1443 (1996) [hereinafter McGinley, *Rethinking Civil Rights*]; McGinley, *Cronyism, supra* note 228, at 1019-1022. Suffice it to say, *Hicks* appears to be a disingenuous opinion because it mischaracterized the *Burdine* language and holding, and permits the factfinder to reach conclusions based on evidence that is not in the record.

241 *Hicks,* 509 U.S. at 511.

facie case, suffice to show intentional discrimination,"[242] strongly implying that such evidence should preclude a grant of summary judgment to the defendant,[243] other language in *Hicks* seemed to contradict this assertion.

Justice Souter's dissenting opinion explained the conflict in the majority opinion:[244]

> In one passage, the Court states that although proof of the falsity of the employer's proffered reasons does not 'compe[l] judgment for the plaintiff,' such evidence, without more, 'will permit the trier of fact to infer the ultimate fact of intentional discrimination.' . . . The same view is implicit in the Court's decision to remand this case, . . . keeping Hicks's chance of winning a judgment alive although he has done no more (in addition to proving his prima facie case) than show that the reasons proffered by St. Mary's are unworthy of credence. But other language in the Court's opinion supports a more extreme conclusion, that proof of the falsity of the employer's articulated reasons will not even be sufficient to sustain judgment for the plaintiff. For example, the Court twice states that the plaintiff must show 'both that the reason was false, and that discrimination was the real reason.' . . . In addition, in summing up its reading of our earlier cases, the Court states that '[i]t is not enough . . . to disbelieve the employer.' . . . This 'pretext-plus' approach would turn *Burdine* on its head . . . and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence.[245]

Justice Souter's criticism was well-taken. There were two possible interpretations of *Hicks*. The first interpretation would permit, but not require, a factfinder to find for the plaintiff upon a showing that the defendant's articulated reason for its behavior is pretextual. This reading, supported by the language above, and followed by a number of courts of

---

242 *Id.*

243 For a discussion of the proper use of summary judgment in Title VII cases, see generally McGinley, *Credulous Courts, supra* note 2.

244 *See Hicks*, 509 U.S. at 535-37.

245 *Id.* at 535-536. (Souter, J., dissenting).

appeal,[246] I shall call the "permissive presumption." On a defense motion for summary judgment, a court adopting the permissive presumption would deny the motion if there were evidence from which a reasonable jury could conclude that the plaintiff established a prima face case and that the defendant's articulated reason was pretextual. This interpretation gave considerable latitude to the factfinder to determine whether it believes that discrimination had occurred.

The second interpretation would not permit a plaintiff's verdict unless there was evidence in the record demonstrating that the defendant offered a pretextual explanation in order to cover up discriminatory intent. This interpretation would require more than a finding that the defendant's reason for its behavior was pretextual.[247] Instead, it would require some evidence, most likely direct or strong circumstantial evidence, that would permit a jury to find the ultimate fact of discrimination. I will call this interpretation the "pretext plus" approach.[248]

---

246 *See* Combs v. Meadowcraft, Inc., 106 F.3d 1519 (11th Cir. 1997); EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831 (6th Cir. 1997); Waldron v. SL Indus., Inc., 56 F.3d 491 (3rd Cir. 1995).

247 *See, e.g.*, Reeves v. Sanderson Plumbing Products, Inc. 197 F.3d 688 (5th Cir. 1999) (overturning a jury verdict for the plaintiff in a case where there was evidence of pretext and two age-related comments in the workplace), *rev'd* 120 S.Ct. 2097 (2000); Lattimore v. Polaroid Corp., 99 F.3d 456 (1st Cir. 1996) (holding that the lower court should have granted defendant's motion for judgment as a matter of law because although there was sufficient evidence of pretext to go to the jury, there was no additional evidence of discriminatory intent as required under *Hicks*). *Compare* Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078 (1994) (plaintiff can overcome a motion for summary judgment with proof of falsity but if plaintiff attempts to show defendant's articulated reason is not the real reason for the decision, additional evidence of discrimination is needed to survive defense motion for summary judgment).

248 I take this term from Professor Lanctot. *See* Lanctot, *supra* note 2, at 66-67. Professor Deborah Malamud, a self-identified liberal scholar, apologetically concludes that *Hicks* is properly decided. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2236, 2243 (1995). Professor Malamud concludes that the Court had never intended to create a mandatory presumption when it decided *McDonnell Douglas* and its progeny. Moreover, she concludes that there is no theoretical justification for such a presumption. While I believe that the Court's intent is unclear, I agree with Professor Malamud that the Court's theoretical justification for the mandatory presumption rests on shaky grounds.

Although the lower courts' avowed justification for the mandatory presumption of discrimination upon a finding of pretext is erroneous, the presumption itself actually furthers important goals and purposes of the statute. It properly requires a finding of illegal discrimination upon a showing of pretext because it holds liable defendants who *consciously or unconsciously* treat members of protected classes in a discriminatory fashion. In doing so, it holds liable defendants who make *non-merit based arbitrary employment decisions* that adversely affect members of protected classes. In other words, the mandatory presumption serves to demonstrate that discrimination was a *but for cause* of the employment decision, even though the employer may not have been aware of the real reasons affecting his decision.

Professor Malamud attacks the mandatory presumption, in part, because it rests on a "basic assumption" that "unexplained" adverse conduct toward women and persons of color is the result of discrimination. The assumption that employers act fairly and reasonably absent discrimination, according to Malamud, is false. *See id.* at 2254-55. While I agree that employers

c. The *Reeves* Readjustment

In *Reeves v. Sanderson Plumbing Products, Inc.*,[249] the Court clarified the holding in *Hicks*. *Reeves* was a 57 year old employee who worked in a toilet manufacturing plant.[250] As a supervisor of the line, he was responsible for recording and reviewing weekly time sheets of the employees working under his supervision.[251] After an investigation in which the employer found irregularities in time sheets, Reeves was fired. Reeves sued the employer under the Age Discrimination in Employment Act.[252] Reeves demonstrated a prima facie case of age discrimination and the employer testified that it fired Reeves because of his poor time keeping.[253] In response, Reeves introduced evidence that the defendant's articulated reason for the discharge was pretextual, testifying that he kept the time records meticulously, that the time keeping mechanism did not always function well, and that a superior who played an instrumental role in the plaintiff's firing had made age-based derrogatory remarks to

---

do not necessarily act fairly and reasonably toward their employees, and the employment at-will doctrine protects employers' right to act unreasonably, Title VII is an exception to the employment at-will doctrine that necessarily guarantees to women and minorities the right to be judged fairly and reasonably on their merit. *See* McGinley, *Cronyism, supra* note 228, at 1011-1016, 1057. Moreover, the psychological and sociological data support the creation of a mandatory presumption.

Underlying the mandatory presumption is a commitment to merit-based decisionmaking. The unspoken assumption of then Justice Rehnquist's reasoning in *Furnco*, *see supra* notes 217 and 218 and accompanying text, is that an employer will (or should) use merit to make employment decisions unless those decisions are infused with conscious discriminatory animus. Although subsequent psychological studies demonstrate that the Court's understanding of the nature of discrimination was not accurate, *Furnco*'s underlying premise that an employer should make employment decisions based on merit in order to avoid liability for discrimination is consistent with at least one reading of the legislative history of the 1964 Civil Rights Act and with the purposes and policies of the Act, as amended. *See* McGinley, *Cronyism, supra* note 228, at 1011-1017.

Given the abundance of psychological research demonstrating that racism and prejudice still exist and that discriminatory behavior results from unconscious processes, permitting employers to act arbitrarily toward minorities and women in employment contexts grants employers permission to treat women and persons of color in a discriminatory fashion. As psychological theory demonstrates, because of the deep-seated prejudice in our society, the history of slavery, cognitive groupings and individual employers' motivations, it is very difficult for white employers to judge black employees without being influenced by race. *See* discussion *supra*, Part I.

For a critique of Professor Malamud's article, see William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time To Jettison McDonnell Douglas*, 2 EMPL. RTS. & EMPLOY. POL'Y J. 361 (1998).

249 S.Ct 2097 (2000); 68 U.S.L.W.4480 (June 13, 2000).

250 68 U.S.L.W. at 4481.

251 *See id.*

252 29 U.S.C. §§ 621-633a makes it unlawful to fail or refuse to hire or to discharge an individual because of his age. It applies only to employees over the age of 40.

See id. at §§ 623(a); 621.

253 *Reeves*, 68 U.S.L.W. at 4481.

the plaintiff.[254] The jury held for the plaintiff and the lower court denied the defendant's motion for judgment as a matter of law.[255]

On appeal, the Fifth Circuit reversed, holding that Reeves had failed to introduce sufficient evidence of age discrimination even though there was evidence from which the jury could conclude that the employer's articulated reason for the firing was pretextual.[256]

The Supreme Court granted certiorari to decide two questions. First, the Court addressed whether the combination of the prima facie case and a showing that the employer's articulated reason for the adverse employment decision was pretextual would be sufficient for a jury verdict for a plaintiff in an employment discrimination case.[257] Second, the Court decided whether the employer was entitled to judgment as a matter of law under the circumstances present in *Reeves*.[258] Noting that the Court had never squarely addressed the issue of whether the *McDonnell Douglas* framework applies to ADEA cases, but assuming that it does,[259] the Court held unanimously that the Fifth Circuit's interpretation of *Hicks* was wrong.[260] Emphasizing that *Hicks* held that the fact finder is entitled to infer the ultimate fact of discrimination from the combination of the prima facie case and proof that the employer's articulated reason is false, the Court stated:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's as-

254 *See id.* at 4485.
255 *See id.* at 4481.
256 *See id.*
257 *See id.*
258 *See id.* at 4484.
259 *See id.* at 4482.
260 *See id.* at 4483.

