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The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination

Ivan E. Bodensteiner

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I. INTRODUCTION

In most cases alleging discrimination in violation of a federal statute or the U.S. Constitution, the plaintiff must prove disparate treatment, i.e., intentional discrimination. These cases arise under several federal statutes that prohibit race discrimination,[1] including (a) Title VII of the Civil Rights Act of 1964 (Title VII),[2] which prohibits employment discrimination based on race, sex, national origin, color and religion; (b) the Civil Rights Act of 1866, as amended in 1870 (§ 1981),[3] which prohibits race discrimination in contracting, including employment; (c) Title VI of the Civil Rights Act of 1964 (Title VI),[4] which prohibits race discrimination in programs receiving federal financial assistance, but addresses employment discrimination only where the federal funds are intended for employment; (d) the Fair Housing Act (FHA),[5] which prohibits discrimination in housing based on race, color, religion, sex, national origin, familial status and disability; (e) the Civil Rights Act of 1866, as amended in 1870 (§ 1982),[6] which prohibits race discrimination in property transactions, including housing; and (f) the Civil Rights Act of 1871 (§ 1983),[7] which provides a cause of action against state and local govern-

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1. Federal statutes addressing other types of discrimination also require the plaintiff to prove disparate treatment. *See, e.g.*, (a) the Age Discrimination in Employment Act (ADEA), which prohibits age discrimination in employment, 29 U.S.C. §§ 621-634; (b) the Americans with Disabilities Act (ADA), which prohibits discrimination based on a disability in employment as well as public accommodations and public (government) services, 42 U.S.C. §§ 12101-12213; (c) § 504 of the Rehabilitation Act (§ 504), which addresses discrimination based on disability in programs receiving federal financial assistance, 29 U.S.C. § 794; and (d) Title IX of the Education Amendments of 1972 (Title IX), which prohibits sex discrimination by educational institutions receiving federal financial assistance, 20 U.S.C. §§ 1681-1688.

2. 42 U.S.C. §§ 2000e-2000e-17 (2006).

3. 42 U.S.C. § 1981.

4. 42 U.S.C. §§ 2000d-2000d-7.

5. 42 U.S.C. §§ 3601-3631.

6. 42 U.S.C. § 1982.

7. 42 U.S.C. § 1983 (sometimes referred to as section 1 of the Ku Klux Klan Act of 1871).

ment for individuals claiming discrimination in violation of the U.S. Constitution.[8] While some of the statutes reach actions or practices that have a disproportionate impact on a protected class or group,[9] most plaintiffs filing a discrimination case allege disparate treatment.

The Supreme Court requires plaintiffs asserting Equal Protection claims, as well as statutory disparate treatment claims, to prove intentional discrimination. This means that showing only a disproportionate impact is not sufficient to establish a violation of the Equal Protection Clause.[10] Rather, there must be proof "that the decisionmakers . . . acted with discriminatory purpose,"[11] which "implies more than intent as volition or intent as awareness of consequences" and requires a showing that the decisionmaker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[12] In its equal protection decisions, the Court has stressed the need for a discriminatory purpose and this is consistent with the Court's decisions in disparate treatment cases based on the antidiscrimination statutes.[13] As the Court stated in *Reeves v. Sanderson Plumbing Products, Inc.*, "[t]he ultimate question in every employment discrimination case involving a claim of disparate treat-

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8. Such claims usually allege discrimination in violation of the equal protection clause of the fourteenth amendment.

9. Most disparate impact cases are based on Title VII, with some based on the FHA and the ADEA. Prior to 2005, when the Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that the ADEA authorizes disparate impact claims at least in limited circumstances, several circuits held that the ADEA does not reach disparate impact claims. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court determined that Title VI does not reach disparate impact; it also held that there is no implied private right of action to enforce Title VI regulations that reach disparate impact.

10. Washington v. Davis, 426 U.S. 229 (1976).

11. McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (race discrimination challenge to the death penalty). *See also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (race discrimination challenge to the denial of a zoning request failed because the plaintiffs failed to prove "that discriminatory purpose was a motivating factor in the [challenged] decision.").

12. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (quoting United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977)) (citations omitted) (sex discrimination challenge to veterans preference in hiring for state civil service positions).