> serted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.[261]

The Court noted that demonstrating a prima facie case combined with proof of pretext may not always be sufficient for a reasonable jury to infer discrimination, and gave examples of a few situations where it would be inappropriate to conclude that discrimination occurred as a result of the combined evidence.[262] For instance, if the employer "conclusively revealed" that the employer gave a pretextual reason to cover up another nondiscriminatory reason for the decision[263] or if the plaintiff created only a weak issue of fact as to the truth or falsity of the employer's explanation and there was "abundant and uncontroverted independent evidence that no discrimination had occurred," the defendant would be entitled to judgment as a matter of law.[264]

The Court also concluded that the lower court erred in granting Sanderson Plumbing's judgment as a matter of law under the particular circumstances presented in *Reeves*.[265] The Court held that the Fifth Circuit erred in deciding the defendant's motion for judgment as a matter of law when it limited its inquiry to additional evidence of discrimination and ignored evidence of the prima facie case and of the pretextual nature of the defendant's explanation.[266] Moreover, the Fifth Circuit erroneously drew inferences in favor of the defendant on a motion for judgment as a matter of law and impermissibly substituted its view of the weight of the evidence for that of the jury.[267] Because there was sufficient evidence from which a reasonable jury could conclude that the defendant had discriminated against plaintiff because of his age, the Court reversed the judgment of the Court of Appeals.[268]

Reeves clarified a number of issues raised by *Hicks*. First, the Court's examples of the situations where the combination of a prima facie case and a showing of pretext would not suffice to carry the plaintiff's burden, demonstrate the Court's intent to limit the potential scope of *Hicks*. Except in limited circumstances, no longer can defendants argue that plaintiffs must prove "pretext plus." Second, *Reeves* signaled the power of juries to decide Title VII disparate treatment cases. Although *Reeves* was decided on a motion for judgment as a matter of law,[269] the

---

261 *See id.* at 4483-84 (citations omitted).

262 *See id.* at 4484.

263 *See id.*

264 *See id.*

265 *See id.*

266 *See id.* at 4485.

267 *See id.*

268 *See id.*

269 Fed. Rule Civ. P. 50 replaced the former "directed verdict" and "judgment notwithstanding the verdict," to create a single "judgment as a matter of law." *See, e.g.*, Robert J.

courts use the same standard in deciding motions for summary judgment.[270] Scholars have criticized lower courts for improvidently granting summary judgment in Title VII cases since the summary judgment trilogy, and in particular, since *Hicks*.[271] *Reeves* demonstrates that these criticisms are well-founded. In *Reeves*, the unanimous Court made it clear that only under unusual circumstances will it tolerate grants of summary judgment where the plaintiff presents, in response to the defendant's summary judgment motion, evidence of a prima facie case and that the defendant's explanation is pretextual. Justice Ginsburg's concurrence reiterates this point, stating:

> [I]t may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond [the prima facie case and pretext] in order to survive a motion for a judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide. . . .But the inference remains B unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence [prima facie case and pretext]. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.[272]

Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689 (1996).

270 *See generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

271 *See, e.g.*, McGinley, *Credulous Courts, supra*, note 2; Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999).

272 *See id.* at 4485-86 (Ginsburg, J., concurring)(citations omitted).

Reeves is an extremely important case for the future of Title VII disparate treatment law. Had the Court required direct evidence of discrimination in order to prevail, the *McDonnell Douglas* methodology of indirect proof would probably not have survived[273] and plaintiffs' recovery would have been extremely limited. *Reeves* reaffirms the vitality of the indirect method of proof, offering plaintiffs the opportunity to prove discriminatory intent through circumstantial evidence.

Ironically, however, *Reeves* suffers from the same theoretical flaw as its predecessors. Both the unanimous Court opinion and the concurrence of Justice Ginsburg stress the conscious nature of the defendant's assertion of a pretextual explanation for its adverse employment decision.[274] Both opinions speak in terms of the "falsity" of the employer's explanation, equating falsity with dissembling or lying on the employer's part.[275] Thus, both apparently ignore that an employer can unknowingly offer a false explanation for its behavior.

To clarify this point, consider again the *Lopez* case study. While *Hicks* and *Reeves* identified the possibility of the Second and Fifth Cases – where the employer's articulated reason for firing Lopez is either false, or if true, is designed to cover up a reason for the decision,[276] they ignored the possibility of the result in the Third and Seventh Cases – that the employer mistakenly but honestly believed that it fired Lopez for a legitimate, legal reason but the firing actually resulted from unconscious racial prejudice against Lopez.[277]

---

273 The "mixed motives" provision in the Civil Rights Act of 1991 codified the burdens and proof requirements when there are "mixed motives" for the adverse employment situation. *See* 42 U.S.C. § 2000e-2(m)(1994). This provision holds the employer liable for illegal discrimination once the plaintiff proves that the plaintiff's protected characteristic was a "motivating factor" in the adverse employment decision. The burden of persuasion then shifts to the defendant to prove that it would have made the same decision absent the discriminatory "motivating factor" If the employer successfully meets this burden, it can limit the remedies available to the plaintiff. *See* § 2000e-5(g). This section is used most frequently where there is direct evidence or very strong circumstantial evidence of discrimination, which some courts actually characterize as "direct" evidence. *See generally* Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572 (1st Cir. 1999). If additional evidence of discrimination because of the plaintiff's protected class were necessary under the *McDonnell Douglas* test, there would be little or no difference between the evidence necessary under the *McDonnell Douglas* test and the "mixed motives" test, eliminating the need to apply the *McDonnell Douglas* test. The problem with this result would be that direct evidence is very hard to come by. For an interesting view that the "mixed motives" provision should apply to both single and mixed motives cases, *see* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563 (1996).

274 *See Reeves*, 68 U.S.L.W., at 4483, 4485.

275 *See id.*

276 *See Hicks*, 509 U.S. at 517; *Reeves*, 68 U.S.L.W., at .4485.

277 Justice Scalia is concerned in *Hicks* about the legal, non-discriminatory reason for firing an employee that the employer does not want to reveal to the factfinder. *See* 509 U.S. at 517. My theory is that if a factfinder is going to find the employer's reason pretextual, pretextual reasons that appear to be non-discriminatory really are unconsciously discriminatory or

Under *Reeves*, the issue of whether Lowell Printing illegally discriminated against Ms. Lopez should go to the jury because there is sufficient evidence from which the jury can conclude that the explanation is pretextual. Ms. Lopez can offer evidence showing that she gets along well with the other employees, that she is organized and/or that whites who were much more disorganized were retained. The jury could conclude after hearing the testimony of William Snead that he was not truthful in his rendition of his reasons for firing Ms. Lopez.

For example, the jury may believe either that Lopez is organized or that whites who were disorganized were treated less harshly. This conclusion is sufficient for a finding that Lowell Printing fired Ms. Lopez because of illegal discrimination. It does not, however, demonstrate that Lowell Printing had a *conscious intent* to discriminate against Ms. Lopez because of her race. Instead, Mr. Snead may be more comfortable working with a friend, John Randall, who is a white male. Although this comfort level with someone who is like the decisionmaker affected Mr. Snead's evaluation of Ms. Lopez' work and ability to deal with her colleagues, his attitude toward her is likely shaped in the unconscious.[278]Thus, a finding of discrimination under these circumstances could represent a finding that the employee was treated differently because she is black even though the supervisor making the decision was not consciously aware that the differential treatment resulted because of the plaintiff's race.

In the alternative, assume that the court permits the case to go to the jury because the plaintiff has ample comparator evidence and a statement made by Snead that Lopez is unintelligent. With the help of expert testi-

---

they undermine the merit principle by elevating, as in this case, a friend of the employer over a member of a minority group. *Hicks* justified its decision based on its recognition that not every negative decision is rooted in intentional conscious discrimination. The Court never addressed, however, the question of to what extent other "legal," "non-discriminatory" reasons for an adverse employment decision may be influenced by unconscious racial prejudice. For example, in *Hicks*, the Court concluded that although the plaintiff had proved that he was treated differently from white employees, this differential treatment was not necessarily caused by race discrimination. It could have resulted from personal animosity that Hicks' supervisor harbored against Hicks. The Court did not explore, however, the very real possibility that the supervisor's personal animosity was caused by unconscious or conscious prejudice against blacks. This failure demonstrates an impoverished understanding of the nature of bias and prejudice and the resulting discriminatory behavior.

278 People in general tend to categorize people who are different less favorably. *See* Joseph G. Weber, *The Nature of Ethnocentric Attribution Bias*, 30 J. EXPER. SOC. PSYCHOL. 482-504 (1994); Frances Olsen, *Affirmative Action: Necessary But Not Sufficient*, 71 CHI.-KENT L. REV. 937, (1996). This is a problematic response given the domination of white male culture in the higher ranks of employment in this nation. *See generally*, McGinley, *Cronyism*, *supra* note 228 (discussing how cronyism operates to disadvantage women and blacks).

This may cause even greater problems where a white manager evaluates an African American because the evaluator most likely harbors unconscious negative attitudes toward blacks that may affect his or her behavior. *See supra* Part I.A.

mony, Lopez may be able to demonstrate that this characterization is not neutral, but results from negative stereotypes about blacks. Given the comparator evidence and the expert testimony about stereotyping, a jury could reasonably conclude that Snead discharged Lopez because of her race. This finding, however, does not necessarily show that Snead was consciously aware that he was discharging Lopez because of her race. In fact, Snead could have a good faith belief that Lopez is unintelligent. Psychological theory demonstrates, however, that Snead's judgment about Ms. Lopez is likely the result of discriminatory attitudes held in the unconscious. Psychological theory further suggests that Snead's after-the-fact justification of the firing will evaluate Lopez more negatively than if Lopez had been white.[279] This more salient reaction results from white ambivalence toward blacks and their need to justify their actions in order to maintain a positive self image that they are not racist.[280]

As the Lopez hypothetical demonstrates, by ignoring the underlying flaw in the *McDonnell Douglas/Burdine* logic, *Hicks* and *Reeves* may still find employers liable for discriminatory behavior caused by unconscious prejudices.

The result, however, is not altogether bad. In actuality, it is more consistent with the policy behind Title VII: the eradication of discrimination in the workplace.[281] The real problem is the Court's failure to acknowledge and embrace these potential results, a failure that could lead to another counter-evolution in response to *Reeves*.

2. *Pattern and Practice Cases: Evolution and Counter-Evolution*

McDonnell Douglas/Burdine applies to individual acts of discrimination; a different method of proof exists for cases alleging a pattern and practice of discrimination.[282] In pattern and practice cases brought by the EEOC[283] the factfinder must find that the employer discriminated intentionally against a class of plaintiffs. In order to prove a pattern and practice of discrimination, the government must prove "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. It [has] to establish by a preponderance of the evidence that racial

---

279 *See* discussion *supra*, Part I.A.

280 *See* discussion *supra*, Part I.A, particularly the work of Professors Dovidio and Gaertner.

281 Even so, a return to the mandatory presumption would further this policy even more by removing from the jury the discretion to determine the underlying reason for the pretextual statement.

282 *See* International Bhd. of Teamsters v. U.S., 431 U.S. 324, 357-358 (1977).

283 Originally, the Attorney General was authorized to bring pattern and practice suits against private or public defendants. *See* 42 U.S.C. § 2000e-6(a)(1994). When the Act was amended in 1972, the functions of the Attorney General were transferred to the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 2000e-6(c)(1994); *see also International Bhd.*, 431 U.S. at 329 n.1.

discrimination was the company's standard operating procedure – the regular rather than the unusual practice."[284]

a. Statistical and Anecdotal Evidence

In *Teamsters v. United States*[285] the United States Attorney General sued a nationwide common carrier and a union representing a large group of the company's employees. The government alleged that the defendants had engaged in a pattern and practice of race discrimination against blacks and Hispanics, by failing to hire them into the better-paid over-the-road driver positions. Instead, according to the government, the company hired blacks and Hispanics into lower paying, less desirable jobs as servicemen or local city drivers and thereafter discriminated against them in promotions and transfers.[286] The lower court held that the government had met its burden of proving illegal discrimination against the hauling company by presenting evidence of a statistical disparity between the general population of blacks in the communities where the company operated and in the workforce[287] and by offering anecdotal evidence of 40 individual cases of discrimination.

The Supreme Court upheld the lower court's finding of discrimination against the company, concluding that the factfinder could infer an intent to discriminate from statistical proof, bolstered by anecdotes of individual instances of discriminatory treatment.[288] While the Court emphasized the conscious intentional nature of the defendant's behavior, this interpretation is not the only possible inference drawn from the evidence. Although statistical proof plus anecdotal evidence of discriminatory treatment can raise an inference of conscious discriminatory intent, this proof does not necessarily demonstrate that the employer consciously undertook to eliminate African American applicants for over-the-road jobs. An alternative inference is possible: defendants may have made little or no effort to combat the products of unconscious discrimination in the hiring, evaluation and promotional processes.

In the case of either inference, it is extremely likely that the statistics prove that the applicant's or employee's race made a difference in the employment decision, either on an individual level or on a structural level.

A closer look at Lopez demonstrates this point. Assume that when Snead arrived at Lowell Printing there were many blacks working under him. Little by little, the workforce became whiter through firings, natu-

---

284 *See id.* at 336.
285 431 U.S. 324 (1977).
286 *See International Bhd.*, 431 U.S. at 329.
287 *See id.* at 337-38.
288 *See id.* at 339.

ral attrition and hiring white employees. Assuming that there are sufficient numbers of employees working at Lowell for the results to be statistically significant, a significant variation between the number of blacks at Lowell and those available in the relevant labor pool, if combined with anecdotes of differential treatment of blacks at the company, would be sufficient under *Teamsters* and its progeny to establish that Lowell intentionally discriminated against African Americans.

While this evidence could prove that Snead, Lowell's agent, consciously intended to eliminate blacks from the workforce, this is not a necessary conclusion. It could also prove that Snead acted on unconsciously held stereotypes and prejudices against blacks, that his assessment of the blacks working for him and of black job applicants was skewed because unconsciously he interpreted information about black applicants and employees less favorably. Moreover, if Snead belongs to the 80% of Americans who believe that they are not racist, he may feel a need to justify his actions toward blacks by emphasizing the negative traits of blacks he fires, fails to promote or fails to hire.[289] This need may account for his evaluation of his employees, leading to their firings, "voluntary" resignations and possibly, fewer job applicants.

As with the *McDonnell Douglas* mandatory presumption, the misunderstanding of the nature of bias and prejudice led to an incomplete justification for the creation of an inference of discrimination in Pattern and Practice cases. In turn, this error has, perhaps unconsciously, led to an attack on Pattern and Practice cases.

b. The *Sears* Counter-Evolution

Employers defend the pattern and practice cases in an increasingly sophisticated manner, challenging the plaintiff's choice of statistical pool,[290] or the inference of intent raised by the statistics.[291] In *EEOC v. Sears, Roebuck & Co.*,[292] for example, the EEOC had presented sophisticated regression analyses to demonstrate that Sears had discriminated in favor of men and against women in its assignment of predominately men to its higher paying "outside" commission sales jobs and predominately women to the lower paying inside non-commission sales jobs. Sears successfully defended by using the lack of interest defense. Defense experts testified that women did not desire the more highly paid jobs because these jobs required more irregular hours and more aggressive sales. The trial judge credited this testimony, finding that female sales applicants

289 *See* discussion *supra*, Part I.A.

290 *See, e.g.*, Hazelwood School Dist. v. U.S., 433 U.S. 299 (1977).

291 *See* EEOC v. Sears Roebuck, Inc., 839 F.2d 302 (7th Cir. 1988).

292 *See id.*

preferred lower-paying noncommission sales jobs.[293] Plaintiffs argued on appeal to the Seventh Circuit that the generalized evidence of women's preference as a matter of law could not rebut the EEOC's statistical presentation. The Seventh Circuit affirmed the lower court's judgment for Sears.[294]

In *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*,[295] Professor Vicki Schultz discusses the lack of interest defense[296] raised by Sears and defendants in other cases. She examined a data set of all published employment discrimination cases decided between 1965 and 1987 in which the lower court considered and addressed the lack of interest argument.[297] Her analysis demonstrates that both the conservative[298] and the liberal[299] views about women tend to reinforce the attitude that women enter the workforce with a set notion about the types of jobs they desire.[300] Conservative judges, according to Schultz, see a difference in nature between men and women and find this notion natural, one that should not impose liability on the employer.[301] Thus, conservative judges tend to reinforce stereotypes about women through their judicial reasoning.

Although liberal judges state that they do not want to reinforce stereotypes, they, too, believe that women have fixed pre-employment notions of their job preferences. Thus, liberal judges look at the woman who wants a "man's" job as having the right to achieve the job, but employers will be liable only if they bar these women from the jobs they desire. These women, however, are viewed as "'ungendered" subjects who emerge from a gender-free social order with the same aspirations and values as men.'"[302] Schultz posits that this liberal focus on a woman's individual decision actually reinforces the stereotype about most

---

293 *See* EEOC v. Sears, Roebuck & Co., 628 F.Supp. 1264, 1324-25 (N.D. Ill. 1986).

294 *See generally* EEOC v. Sears Roebuck Inc., 839 F.2d 302 (7th 1988).

295 Vicki Schultz, 103 HARV. L. REV. 1749 (1990).

296 Professor Schultz finds that the lack of interest defense has been asserted most frequently in pattern and practice or class action cases brought under either the disparate treatment or the disparate impact theories. *See id.* at 1767-68.

297 *See id.* at 1766-67.

298 Professor Schultz defines "conservative" courts as those generally accepting the lack of interest argument in sex discrimination and refusing to infer sex discrimination from statistics. *See id.* at 1784 n.125.

299 Professor Schultz uses the term "liberal" to refer to courts rejecting the lack of interest argument in sex discrimination cases. *See id.* at 1785 n.134.

300 *See id.* at 1792.

301 *See id.* at 1799-1800.

302 *See id* at 1800.

women.[303] The women who desire the "male" jobs are seen as genderless and tend to differ from the "norm".[304]

Both of these concepts, according to Schultz, are inaccurate. By assuming that women come to employers with specific, inalterable preferences, both conservative and liberal courts fail to consider how employers shape women's work aspirations.[305] Professor Schultz demonstrates through an analysis of social science research that many women change their views of the types of jobs they wish depending on the availability and the attractiveness of the work.[306] Thus, according to Schultz, although women are socialized to follow particular "feminine" career paths, this socialization is not wholly determinative of women's later careers.[307] In fact, according to Professor Schultz, women's job "choices" are often shaped by the availability of different types of work to women,[308] by the lack of mobility from traditionally "female" jobs,[309] and by the prevalence of harassment in the work cultures of traditionally male jobs.[310]

The lack of interest defense, therefore, rests on stereotypical assumptions about women's natural preferences and about women's reactions to socialization concerning their job choices, perhaps formed in the unconscious, rather than hard evidence of inherent differences between men and women's job interests at the workplace. Permitting the defense actually reinforces the stereotype about women and exonerates employers of their responsibility in shaping women's ability and preferences to perform certain types of positions. Even courts that do not permit the defense join in rhetoric and assumptions that lead to stereotyping of women, participating in the denial of equal opportunities for women in the workplace.

Professor Schultz demonstrates that an acceptance of the lack of interest defense in employment discrimination cases is not inevitable.[311] She looks at the treatment of race discrimination cases and how the defense has fared.[312] Unlike in sex discrimination cases, Professor Schultz demonstrates that early in the history of Title VII, courts refused to enter-

---

303 *See id.* at 1808.

304 *See id.* at 1807.

305 *See id.* at 1811. One example of how employers shape women's job preferences is their advertising strategies. Schultz demonstrates that the type of job advertising can have a profound effect on women's interest and response. *See id.* at 1811-12; *supra* note 295.

306 *See id.* at 1821-28.

307 See id.

308 *See id.* at 1816, 1823.

309 *See id.* at 1827.

310 *See id.* at 1832-33.

311 *See id.* at 1770-71.