13. Professor Linda Hamilton Krieger points out that some lower courts in ADEA cases distinguish between motive and intent, and hold that a plaintiff can establish liability based on the ADEA without evidence of the employer's state of mind, *i.e.*, intent. Instead, an impermissible motive, *i.e.*, "what prompts a person to act or fail to act, is sufficient." Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1170-71 (1995); *see also* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1056 (2006).

ment is whether the plaintiff was the victim of intentional discrimination."[14] This means that "liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision,"[15]

Much has been written in recent years about unconscious discrimination and implicit bias or stereotypes.[16] This relatively recent research raises important questions about whether our antidiscrimination laws, at least as interpreted, are misguided insofar as they primarily address intentional discrimination at the point of the challenged decision,[17] while much discrimination may be the result of implicit or unconscious stereotypes. To the extent courts require plaintiffs to show intent at the point of the challenged decision, they have not adopted recent psychological and behavioral theories in understanding the nature of discrimination. A decisionmaker who chooses to make decisions based on stereotypes rather than individual assessments,[18] has made a conscious decision to disfavor members of a group he views negatively. This decision to discriminate is implemented each time the decisionmaker excludes a candidate who is a member of a disfavored group. At the point where the candidate is excluded the decisionmaker may have acted unconsciously in the sense that the actual decision was predetermined.

Taking into account recent psychological research related to implicit bias and discrimination, this article will address proof of intent in disparate treatment cases.[19] Part II of the article will examine a likely source of proof of discrimination – comments made by agents of the defendant. Courts frequently discount such comments, labeling them as "stray remarks"[20] and

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14. 530 U.S. 133, 153 (2000).

15. *Id.* at 141 ("the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome.'" (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

16. Many of these articles are cited in Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006), which is critical of the implicit bias research: "We . . . detail the numerous problems of scientific validity that plague the research program and discuss the conceptual confusions within this body of work that undercut its credence both as legislative authority and litigation evidence." *Id.* at 1034.

17. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 240-41 (1989) (plurality opinion) (focusing on "the actual moment of the event in question"); Krieger, *supra* note 13, at 1181-85.

18. *See* Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, *in* UNINTENDED THOUGHT: THE LIMITS OF AWARENESS 253, 253-83 (James S. Uleman & John A. Bargh eds., 1989).

19. It is not the purpose of this article to enter the debate about the validity of the implicit prejudice research. *See* Mitchell & Tetlock, *supra* note 16. Rather, this article assumes the validity of the implicit bias research, but also assumes there remains much "old-fashioned," intentional discrimination.

20. This unfortunate characterization is found in both the plurality opinion of Justice Brennan and the concurring opinion of Justice O'Connor in *Price Waterhouse*

either excluding them as evidence or determining that they are insufficient to defeat a motion for summary judgment. Derogatory comments directed at an individual, based on certain characteristics the speaker attributes to the individual, provide substantial insight into how the speaker assesses people. For this reason, such comments – even standing alone – provide direct evidence of purposeful or intentional discrimination and may be the only available evidence.[21] It has also acknowledged a number of different methods of proving intentional discrimination. Part III explores recent psychological research and theories, which question both the laws intended to address discrimination and the courts' interpretations of them, as well as the proof schemes. Assuming plaintiffs alleging a violation of the Equal Protection Clause or an antidiscrimination statute must show intentional discrimination, Part IV discusses the implication of the psychological research in proving such discrimination, suggesting the existing proof schemes should be modified or adjusted, with more emphasis on the direct method and the mixed-motive defense.

II. CURRENT APPROACHES TO PROOF IN DISPARATE TREATMENT CASES

To understand the shortcomings of the current approaches to proof in disparate treatment cases, it is necessary to discuss these approaches in some detail. The courts have interpreted most antidiscrimination laws in a narrow fashion that is not required explicitly by the language of the statutes. For example, Title VII makes it an

> unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

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v. Hopkins, 490 U.S. 228, 251, 280 (1989). Justice Brennan said "the stereotyping in this case did not simply consist of stray remarks." *Id.* at 251. Justice O'Connor said

> stray 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 to satisfy the plaintiff's burden in this regard.

Id. at 277 (O'Connor, J., concurring) (citation omitted).

21. The Court has acknowledged the difficulty of proving such discrimination. *See, e.g.*, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes" but the "law often obliges finders of fact to inquire into a person's state of mind"); *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring) ("the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by").

> conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin.[22]

This language does not clearly require proof of purposeful or intentional discrimination. "It would be reasonable to interpret this language as simply requiring proof of causation without proof of intent," so that a Title VII plaintiff would have to establish only that the protected status "made a difference" or "played a role" in the challenged employment decision.[23] After noting that some courts have recognized the role of "unconscious application of stereotyped notions of ability" in age discrimination cases,[24] Professor Krieger says

> [i]t is hard to understand why a court would assume that race discrimination could not, as easily as age discrimination, result from the unconscious application of stereotyped notions of ability or other characteristics. It is also difficult to understand why a court would assume that race discrimination results exclusively from a deliberate desire to exclude members of a particular racial group from the workforce.[25]

The courts' questionable interpretation of Title VII and other antidiscrimination statutes, requiring most plaintiffs to prove intentional discrimination,[26] is consistent with the Supreme Court's determination that the Equal Protection Clause of the Fourteenth Amendment reaches only intentional discrimination.[27] The courts recognize two methods of proving intentional discrimina-

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22. 42 U.S.C. § 2000e-2(a) (2006) (emphasis added). Other federal statutes use "because of" in identifying the prohibited action. *See, e.g.*, Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a); Fair Housing Act (FHA), 42 U.S.C. § 3604; Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a).

23. Krieger, *supra* note 13, at 1168.

24. *Id.* at 1169.

25. *Id.*

26. Title VII, the ADEA and the FHA have been interpreted to reach facially neutral practices with a disproportionate impact. *See supra* note 9 and accompanying text. This theory of liability under Title VII was approved by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); subsequently, *Griggs* was limited by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which was modified later by a 1991 amendment, found at 42 U.S.C. § 2000e-2(k)(1)(B)(i), designed to return the law to its pre-*Wards Cove* status. However, that amendment did not include the ADEA or the FHA.

27. Washington v. Davis, 426 U.S. 229, 247-48 (1976); *see also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (the challenged decision must be made "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

tion: the direct method and the indirect method,[28] with a mixed-motive defense available in some cases.

A. Indirect Method

The indirect method, referred to as the *McDonnell-Douglas* proof scheme, and used most often in employment discrimination cases, establishes a three-step burden-shifting framework. First, the plaintiff must establish a *prima facie* case.[29] For example, an applicant for a position claiming her application was rejected because of sex can establish a *prima facie* case by showing (i) she is a member of a protected group, (ii) applied for an open position, (iii) she was qualified for the position, and (iv) her application was rejected and the employer hired a male, or the position remained open and the employer continued to seek applications from persons with qualifications similar to the plaintiff's. This creates a presumption of discrimination.[30] Second, the burden of production[31] then shifts to the employer to articulate a legitimate, non-discriminatory reason for the challenged action.[32] Third, assuming the employer meets this minimal burden, the plaintiff, who retains the ultimate burden of persuasion, can establish intentional discrimination either directly by showing "that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered explanation is unworthy of credence [pretext]."[33]

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28. The indirect method was established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). The difficulty in proving intentional discrimination was recognized by the Court and served as the impetus for establishing the indirect method. *See, e.g.*, U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983); Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by").

29. *McDonnell Douglas,* 411 U.S. at 802. There are many formulations of this standard, which is adapted to address different types of discrimination and different types of adverse actions. *Id.* at n.13.

30. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (the effect of the presumption is to force the defendant to provide a nondiscriminatory explanation because silence in the face of the presumption results in judgment for the plaintiff). The *prima facie* case serves an important function in that "it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.* at 253-54.

31. The burden of proof has two aspects: burden of production, which identifies the party with the obligation to go forward with the evidence and the amount of evidence needed to survive, and burden of persuasion, which identifies the party that runs the risk of losing if it does not convince the trier of fact. *Id.* at 252-56.

32. *Id.* at 254-55 ("the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection").

33. *Id.* at 256. Since establishing a *prima facie* case was not intended to be particularly difficult, and articulating a legitimate, nondiscriminatory reason is even less

The *McDonnell-Douglas* proof scheme, including the presumption it creates, represents a recognition that "the question facing triers of fact in discrimination cases is both sensitive and difficult," and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes."[34] However, after each side meets its initial burden "the *McDonnell Douglas* framework – with its presumptions and burdens" – disappears and the sole remaining issue is "discrimination *vel non*."[35] Thus, proving intentional discrimination remains difficult because it is easy for defendants to articulate a nondiscriminatory reason(s) for the challenged decision.