312 *See id.* at 1771.

tain the lack of interest defense in race discrimination cases.[313] Courts instead developed what Schultz terms the "futility doctrine."[314] That doctrine accounts for blacks' failure to apply in representative numbers for positions earlier considered to be "white" jobs by concluding that blacks' lower application rates resulted from the employer's history of discrimination and blacks' sense of futility rather than from a lack of interest.[315] This doctrine created "almost an irrebuttable presumption" that blacks' failure to apply resulted from the employer's history of discrimination.[316] Professor Schultz notes that the futility doctrine could have been applicable in sex discrimination cases, but generally has not been used by the courts.[317]

Ironically, in a subsequent empirical study of the lack of interest defense in both sex and race discrimination,[318] Professors Stephen Petterson and Vicki Schultz find that although early in the history of Title VII the defense was considerably more successful against women than against racial minorities,[319] later on the defense became increasingly successful against minorities and was apparently endorsed by the Supreme Court.[320] This defense, as Schultz and Petterson note, is rooted in stereotyping. It assumes for women that they have less interest in achieving more highly paid, visible jobs in the workplace and that their lack of interest stems from social or biological causes, not from the employer's practices.[321] For African Americans, this defense assumes the derogatory stereotype that blacks lack the motivation and drive to work hard.[322] According to Schultz and Petterson:

> [S]uch explanations, apparently adopted by the Supreme Court in *Wards Cove*, minority workers select and stay in lower-paying jobs because they lack the initiative to pursue better alternatives. Appeals to such accounts,

---

313 *See id.* at 1771-72.

314 *See id.* at 1772.

315 See id.

316 *Id.* at 1773.

317 *See id.* at 1776.

318 See Vicki Schultz and Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. CHI. L. REV. 1073 (1992).

319 *See id.* at 1081.

320 *See id.* at 1082. As Schultz and Petterson note, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), despite a severely racially segregated workplace in the Alaskan salmon canneries, including segregated housing and eating facilities and word-of-mouth hiring systems, the Court held that there was no showing of discrimination against the low-paid cannery workers of color because the cannery workers did not seek other jobs within the company. This decision affirmed a lower court finding of a general lack of interest on the part of the cannery workers in the better jobs. *See* Schultz and Petterson, *supra* note 318, at 1077-78.

321 *See id.* at 1079.

322 *See id.* at 1078-80.

> which tend to romanticize women and denigrate minorities, produce similar effects in Title VII cases. By portraying segregation as the expression of women's or minorities' preexisting job preferences, and by attributing their preferences to social and cultural forces beyond employers' control, the lack of interest defense privatizes job segregation and places it beyond the responsibility of employers and courts.[323]

Schultz and Petterson's findings support my theory that a counter-evolution is taking place in employment discrimination law. Their empirical study demonstrates convincingly that courts have since the beginnings of Title VII approached class action cases with a gender bias, and that this bias continues to the present day. Perhaps more startling, however, is the finding that there has been a marked change in courts' reaction to race discrimination cases. While the earlier race cases demonstrated a willingness to attribute a statistical disparity between minorities and whites to discrimination, the newer cases look at statistics with a jaundiced eye.[324] Race discrimination cases have gone the route of sex discrimination cases.

Why does this lack of interest defense succeed? In part, it succeeds because judges do not believe that discrimination is prevalent in today's workplace.[325] Its success is also due to a mistaken theoretical justification for the inference of conscious discrimination from statistical proof; this error subjects the statistical method of proof to attack. Statistical proof demonstrating a disparity in the numbers of woman and blacks in particular jobs does not necessarily create the inference of a *conscious* discriminatory intent.

The inference can be justified, however, based on strong psychological and sociological evidence that confirms our tendency to permit unconscious racist and sexist prejudice to affect decisionmaking. The statistical pattern can raise an inference that an employer has discriminated against a class of women or persons of color, consciously or unconsciously.

---

323 *Id.* at 1080.

324 *See id.* at 1159-60.

325 *See* Selmi, *supra* note 13, at 284 (arguing that the Court has consistently seen discrimination only when it has been overt); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994) (opining that *St. Mary's Honor Center v. Hicks* can be explained by the Court's belief that discrimination does not really exist anymore).

3. *Stereotyping as Direct Evidence*

Price Waterhouse v. Hopkins[326] established what I call the "Stereotyping Doctrine." This doctrine, in effect, sees overt stereotyping by a decisionmaker as virtually the equivalent of direct evidence of discrimination. In *Price Waterhouse*, Ann Hopkins, an extraordinarily successful accountant, applied for partnership.[327] She was denied, in part, because of the partners' use of stereotyping to evaluate her candidacy.[328] Her mentor explained to her that she could improve her chances of election to partnership if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry".[329] Justice Brennan writing for the Court, explained the power of stereotyping:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.[330]

Justice O'Connor's concurrence emphatically decried the use of stereotyping in the employment context, treating it as if it were direct evidence of conscious discriminatory intent:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As

---

326 Where the *McDonnell Douglas/Burdine* method of proof applies to cases alleging that the employer had a single discriminatory motive for the firing, a different standard of proof applies in mixed motive cases. This different standard originated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and was subsequently modified by the 1991 Civil Rights Act, 42 U.S.C. § 2000e-2(m)(1994). According to the 1991 Act, once a plaintiff demonstrates that an illegitimate factor such as race was a motivating factor in the employer's decision, the employer is liable. The employer, however, can limit the remedies available to the plaintiff by proving that it also had a legitimate reason for taking the adverse employment action and that it would have fired the plaintiff even absent the illegitimate reason. *See* 42 U.S.C. § 2000e-5(g) (1994).

327 *See Price Waterhouse*, 490 U.S. at 233.

328 *Id.* at 255-56.

329 *Id.* at 272 (O'Connor J., concurring) (*quoting* 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

330 *Id.* at 251 (citations omitted).

> the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisonmaking process that her gender was a major reason for the rejection of her partnership bid.[331]

Evidence of stereotyping will remove the case from the *McDonnell Douglas* proof construct, allowing the plaintiff to argue that the statement demonstrates that the protected characteristic was a motivating factor in the employment decision.[332]

To understand the stereotyping doctrine, let us add one more fact to *Lopez*. Assume that Mr. Snead told Ms. Lopez at the time of her firing, "Your kind is lazy and difficult to get along with." This statement, expressing a stereotype about African Americans, more clearly links Lopez' firing to her race. According to the court, this statement would demonstrate a conscious intent to discriminate because of Lopez' race. However, this is not a necessary conclusion. Snead may have the following different states of mind:

CASE EIGHT

Snead consciously decided to fire Ms. Lopez because of her race. He consciously believes the stereotype that blacks are lazy and he communicates that conscious belief to Lopez at the time of her firing. He is aware that the belief is a stereotype and he acts upon it nonetheless because, based on his experience, the stereotype is true. This statement, therefore, would be the equivalent of "I am firing you because you are black. Like all blacks, you are lazy."

CASE NINE

Snead consciously decided to fire Ms. Lopez because he believes that she is lazy. He is aware of the stereotype that blacks are lazy and even though he believes that the stereotype might not be true in some cases, he has concluded that it fits Ms. Lopez' case. He is consciously applying what he knows to be a stereotype about blacks to Ms. Lopez case and is acting upon it. He is not aware, however, that the stereotype has unconsciously affected his evaluation of Lopez, allowing him to judge her more harshly than her white counterparts.

CASE TEN

---

331 *Id.* at 272 (O'Connor, J., concurring).

332 42 U.S.C. § 2000e-2(m) of the 1991 Act, which amended *Price Waterhouse*, states:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (1994).

Snead believes the stereotype that "blacks are lazy," but he is unaware that this belief about blacks is a stereotype. Instead, his experience has demonstrated that the statement is true. He is also unaware that the stereotype, formed in his unconscious, has influenced his judgment about Ms. Lopez.

CASE ELEVEN

Snead believes the stereotype that "blacks are lazy," but has not fired Lopez as a result of the stereotype. In fact, Lopez is a lazy person and does not get along with other employees and Snead fires her for these reasons.

***

Under the stereotypes doctrine the statement "your kind is lazy and difficult to get along with," made at the time of the firing by the decisionmaker is legally sufficient to prove that race "was a motivating factor" in the decision to fire Lopez and to hold Lowell liable for illegal discrimination. Lowell would then have the opportunity to limit the plaintiff's remedies by proving that it would have fired Lopez for a legitimate reason even absent the role race played in the decision.[333] Under this doctrine, the employer would be liable in Cases Eight through Eleven in *Lopez* unless Lowell Printing could prove that it would have fired Lopez for a legal reason that is unrelated to the stereotyping. The law would see Cases Eight through Eleven as indistinguishable, even though the moral culpability of the employer differs significantly in these cases. Snead's moral failure in Case Eight – where he is aware of the stereotype and acts upon it because he has a conscious racist attitude, is considerably greater than that in Cases Nine or Ten, where he unconsciously uses race as a filtering mechanism to assess the quality of his employee. In Cases Nine, Ten and Eleven, the employer does not possess the conscious intent to discriminate that the law presumes. Rather, Snead judges Lopez through the distorted cognitive lens of a stereotype and his behavior is affected by it.[334] Case Ten, in fact, is similar to Cases Three and Seven above, where Snead's honest but mistaken belief that his employee is not up to par is influenced by an unconscious prejudice. In Case Eleven, the employer could be held liable even though the stereotype may not have influenced his attitude toward Lopez.

Lopez demonstrates that the only difference between the cases decided under the *Price Waterhouse* test and those decided under *Burdine* is the statement, which serves to prove to the factfinder that race or gender was a causal factor in the employment decision. Thus, it appears that *it is not the moral culpability of the decisionmaker that the courts' proof*

333 *See* 42 U.S.C. § 2000e-5(g) (1994).

334 *See* discussion on stereotyping *supra* Part I.

methodologies determine in assessing liability, but rather whether the decision was motivated by the protected characteristic.[335] A stereotypical statement serves to demonstrate to the factfinder that race played a causal role in the decisionmaking process. It does not show, as we have seen in Case Ten, that the employer consciously judged the employee differently because of her race.

An analysis of these cases demonstrates that even in situations where the Court would find significant evidence of discriminatory "intent," the evidence, in fact, proves only that the decision was infected by illegal considerations. It does not prove whether those considerations are conscious or unconscious on the employer's part. The Stereotyping Doctrine, like the *McDonnell Douglas/Burdine* approach, while unable to define which employers possess culpable states of mind, is useful in proving causation – it ensures that it is likely that the protected characteristic was a motivating factor that made a difference in the outcome.

Price Waterhouse unwittingly expands the definition of intent to include the use of unconsciously or consciously held stereotypes to make employment decisions. Even though some of the partners at Price Waterhouse may have been unaware that their expectations of Ms. Hopkins were affected by gender stereotypes, the Court still held the employer liable for permitting stereotypes to influence the decisionmaking process.[336]

The counter-evolution to the Stereotyping Doctrine originated in *Price Waterhouse* itself. Both Justice Brennan's plurality[337] and Justice O'Connor's concurrence eschew the sufficiency of stray remarks to create employer liability. Justice O'Connor's statement, however, is normally relied upon by courts enforcing the Stray Remarks Doctrine.[338] Justice O'Connor stated:

---

335 Case 12 is an exception. In this case, the employer will be liable even if he is not acting on the stereotype. It seems highly likely, however, that an employer who makes this type of statement to an employee, at the time of the discharge is affected by the stereotype either unconsciously or consciously.

336 This is a break from *Watson v. Fort Worth Bank & Trust*, 490 U.S. 977 (1988), where the Court stated that the subjective decision making process could be examined under the disparate impact theory but, in a similar fact situation, was probably insufficient to demonstrate intentional discrimination.

337 Justice Brennan stated:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in the particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks.

Watson, 490 U.S. at 251.

338 *See, e.g.*, Holly-Anne Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996).

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice tosatisfy the plaintiff's burden in this regard.[339]

Many of the courts have enforced the Stray Remarks Doctrine with vigor, holding that a remark evidencing a race or gender stereotype must be made by the decisionmaker at or close to the time of the adverse employment decision so that the employee can prove that there is a causal connection between the remark and the employment decision.[340] Moreover, once the courts find that the circumstances do not meet these requirements of direct proof, some courts refuse to consider the remarks as circumstantial evidence combined with other circumstantial evidence to prove pretext.[341] This interpretation distorts Justice O'Connor's statement in *Price Waterhouse* that applies only to the creation of a direct inference of discrimination. Moreover, this interpretation demonstrates a poor understanding of the nature of stereotyping, how stereotypes are formed through cognitive processing and how they can unconsciously affect our evaluations of others' work.[342] Finally, like the counter-evolution spawned by *Hicks*, the Stray Remarks counter-evolution contributes

---

339 *Watson,* 490 U.S. at 277 (O'Connor, J. concurring) (citations omitted).

340 *See, e.g.*, Nichols v. Loral Vought Systems Corp., 81 F.3d 38, 41-42 (5th Cir. 1996) ("To be probative, allegedly discriminatory statements must be made by the relevant decision maker."); EEOC v. Texas Instruments Inc., 100 F.3d 1173 (5th Cir. 1996) (age-related comments insufficient to survive summary judgment motion); Gilberto Mulero-Rodriguez v. Ponte, 98 F.3d 670, (1st Cir. 1996) (nexus existed in record between eight month old comment and adverse employment decision).

341 *See, e.g.*, Kennedy v. Schoenber, Fisher & Newman, Ltd., 140 F.3d 716, 723-724 (7th Cir. 1997) (ignoring strong anti-pregnancy statements by supervisor in pregnancy discrimination case); Fuka v. Thomson Consumer Electronics, 82 F.3d 1397 (7th Cir. 1996) (age-related comments made by decisionmaker insufficient for direct evidence and not considered under *McDonnell Douglas* proof); Holly-Anne Geier v. Medtronic, Inc., 99 F.3d 238, 242-243 (7th Cir. 1996) (anti-pregnancy remarks made by supervisor insufficient for direct evidence of pregnancy discrimination and not considered under *McDonnell Douglas*). *But see* Huff v. UARCO, Inc., 122 F. 3d 374, 385 (7th Cir. 1997) (remarks insufficient to prove age discrimination directly can be combined with other evidence to prove a circumstantial case under *McDonnell Douglas*).

342 For a description of stereotyping, *see supra* Part I. In *Structuralist and Cultural Domination Theories Meet Title VII*, 92 MICH. L. REV. 2370 (1994), Professor Martha Chamallas presents a critique of the Court's "motivational" approach to stereotyping in *Price Waterhouse* rather than the structural approach offered by expert witness, Dr. Susan Fiske. Unlike a motivational analysis which focuses on the mindset of the employer and employee, the structural approach would focus on the employee's status as a token, making her particularly vulnerable to stereotyping and typecasting. *See* Chamallas, at 2395-98. An expanded stereotyping approach that abolishes the stray remarks doctrine could follow the structural model.

to increased inappropriate use of summary judgment to dispose of cases.[343]

4. *Intent's Purpose: Confusing Causation and Mental State*

These cases demonstrate that Title VII's concept of intent differs significantly from that in tort law. While in tort law, the intent requirement appears to assure the moral culpability of the actor, in employment discrimination law, proof of intent guarantees that the employment decision was made *because of* the employee's protected characteristic, whether or not the employer is aware of the motivation.[344] This purpose, while apparently unanticipated by legislators passing the original Act, is consistent with the goal of the statute to guarantee equal economic opportunities to person of color and women and is also consistent with the reasoning underlying *Griggs* and the disparate impact theory.[345]

While "intent" in employment discrimination law is the same as "motive," tort law defines "intent" with reference to the actor's state of mind regarding the act and its consequences. In tort law for example, "intent" involves three basic requirements:

It is a *state of mind*; about *consequences* of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.[346]

---

343 *See, e.g.*, Holly-Anne Geier v. Medtronic, Inc., 99 F.3d 238 (7th Cir. 1996) (affirming summary judgment in pregnancy discrimination case); Kennedy v. Schoenberg, Fisher & Newman, ltd., 140 F.3d 716 (7th Cir. 1998) (affirming summary judgment in pregnancy discrimination case). Although in many instances before *Price Waterhouse*, courts used the term "direct evidence" incorrectly in the true evidentiary sense of the term, *see* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 213 n. 37 (1993), this evidence of stereotyping is still probative and should often create a genuine issue of material fact, precluding summary judgment in a *McDonnell Douglas* case.

344 Even if consciously aware, the actor need not have a malicious or invidious purpose to harm in order to discriminate *intentionally*. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (holding union liable for failing to represent black employees' grievances of racial discrimination even if purpose is non-discriminatory); *compare* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) (white employer not liable for *personal* animus against black employee unless shown to be racially motivated). *But see* Wessman v. Gittens, 1998 U.S. App. Lexis 29805, at *95-96 (1st Cir. 1998) (Lipez, J., dissenting).

345 The Court created the disparate impact theory of discrimination in its decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding an employer liable for the disparate impact on blacks caused by a neutral policy requiring that job applicants or transferees possess a high school diploma and the employer could not prove that the job requirements were necessary and business-related). The disparate impact policy does not require intent to discriminate, but rather focuses on the impact of the policy and the purpose of the Act.

346 *See* W. Page Keeton et al., Prosser and Keeton on The Law of Torts, 5th ed. (1984).

In tort law, for intent to exist, the actor need not have a hostile attitude toward the victim or toward another and he need not have a desire to do any harm.[347] In fact, the actor could be liable for an intentional tort even though he or she desires to help the person who is harmed.[348]

But neither is the mere knowledge and/or appreciation of a risk sufficient for intent to exist.[349] Instead, the actor must have a purpose or desire to bring about certain consequences and a belief or knowledge that the consequences are substantially certain to occur. In *Gouger v. Hardtke*,[350] the Supreme Court of Wisconsin explained the difference between intentional torts and negligence:

> The principal difference between negligent and intentional conduct is 'the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act.' Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor subjectively intends to cause injury or where injury is substantially certain to occur from the actor's conduct. If the conduct merely creates a foreseeable risk of some harm to someone, which may or may not result, the conduct is negligent.[351]

If the tort definition of intent were applied to *Lopez*, the "act" would be the firing of Lopez and the filling of the position with John Randall. The consequences of the act are that a black woman no longer has a job at Lowell while a white male does. There is no question that Snead had a desire or purpose to bring about the consequences of his act or at least an awareness that the consequences were substantially certain to occur.

Although this state of mind defines intent in tort law, it has never been sufficient to constitute "intentional discrimination" under the employment discrimination laws. In determining whether "discriminatory intent" exists in an employment discrimination case, courts look at the *reason or motivation* for the act. The actor's purpose must not only be to treat someone of a protected characteristic differently; it must also be to treat someone differently *because of* the protected characteristic.

---

347 *See id.* at 36.

348 See id.

349 See id.

350 167 Wis. 2d 504 (Wis. 1992).

351 *Id.* at 512; *see also* Spivey v. Battaglia, 258 So.2d 815 (Fla. 1972) (holding that knowledge and appreciation of risk, absent substantial certainty that the harm will occur, is not sufficient to constitute intent).

Unlike in the traditional torts area, where motive is nothing more than the reason driving the employer's act, motive in employment discrimination law is the essence of the tort. This is true because the underlying act in our story – Snead's firing of Lopez – is legal. Taken alone, the act does not create liability. Lowell will be liable only if Snead fires Lopez *because of* her race. Thus, it seems that *intent and motive, used interchangeably in employment discrimination discourse, play the same role as but for causation.* That is, a finding of "intent" demonstrates that the protected characteristic plays a role in the employment decision and makes a difference in the outcome.[352] It does not necessarily imply that the employer was conscious of the reason for his or her decision. It implies only that the motivation behind the decision, whether conscious or unconscious, was the employee's protected characteristic.

Lopez demonstrates this point. Especially under the traditional *McDonnell Douglas/Burdine* analysis before *Hicks*, which required a finding of discrimination once pretext is shown, the intent requirement, achieved through a finding of pretext, will define which actions stem from discriminatory motives whether conscious or not. Even after *Hicks* and *Reeves*, as demonstrated above, many acts resulting from unconscious prejudice toward protected class members, will lead to employer liability. As we have seen above, this is also true in the area of pattern and practice cases and those cases applying the stereotyping doctrine.