For a variety of reasons, the indirect method provides plaintiffs with little assistance in proving disparate treatment. First, some circuits have modified the *prima facie* case requirements articulated by the Court in *McDonnell-Douglas,* particularly the fourth factor.[36] For example, instead of requiring a plaintiff claiming sex discrimination in an employer's rejection of her application to show that "after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications,"[37] some circuits either require a showing that she "was treated less favorably than similarly situated individuals outside of [her] protected class," or treat such a showing as an alternative way of satisfying the fourth factor.[38]

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difficult, at the summary judgment stage cases often turn on the pretext issue. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), the Court confirmed that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." This was initially decided in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), but the Court revisited the issue in *Reeves* because some circuits ignored *Hicks* and determined that "a plaintiff must always present additional, independent evidence of discrimination." *Reeves*, 530 U.S. at 146, 149.

34. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

35. *Reeves*, 530 U.S. at 142-43 (quoting *Hicks,* 509 U.S. at 510, and *Aikens*, 460 U.S. at 714). While the presumption created by the plaintiff's *prima facie* case disappears when the employer satisfies its burden of production, "[t]he trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 255 n.10).

36. *See* Pantoja v. Am. NTN Bearing Mfg. Corp., 495 F.3d 840, 845-46 (7th Cir. 2007) (noting "that there has been a subtle evolution in the way that courts described the *McDonnell Douglas* requirements for a *prima facie* case of discrimination, at least when the adverse action at issue is the employee's termination").

37. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

38. Thanongsinh v. Bd. of Educ., Dist. U-46, 462 F.3d 762, 772 (7th Cir. 2006); *see also* Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ. *ex rel.* Univ. of S. Fla., 342 F.3d 1281, 1289 (11th Cir. 2003); Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002); Graham v. Long Island R.R., 230 F.3d 34, 38-39 (2d Cir. 2000); Chuang v. Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1123 (9th Cir. 2000).

By requiring a plaintiff to show she "was treated less favorably than similarly situated individuals outside of [her] protected class," a court is effectively requiring her to prove intentional discrimination by direct evidence as part of the *prima facie* case.[39] Requiring the plaintiff to show that a similarly situated person outside the protected class was treated more favorably is particularly burdensome because "similarly situated" means nearly identical.[40]

Second, the defendant's burden of production in the second stage of the indirect method is a very minimal burden because all the defendant has to do to avoid the presumption created by the *prima facie* case is articulate a nondiscriminatory reason for the challenged action.[41] This leaves the plaintiff with the burden of persuasion to show intentional discrimination, without the benefit of a presumption, by showing either that a discriminatory reason more likely motivated the employer or that the articulated reason is not the true reason, but rather a pretext for intentional discrimination.[42] While in theory, the force of the *prima facie* case, combined with a showing that the articulated reason is not the real reason for the challenged decision, is sufficient for a finding of intentional discrimination, there are still circuits that are reluctant to follow the Court's holding.[43]

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39. This is true because a reasonable jury could infer discrimination from such evidence alone. *See, e.g.*, Graham v. Long Island R.R., 230 F.3d 34, 39 (2d Cir. 2000) (proof that the plaintiff was treated less favorably than a similarly situated person outside the protected group raises an inference of discrimination).

40. *See, e.g.*, Barricks v. Eli Lilly and Co., 481 F.3d 556, 560 (7th Cir. 2007) (the purpose of the "'similarly situated' test . . . is to determine whether there are enough common factors between a plaintiff and a comparator – and few enough confounding ones – to allow for a meaningful comparison in order to divine whether discrimination was at play"); Fane v. Locke Reynolds, LLP, 480 F.3d 534, 540 (7th Cir. 2007) ("[a]n employee is similarly situated to a plaintiff if the two employees deal with the same supervisor, are subject to the same standards, and have engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them"); Sublett v. John Wiley & Sons, Inc., 463 F.3d 731, 740-41 (7th Cir. 2000) (the other(s) must be "directly comparable in all material respects," including 1) the same job descriptions, 2) the same standards, 3) the same supervisor, and 4) comparable experience, education and other qualifications – provided these latter factors were considered in making the challenged decision); *Thanongsinh*, 462 F.3d at 774 (quoting Brummett v. Sinclair Broad. Group, Inc., 414 F.3d 686, 692 (7th Cir. 2005)) (to be "similarly situated" to the plaintiff a person "must be 'directly comparable in all material respects,'" taking into account all of the relevant factors).