5. *Evolutionary and Counter-Evolutionary Patterns*

As we have seen, in every major area of employment discrimination law under Title VII, a pattern has developed. First, the courts have departed from the language of the statute and perhaps from the intent of the legislature in order to give full effect to the egalitarian purposes of the statute. This movement is represented by the creation of the *McDonnell Douglas/Burdine* methodology, and the use of statistical proof in pattern and practice cases.[353] Both *McDonnell Douglas/Burdine* and the pattern and practice cases permitted a finding of discrimination based on conscious or unconscious discriminatory actions. A similar evolution occurred in the emergence of the stereotype doctrine in *Price Waterhouse*, which holds an employer liable who apparently acts upon a stereotype even though he may be unaware that his perception is rooted in unconscious biases.

The second stage of the pattern is a counter-evolution. In the *McDonnell Douglas* cases, the Court decided *Hicks* which made it more difficult for employees to prove discrimination, leading to increased

352 *See, e.g.*, Holzman v. Jaymar-Ruby, Inc., 916 F.2d 1298, 1304 (7th Cir. 1990).

353 The evolution also occurred with the emergence of the disparate impact cause of action. *See supra* note 369 and accompanying text.

summary judgments and in some courts, an expectation that the employee will use direct evidence to prove discrimination.[354] Recently, however, the Court cut back on *Hicks* in *Reeves v. Sanderson Plumbing, Inc.* In pattern and practice cases, the Court has moved away from an acceptance of general population statistics as proof of discrimination, requiring much more specific and sophisticated statistical analysis and permitting the lack of interest defense in both race and sex discrimination cases.[355] In *Price Waterhouse* cases, although the stereotype doctrine still exists, courts often dismiss strong evidence of the presence of stereotyping in the workplace as "stray remarks" having no probative value.

Although not always apparent from the courts' opinions, this redefinition of intent represents a major shift in the focus of employment discrimination law, a shift away from an emphasis on the purpose of creating economic opportunity for persons of color and women and toward a purpose never articulated in the original statute: punishment of *only* those employers who make adverse employment decisions because of conscious, (and often) invidious attitudes toward members of protected groups.

Curiously, this shift has occurred in the face of mounting evidence in the psychological literature that *much discrimination results not from a conscious intent to discriminate, but from cognitive categorizations or subconscious processes*. Recent cramped interpretations of the definition of discriminatory intent result in minimal enforcement of the law, erring on the side of the employer. The effect: by imposing a new, more rigorous intent standard and by ignoring that discrimination occurs in large part without a conscious intent to discriminate, more recent court decisions reinforce structural discrimination against women and minorities caused by a history of oppression of these groups that cannot be erased without a conscious effort.[356] Part III suggests legislative proposals and judicial interpretations of the existing statute that would ameliorate the problem.

III. RESPECTING EVOLUTION: CONFORMING THE LAW TO THE EVIDENCE

This Part offers legislative and judicial proposals that would move in the direction of conforming the law to the social science evidence about the nature of discrimination. Although a legislative solution would

---

354 *See* discussion *supra* Part II.B.1 (b).

355 *See* discussion *supra* Part II.B.2 (b).

356 The only conscious effort – affirmative action – is currently under attack as discrimination itself. *See* Ann C. McGinley, *Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications for Race-Conscious Measures*, 4 ROGER WILL. L. REV. 209 (1998).

be preferable, absent legislative amendment, the lower courts could reach similar results through strict summary judgment standards and the use of jury instructions that would make explicit the intent to find employers liable for discriminatory behavior resulting from unconscious biases.

A. LEGISLATIVE SOLUTION

An amended statute would define intent as unconscious as well as conscious. It would overturn *Hicks* and *Reeves* to the extent they reject the mandatory presumption, reaffirming the traditional *McDonnell Douglas* construct, expand the stereotypes doctrine established in *Price Waterhouse*, and establish that discriminatory racial or sexual remarks are relevant in proving discrimination under *McDonnell Douglas* even if they do not rise to the level of direct evidence. In cases alleging a pattern and practice, the new statute would permit lack of interest as an affirmative defense, requiring defendants to prove the extent to which a lack of interest, unaffected by the employer's actions, accounts for the statistical disparity.

1. *Individual Cases Brought Under McDonnell Douglas*

A bill to overcome *Hicks* would include: (1) a statement of purpose to conform the law to the scientific understanding of the nature of discrimination; (2) a definition of "intentional" to equal motive, including discriminatory behavior caused by conscious and unconscious processes; (3) a definition of prima facie case to include a bare bones prima facie case; (4) the reaffirmation of the mandatory presumption of the *McDonnell Douglas/Burdine* mode of proof;[357] (5) an explanation of the theoretical justification for the mandatory presumption; (6) a provision prohibiting summary judgment of an employment discrimination claim where there is a genuine issue of material fact concerning whether the employer's explanation for its action was pretextual; and (8) a broad definition of "pretext" to include not only a conscious bad faith coverup for a discriminatory action, but also "not the true or real reason for the behavior."

Under this scheme, the judge would instruct the jury about the nature of discriminatory behavior and the theoretical justification for the law. The judge would admit testimony of social science experts establishing the prevalence of unconscious forms of discriminatory decision-

---

357 The mandatory presumption would not exist in reverse discrimination cases because the failure to hire a person of the dominant race or gender does not create a presumption that the failure is because of race or gender unless there are unusual and specific circumstances in the workplace. *See, e.g.*, Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997); Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993); McHenry v. Pennsylvania State System of Higher Education, 1999 U.S. Dist. LEXIS 7188 (E.D. Pa. May 11, 1999).

making.[358] The judge would give the jury three simple interrogatories to answer:

(1) Did the plaintiff make out a prima facie case of discrimination?;

(2) If your answer is "yes" to question number one, did the defendant articulate a legitimate non-discriminatory reason for its employment action?; and

(3) If your answer to number two is "yes," did the plaintiff prove by a preponderance of the evidence that the reason defendant gives for its employment decision is inaccurate or untrue?

If the jury answers all of the questions in the affirmative, judgment should go to the plaintiff. The instruction about the nature of discrimination would serve to educate the public about discrimination. The interrogatories would also avoid jury nullification.[359]

It is possible that the mandatory presumption will hold liable an employer who did not act from discriminatory attitudes, either conscious or unconscious. If, for example, Snead fired Lopez to make room for a friend who is better qualified than Lopez, a jury could conceivably believe that his argument that the friend was better qualified is pretextual.

The social science research, however, suggests that the opportunities for underestimating the incidence of discriminatory behavior are much greater than the reverse.[360] Reinstatement of the mandatory pre-

---

358 For a discussion of potential jury instructions and the admissibility of expert testimony on the unconscious nature of stereotyping, see Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L. J. 1487, 1508-17 (1997).

359 Concededly, even a mandatory presumption will not solve all of the proof problems under the *McDonnell Douglas* construct. Employers whose judgments about their employees are unconsciously affected by the employee's race may develop justifications that appear non-discriminatory. For example, in the *Lopez* case, Snead may have records detailing his problems with Ms. Lopez, her lack of organization, and her inability to get along with her peers. Unless there is evidence to rebut Lowell Printing's documents or to demonstrate that white employees with the same problems were treated differently, Ms. Lopez will not be able to prove pretext. In this scenario, the employer will prevail even though his negative judgment of the employee may be caused by unconscious discriminatory animus.

360 Research demonstrates that there is a vast difference between perceptions of blacks and whites and women and men concerning the prevalence of race and sex discrimination. A recent Gallop poll social audit demonstrates that while 76% of whites believe that blacks are treated equally in their communities, only 49% of blacks believe that blacks receive equal treatment. *See Executive Summary: The Gallup Poll Social Audit on Black/White Relations in the United States* 6 (June 9, 1997); *see also* Terry Carter, *Divided Justice* 43 ABA JOURNAL, 43 (Feb.1999) (stating that more than half of black lawyers participating in a survey of ABA and National Bar Association members believed that "very much" racial bias exists in the justice system whereas almost one-third of white lawyers answered "very little" to the same question).

The perceptual divide is similar for women and men. Although three-quarters of female attorneys report having experienced gender bias, only one-third of men questioned had observed gender bias. *See* DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 4 (1997). Even those men who saw sex discrimination against women tended to

sumption, when combined with a judicial acknowledgment of its purpose, appropriate expert testimony about unconscious discrimination, proper jury instructions and proper judicial enforcement of summary judgment standards, can more effectively achieve the purposes of the Civil Rights Act – eliminating discrimination and compensating victims without creating an undue burden on employers.

2. *Individual Mixed Motives Cases*

The bill would reaffirm and expand the stereotypes doctrine as established in *Price Waterhouse*, stating that evidence of stereotyping, either conscious or unconscious, in the decisionmaking process is relevant to the inquiry as to whether race or sex motivated the employer's adverse employment decision. The bill would state that discriminatory comments made by co-workers and employers in the workplace may be relevant to the determination of whether the protected characteristic motivated the decision and that evidence of stereotyping in the workplace is relevant to the question of causation. If the comments do not rise to the level of direct proof of discrimination, they can be considered along with other evidence indicating discrimination. Expert testimony about conscious and unconscious discrimination and the meaning of the comments will be admissible to prove causation. If the discriminatory comments are insufficient to prove causation directly, they can be considered under the *McDonnell Douglas* analysis.

The court will instruct the jury that if race or sex is a motivating factor, the plaintiff will prevail. The instructions should explain the im-

---

underestimate its significance. *See id*; *see also* Phyllis C. Coontz, *Gender Bias in the Legal Profession: Women "See" It, Men Don't* in GENDER AND AMERICAN LAW: THE IMPACT OF THE LAW ON THE LIVES OF WOMEN 283-84 (Karen J. Maschke, ed., 1997) (finding based on empirical research that women lawyers observe bias in the legal profession significantly more than men lawyers do).

There is other troubling evidence suggesting that discrimination victims go without redress or compensation for their injuries. Social Science research demonstrates that victims of discrimination tend to underestimate the extent of the discrimination they suffer. *See* Faye J. Crosby et al., *The Denial of Personal Disadvantage Among You,Me and All the Other Ostriches* in GENDER AND THOUGHT: PSYCHOLOGICAL PERSPECTIVES 79, 95-97 (Mary Crawford and Margaret Gentry, eds. 1989). This phenomenon is known as the denial of personal disadvantage. *See id.*

Moreover, persons analyzing whether discrimination exists in individual cases grossly underestimate the occurrence of discrimination, unless the individual case is presented to the factfinder as part of a pattern of discrimination. *See id.*

This research suggests three conclusions: (1) victims of discrimination are more likely to underuse, rather than overuse, the statutory remedies available to them; (2) when individuals bring suits alleging individual discrimination in absence of evidence of a pattern and practice of discrimination, factfindinders will likely err in defendants' favor; and (3) the determination of whether discrimination has occurred may be highly dependent upon the race and sex of the factfinder. In a system where the vast majority of judges are white males, the excessive use of summary judgment becomes a very real possibility given this research.

portance of the social science testimony concerning stereotyping and that stereotyping is an unconscious process, and the particular danger of making judgments based on stereotypes when women and persons of color are underrepresented in the particular job in question.[361] It will also explain that discriminatory remarks made by co-workers or employers are relevant to the existence of stereotyping in the workplace and to the question of whether the decision in question was the result of stereotyping. The court will instruct the jury that if the evidence, including the discriminatory comments, is insufficient to prove discrimination directly, the jury should apply the *McDonnell Douglas* proof mechanism, considering the comments as evidence of pretext.

3. *Pattern and Practice Cases*

For pattern and practice cases, the statute should limit the lack of interest defense to an affirmative defense, provable by the defendant only to the extent the defendant can prove that a lack of interest unrelated to employer action accounts for the statistical disparity between the expected and actual percentages of blacks and women in the workplace. To the extent the defendant proves some lack of interest, the defendant will be relieved of liability for the proportion of the lack of interest not caused by the employer's actions. Thus, the statistical disparity will raise a rebuttable presumption as to the existence of discrimination and its extent. The court will instruct the jury as to the nature of stereotyping and permit expert testimony of the stereotyping involved in the lack of interest defense.

B. JUDICIAL REFORMS

Although an amendment to Title VII would be preferable in its scope and ability to overrule Supreme Court precedent, even as the law stands, lower courts have considerable leeway to conform Title VII law to the scientific evidence regarding the nature of discrimination. In all types of disparate treatment cases, courts can define "intent" to include both conscious and unconscious discrimination, admitting expert testimony explaining the unconscious nature of stereotyping of women and persons of color, and demonstrating how their stereotypes result in discriminatory behavior. In admitting this testimony, courts can rely on *Price Waterhouse v. Hopkins*. Jury instructions can comment on the evidence of social science findings concerning unconscious stereotyping and how it affects decisionmaking. Courts of Appeals can accept Brandeis briefs analyzing the social science literature on the nature of stere-

---

361 *See* Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2379-81 (1994) (explaining that tokens tend to be more subject to stereotyping).

otyping and the role it plays in decisionmaking. This reading of the statute should be permissible because for many years the proof constructs operated to include unconscious discrimination as illegal and the court has quietly endorsed such results in *Price Waterhouse v. Hopkins*.

After *Reeves*, courts should regularly permit a factfinder's determination of liability where there is sufficient evidence from which a reasonable factfinder can conclude that the employer's articulated reason for the decision is pretextual. The definition of pretext would include not only a "coverup," but also that the employer's reason is not the real reason for the employment decision.

Lower courts can permit the introduction of expert testimony explaining the nature of discrimination and the existence of unconscious negative attitudes that result in discriminatory behaviors. Following this testimony, the court can instruct the jury that the statute permits a finding of discrimination where the act is "intentional," defining "intentional" to include both conscious and unconscious discrimination. The court would also instruct the jury that a finding of pretext creates a permissible inference of discrimination. Here, the judge would explain to the jury the justification for the permissible inference of discrimination. That justification is that the combination of the prima facie case and the finding of pretext can raise an inference that the employer, in evaluating the employee, was either consciously or unconsciously influenced by the employee's race, gender or national origin. Juries would then be required to decide the factual question of whether the employer's explanation is pretextual. If so, the jury would be permitted, but not required, to find for the plaintiff. This option carries with it some risks, since lower courts are bound by the precedent of higher courts and a number of circuits might overrule this definition of Title VII law. Nonetheless, since law evolves from the bottom up,[362] lawyers practicing in this field should consider offering expert testimony to the courts upon which they can rely to define "intentional" to include unconscious as well as conscious discrimination.[363] *Price Waterhouse* provides support for this position.

Without legislative change, courts can also make a substantial difference in the areas of stereotyping and pattern and practice cases.

---

362 *See* ESKRIDGE, *supra* note 194.

363 A second option is less explicit. Lower courts can permit a jury to decide whether an employer has illegally discriminated against an employee whenever there is sufficient evidence from which a reasonable jury can conclude that the plaintiff had made out a prima facie case and that the employer's explanation for its decision is pretextual. Once again, the definition of pretext would be a broad one. The court would not define "intentional" for the jury. Although this latter option conforms explicitly to *Reeves*, it gives the jury more power without giving it more information about the nature of discrimination. Nonetheless, it permits the jury to conclude that an employer illegally discriminated based on the combination of a prima facie case and a finding of pretext.

Courts can hold that proof of a statistical disparity in a pattern and practice case creates a presumption of discrimination, rebuttable by the lack of interest affirmative defense only to the extent that the defendant proves that the lack of interest is not caused by or contributed to by the employer's actions. Courts can limit the "stray remarks" doctrine, holding that discriminatory remarks of co-workers or supervisors in the workplace are relevant to the question of whether the adverse employment decision resulted from discrimination by demonstrating that the co-workers or employer harbor stereotypical beliefs and that an atmosphere of tolerance by an employer may signal discrimination. Even where the discriminatory remarks and comments do not rise to the level of direct evidence, courts should hold the remarks are relevant evidence of pretext in a case using the indirect method of proof under *McDonnell Douglas*.

This proposal would not unduly burden employers. Although methods designed to eliminate discrimination in the workplace are not foolproof,[364] and the relationship among affect, cognition and stereotyping is extremely complicated, the psychological literature provides hope for prejudice reduction. Research demonstrates that the mood state or affect of the evaluator may affect whether he or she relies on stereotypes rather than processing information that differentiates an individual from the group's stereotype.[365] Although the research has not reached a level whereby psychologists can tell employers exactly what mood states to evoke and how to do so in order to assure perfectly non-discriminatory responses, the literature is increasing in sophistication in this area.[366] Moreover, Professors Devine and Monteith of the University of Wisconsin have established a model for discrimination reduction for persons who have already internalized egalitarian principles.[367] Devine and Monteith agree that the mere internalization of non-discriminatory principles is not sufficient to change the activation of stereotyping and its consequent behavior; internalization is the first step toward reducing prejudicial responses.[368] Devino and Monteith demonstrate that "low

---

364 One example of a failed theory is contact hypothesis, which holds that contact alone between ingroups and outgroups will lead to less prejudice and discrimination. Although this hypothesis is not always nor totally inaccurate, the contact must occur under very specific circumstances, some of which even researchers in psychology have not discovered yet. *See* Diane M. Mackie & David L. Hamilton, *Affect, Cognition and Stereotyping: Concluding Comments, in* AFFECT, COGNITION AND STEREOTYPING 371, 378 (Diane M. Mackie & David L. Hamilton, eds., 1993) [hereinafter *Concluding Comments*].

365 *See e.g.*, David L. Hamilton et al., *The Influence of Affect on Stereotyping: The Case of Illusory Correlations in* AFFECT, COGNITION, AND STEREOTYPING 39, 41 (Diane M. Mackie & David L. Hamilton, eds, 1993).

366 *See* Mackie & Hamilton, *Concluding Comments*, *supra* note 388, at 378-82.

367 *See* Patricia G. Devine & Margo J. Monteith, *The Role of Discrepancy-Associated Affect in Prejudice Reduction, in* AFFECT, COGNITION, AND STEREOTYPING 317, 334-341 (Diane M. Mackie & David L. Hamilton, eds., 1993).

368 *See id.* at 334.

prejudiced" individuals[369] can learn inhibitory responses that challenge the stereotypes and permit them to reduce their automatic prejudicial responses.[370]

Dr. Valian also suggests a number of practical means by which employers can "nullify the negative professional consequences of gender schemas and to equalize men's and women's ability to accumulate advantage."[371] Employers need to create institutional policies that further the advancement of women and minorities, including effective training programs for managers.[372] Employers should place in positions of power leaders who are dedicated to furthering equality for women and persons of color.[373] Moreover, employers need to establish and enforce objective criteria for evaluation.[374]

Furthermore, as demonstrated by Professor Vicki Schultz, the sociological evidence demonstrates that many practices unwittingly engaged in by employers can create a disincentive for women and minorities to apply for positions. For example, employers should reconsider their advertising for positions, the implicit messages sent through the substantive ads as well as the modes of advertisement such as word-of-mouth hiring. They should examine their workforce for sex segregation to determine what conditions exist that create and reinforce the segregation. Employers should also examine the traditionally female and male jobs, questioning whether the job descriptions are "feminine" and "masculine" because the jobs are commonly occupied by one sex. They should establish strong sexual and racial harassment policies in the workplace, enforcing them with vigor. These policies protect women and minorities who attempt to move into "non-traditional" jobs from harassment. Studies show that if corporate leaders set a non-racist, non-sexist tone, there is a significant improvement in the workplace atmosphere for women and minorities.[375]

The American Psychological Association agrees that employers can train employees to reduce the likelihood that stereotypical thinking will

---

369 Low prejudiced individuals are those who have internalized anti-discriminatory principles. *See* Margo J. Monteith, Self-Regulation of Stereotypic Responses: Implications for Prejudice Reduction Efforts 4 (1991) (dissertation UMI Dissertation Services).

370 *See id.* at 334-341; *see also*, Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 759-60 (1995) (advocating the use of the "dissociation model" to remind jurors of their personal beliefs in order to assure that their decision making is controlled by personal beliefs rather than by stereotypes).

371 VALIAN, *supra* note 110, at 303.

372 *See id.* at 315.

373 *See id.* at 316-317.

374 *See* VALIAN, *supra* note 110, at 318.

375 *See id.* at 316-18; *see also*, Elusive Equality: *The Experiences of Women in Legal Education*, ABA Commission on Women in the Profession, 23-25 (1996) (concluding that the dean's leadership or lack thereof plays a vital role in granting women faculty equality in law schools).

result in discrimination in the workplace.[376] Although some studies question whether an intent to inhibit stereotyping works because it could produce a rebound effect,[377] a very new study gives hope about the use of self-focus to inhibit the use of stereotypes in decision making.[378] Moreover, many other studies show that information, increased attention to the information and motivational incentives supporting the increased attention as well as demonstrating disapproval of stereotyping have worked in the past.[379] According to the literature cited by the APA, there are three types of motivational methods that reduce stereotyping: (1) interdependence – an organization that uses teamwork and makes promotions dependent on group projects and emphasizes supervisors' responsibilities for the success of subordinates;[380] (2) emphasis on accuracy and accountability in evaluation;[381] and (3) a strong opinion or commitment of superiors or colleagues who discourage stereotyping.[382]

Dr. Valian suggests training of managerial employees in the concept of accumulation of advantage and disadvantage and in recognizing when such accumulation operates to the detriment of women or the benefit of men;[383] she also recommends training managers about gender schemas and how to reprogram their reactions. One method of reprogramming, suggests Dr. Valian, is to challenge the assumptions by recalling objectively similar events happening to men and women and comparing our reactions to them.[384] Another means is an experiment in thought, considering in our minds how we would react to a person of the opposite sex if he or she performed in the same manner.[385]

Other means of reducing reliance on gender schemas include devoting more time to evaluations,[386] and creating the opportunity for managers to devote their full attention to performance evaluations.[387] Studies of policemen demonstrate that when an evaluator has little time and cannot devote his full attention to the evaluation, he is more likely to rely on

---

376 *See* Amicus Curiae Brief, APA, *supra* note 189.

377 *See generally* C. Neil Macrae et al., *Out Of Mind But Back In Sight: Stereotypes On The Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

378 *See generally* Macrae et al., *supra* note 78.

379 See id.

380 See generally Amicus Curia Brief, APA; see also Barbara F. Reskin & Irene Padovic, Supervisors as Gatekeepers: Male Supervisors' Response To Women's Integration In Plant Jobs, 35 SOCIAL PROBLEMS 536, 547 (1988).

381 *See* Amicus Curiae Brief, APA, *supra* note 189.

382 See id.

383 *See* VALIAN, *supra* note 110, at 303.

384 *See id.* at 305.

385 *See id.* at 305-06.

386 *See id.* at 307.

387 *See id.* at 308-09

the gender schema.[388] Increasing accountability reduces reliance on schemas and increases accuracy.[389]

Employers can also reduce the chance of unconscious bias affecting the evaluation of women and blacks by having a greater pool of female and black employees and applicants.[390] Studies demonstrate that work units having a larger percentage of women and minorities have a positive effect on the job performance evaluations of women and minorities. Data suggests that women will receive a fairer evaluation if they represent at least 25% of the group.[391] According to Valian:

That percentage of women not only reduces the availability of the female gender schema but, just as significantly, it alters perceptions of the job itself. A job held by both males and females in reasonable numbers appears to be a human job rather than a male or female job.[392]

Finally, managers need training in cognitive failures such as failure to appreciate covariation,[393] blocking of relevant hypothesis,[394] and illusory correlation.[395] Each of these is a reasoning error that tends to vali-

---

388 See id. at 308; R.F. Martell, Sex Bias, at Work: The Effects of Attentional And Memory Demands On Performance Ratings Of Men and Women, 21 J. APPLIED SOC. PSYCHOL. 1939-60 (1991).

389 *See* VALIAN, *supra* note 110, at 308.

390 A study of employers' evaluations of female employees demonstrated that the negative ratings were inversely proportional to the number of women in the work group. Where women represented only 1-10% of the work group, the women received more negative ratings than the men; where they constituted 11-20% of the group, their ratings were somewhat less negative; when women comprised 50% of the group, their ratings were more positive than the men's. *See* VALIAN, *supra* note 110, at 140, 309-310; Paul R. Sackett et al., *supra* note 121, at 266-267. Increased numbers of blacks in the organization, however, did not lead to higher evaluations in this study. *See id.*

391 See VALIAN, supra note 110, at 309 (1998); Madeline D. Heilman, The Impact of Situational Factors on Personnel Decisions Concerning Women: Varying the Sex Composition of the Applicant Pool, in 26 ORGANIZATIONAL BEHAVIOR AND HUMAN PERFORMANCE 386-393 (1980) (finding that the proportion of women in the applicant pool for a traditional male job can have an impact on personnel decisionmaking). There is also some support for the "contact theory" which theorizes that stereotypes will be reduced in white male workplaces if persons of color and women are given an opportunity to work with white males in what have formerly been considered jobs for white males. See Barbara F. Reskin & Irene Padavic, Supervisors As Gatekeepers: Male Supervisors' Response To Women's Integration in Plant Jobs, 35 SOC. PROBLEMS 536, 537, 547.

392 VALIAN, *supra* note 110, at 309 (*citing* C. Hoffman & N. Hurst, *Gender Stereotypes*, 58 J. PERSONALITY & SOC. PSYCHOL. 197-208 (1990).

393 A failure to appreciate covariation will lead to faulty conclusions. Dr. Valian explains covariation by describing a study concluding that women are more likely than men to correctly analyze statistical information demonstrating hiring bias against women. *See* VALIAN, *supra* note 110, at 310-312.

394 Blocking is a phenomenon common to men and women. It explains that a person holding a gender schema will tend to disregard important information concerning causation of another's performance if the performance fits with the expected gender schema. *See* VALIAN, *supra* note 110, at 312-313.

395 *See* VALIAN, *supra* note 110, at 310. "Illusory correlation" is a cognitive process that "could have a particularly negative influence on evaluations of women in male-dominated

date gender and/or race schemas and to operate against a fair evaluation of women and minorities in the workplace. Although the psychological literature suggests that training alone will not completely cure the reliance on stereotypes since such reliance is often an automatic response generated by a combination of affect and cognitive processes, training has proven successful in workplaces in the past.[396]

IV. CONCLUSION: EVOLUTIONARY PATTERNS IN STATUTORY AND COMMON LAW: PRESERVING AND RENEWING THE CAT'S CLAVICLE

In THE COMMON LAW, Justice Oliver Wendell Holmes compares legal precedent to the clavicle of the cat. The clavicle (a collarbone) "tells of the existence of some earlier creature to which a collarbone was useful" just as precedent survives long after its original use is over. Justice Holmes notes that old legal rules are retained, gaining new justifications for the old rules:

> Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. {W}hen ancient rules maintain themselves . . . , new reasons more fitted to the time have been found for them, and . . . they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.[397]

This article demonstrates that, perhaps the "unconscious result of instinctive preferences and inarticulate convictions," Title VII law has

---

professions." *See id.* at 314. Illusory correlation occurs when there are two groups and one group is the dominant and more prevalent group. In this situation, observers overestimate the frequency with which the less prevalent group – women in a male-dominated profession –perform the less frequent behavior – incompetent behavior. Thus, the cognitive error will overemphasize and overestimate the incompetence of women even though incompetence occurs equally as frequently in women and men. *See id.*

396 The work of Professor Monteith suggests that at least low-prejudiced employees, if trained properly, can reduce their stereotypic responses. *See* Margo J. Monteith, Self-Regulation of Stereotypic Responses: Implication for Prejudice Reduction Efforts (1991) (unpublished Ph.D. dissertation, University of Wisconsin – Madison). Employers could presumably give psychological tests to job applicants to assure that they hire low-prejudiced individuals and they could follow up with proper training of employees.

397 *See* OLIVER WENDELL HOLMES, THE COMMON LAW, 31-32 (1963). Justice Holmes' theory has been called "evolutionary pragmatism." *See* E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38, 51 (*quoting* P. Wiener, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 172 (1949)).

evolved proof constructs and substantive doctrines that permit factfinders to hold defendants liable for unequal discriminatory treatment of women and minorities, whether or not the employer is consciously aware of the discriminatory treatment. This article also shows, however, that the evolution spawned a counter-evolution, a narrowing of proof mechanisms, and a limitation on substantive doctrines. This counter-evolution was caused, in large part, by the courts' failure to articulate "new reasons more fitted to the time" justifying the evolution.

The article proposes that the "old" legal rules – which originally evolved to prove discrimination – be renewed even though the former justification for the constructs may no longer survive scrutiny. It suggests that social science literature demonstrating the unconscious nature of racial and gender stereotyping, bias, prejudice, and behavior provides the "new reasons" to justify the rules developed during the evolutionary process. If Title VII is to fulfill its purpose, it must define discrimination in accordance with scientific understanding. The law can no longer limit its definition of discrimination to conscious discriminatory behavior; the definition should also include behavior that is rooted in unconscious prejudice.

This article demonstrates that the traditional proof mechanisms provide a practical method of identifying employers who have unconsciously made discriminatory employment decisions; it recommends legislation restoring the use of the traditional proof mechanisms, combined with expert testimony about the nature of unconscious discrimination and jury instructions defining intent to include both conscious and unconscious discrimination.

In the absence of legislative reform, this article suggests a narrow reading of *Hicks*, an expansive reading of *Price Waterhouse* and the stereotypes doctrine, and greater reliance on statistics in pattern and practice cases. It also recommends improved expert testimony and jury instructions and more exacting summary judgment standards.

This article demonstrates that the evolution of the doctrine is consistent with the theory that discriminatory intent or motive fulfills the purpose of establishing causation in a discrimination case; to the extent the courts are currently turning back that evolution by focusing on the culpability of the discriminator, the doctrine does not fulfill the purposes of the statute.

Thus, we should trust the evolution. Like the cat's clavicle, the *McDonnell Douglas* construct, the stereotypes doctrine and the use of statistics in the pattern and practice cases are important evolutions in Title VII law that the courts should respect. In order to preserve this evolution,

which is consistent with social science research and fulfills the broad purposes of the original Act, the legislature and/or the courts must articulate a new justification for the "old" rules that evolved early in the history of Title VII.