41. In *Texas Department of Community Affairs v. Burdine*, the Court said the "burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons." 450 U.S. 248, 254 (1981).

42. *See id.* at 255-56.

43. *See, e.g.*, Young v. Dillon Cos., Inc., 468 F.3d 1243, 1250-52 (10th Cir. 2006); Ronda-Perez v. Banco Bilbao Vizcaya Argentaria-Puerto Rico, 404 F.3d 42,

Finally, at the third stage of the indirect method the lower courts continue to inappropriately discount comments when ruling on summary judgment, despite the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, where it stated that the court of appeals "failed to draw all reasonable inferences in favor of [the plaintiff]. For instance, while acknowledging 'the potentially damning nature' of Chestnut's age-related comments, the [lower] court discounted them on the ground that they 'were not made in the direct context of Reeves's termination.'"[44] This suggests comments should not be discounted simply because they were not made in the "direct context" of the challenged decision. Nevertheless, lower courts continue to do just that.[45] In contrast, other lower court decisions hold that such comments, at least where there is temporal proximity, create an issue of material fact.[46]

B. Direct Method

Courts frequently say that discrimination claims may be established by utilizing either the indirect method, described above, or the direct method.[47] Under the latter method, "the plaintiff must show either through direct or circumstantial evidence that the employer's decision to take the adverse job action was motivated by an impermissible purpose, such as her race or national origin."[48] Thus, "direct method" describes the usual or conventional way of proving a case without the benefit of the presumption available under the indirect method. Despite the difficulty in succeeding under the indirect method, plaintiffs pursuing discrimination cases tend to rely on this method instead of the direct method. There are several possible explanations for this, including a misperception that the indirect method is plaintiff-friendly be-

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44-48 (1st Cir. 2005); Noble v. Brinker Int'l, Inc., 391 F.3d 715, 725-31 (6th Cir. 2004); Price v. Thompson, 380 F.3d 209, 214-15 (4th Cir. 2004); Girten v. McRentals, Inc., 337 F.3d 979, 982-83 (8th Cir. 2003).

44. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 152 (2000).

45. *See, e.g.*, Ramlet v. E.F. Johnson Co., 507 F.3d 1149, 1152-53 (8th Cir. 2007); Blair v. Henry Filters, Inc., 505 F.3d 517, 523-28 (6th Cir. 2007); Ramirez Rodriguez v. Boehringer Ingelheim Pharms., Inc., 425 F.3d 67, 78-84 (1st Cir. 2005); Rowan v. Lockheed Martin Energy Sys., Inc., 360 F.3d 544, 548-51 (6th Cir. 2006).

46. *See, e.g.*, Volovsek v. Wis. Dep't of Agric., Trade & Consumer Prot., 344 F.3d 680, 689-90 (7th Cir. 2003) (plaintiff overheard her supervisors speaking about "keeping them barefoot and pregnant" shortly before she was denied a promotion and because of the temporal proximity this gender-related comment created an issue of material fact).

47. *See, e.g.*, Adams v. Wal Mart Stores, Inc., 324 F.3d 935, 938-39 (7th Cir. 2003).

48. *Id.*

cause of the presumption.[49] Further, some courts take a narrow view of what type of evidence may be used under the direct method, limiting the plaintiff to direct evidence.[50] While it may be appropriate to distinguish direct evidence from circumstantial evidence,[51] the confusion arises when the direct method of proving disparate treatment, is interpreted to exclude circumstantial evidence.[52] Cases recognize that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence."[53] The Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[54] explicitly

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49. In addition, the courts may have promoted the use of the indirect method. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 278-79 (1989) (O'Connor, J., concurring).

50. Usually direct evidence does not include circumstantial evidence. Obviously comments like "I won't hire you because you're a woman" or "I'm firing you because you're not a Christian" constitute direct proof of discrimination, but direct method evidence should include "remarks and other evidence that reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria . . . even if the evidence stops short of a virtual admission of illegality." Venters v. City of Delphi, 123 F.3d 956, 973 (7th Cir. 1997). Some courts are inclined to either exclude or discount comments of the latter type.

51. For example, in *Desert Palace, Inc. v. Costa*, the issue was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII." 539 U.S. 90, 92 (2003). The Court concluded that direct evidence of discrimination is not required, meaning that circumstantial evidence alone could satisfy the plaintiff's burden. *Id.* at 101-02. The point is that circumstantial evidence was viewed differently than direct evidence. *But see* Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 903 (7th Cir. 2006) (the "distinction between direct and circumstantial evidence is vague").

52. Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902-03 (7th Cir. 2006); *see also* Lewis v. City of Chi., 496 F.3d 645, 650-52 (7th Cir. 2007) (discussing confusing terminology – "direct method" and "direct evidence" – and noting that "[e]vidence used in the direct method is 'not limited to near-admissions by the employer'"); Hossack v. Floor Covering Assocs. of Joliet, Inc., 492 F.3d 853, 861-62 (7th Cir. 2007) (under the direct method we now allow circumstantial evidence to be introduced); Luks v. Baxter Healthcare Corp., 467 F.3d 1049, 1052 (7th Cir. 2006) (direct proof of discrimination is not limited to "near-admissions," but includes circumstantial evidence that "suggests discrimination albeit through a longer chain of inferences"); Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 695 (7th Cir. 2006) (direct evidence includes an "outright admission" of discrimination as well as circumstantial evidence that points directly to a discriminatory reason for the challenged decision).

53. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)); *see also Sylvester*, 453 F.3d at 903 (while on average circumstantial evidence may require a "longer chain of inferences, . . . if each link is solid, the evidence may be compelling – may be more compelling than eyewitness testimony, which depends for its accuracy on the accuracy of the eyewitness's recollection as well as on his honesty").

54. 429 U.S. 252 (1977). In this case, the plaintiffs alleged race discrimination in the denial of a rezoning request that would have allowed construction of townhouse units for low- and moderate-income tenants. *Id.* at 254.

approved the use of circumstantial evidence under the direct method of proving intentional discrimination, including:

> a) statistical evidence of a clearly discriminatory impact,
>
> b) the historical background of the challenged decision, including the sequence of events leading to it, and
>
> c) the legislative or administrative history of a law or decision.[55]

However, the Court concluded that the plaintiffs "simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the [challenged] decision."[56] Even if the plaintiffs had established that a discriminatory purpose was a motivating factor this would not have required invalidation of the challenged decision. Rather, "[s]uch proof would have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."[57]

In another case, *Castaneda v. Partida*,[58] the Court held that the stark statistical disparity showing a substantial underrepresentation of a particular group establishes a *prima facie* case of intentional discrimination, particularly where the selection process at issue is highly subjective.[59] The statistical disparity, showing a 40% difference between Mexican-Americans in the relevant population and Mexican-Americans summoned for grand jury service, established a *prima facie* case of intentional discrimination and "shifted the burden of proof to the State to dispel the inference of intentional discrimination."[60] Because the State failed to rebut this inference, the Court affirmed the lower court's finding of a violation of equal protection in the grand jury selection process.[61] Both cases, *Village of Arlington Heights* and *Castaneda*,

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55. *Id.* at 266-68.

56. *Id.* at 270.

57. *Id.* at 271 n.21. If the Village satisfied its burden, the injury complained of by the plaintiffs could no longer be attributed to the "improper consideration of a discriminatory purpose" and there would be no justification for judicial interference with the challenged decision. *Id.* Note how this differs from the mixed-motive cases, based on Title VII, where establishing that the same decision would have been reached absent the improper motive, affects the remedy but not liability. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2006).

58. 430 U.S. 482 (1977). This case challenged the selection of members of the grand jury, alleging discrimination against Mexican-Americans. *Id.* at 483. Statistics showed that even though the population of the county was 79.1% Mexican-American, over an eleven-year period only 39% of the persons summoned for grand jury service were Mexican-American. *Id.* at 486-87.

59. *Id.* at 494-98.

60. *Id.* at 495-98.

61. *Id.* at 501. The method of proof in *Castaneda*, where the circumstantial evidence permitted an inference of discrimination, should not be confused with the

approve the use of circumstantial evidence when proceeding under the direct method. This is consistent with *Sylvester v. SOS Children's Villages Illinois*, where the court clarifies that circumstantial evidence may be utilized by a plaintiff proceeding under the direct method of proof.[62]

C. Mixed-Motive Defense

Recognizing that a decision can be motivated by more than one factor, the Court in *Village of Arlington Heights* determined that the plaintiff need only show that "discriminatory purpose was a motivating factor," not the sole factor.[63] If a plaintiff utilizing the direct method of proof provides evidence sufficient to support a finding that a prohibited factor was a motivating factor in the challenged decision, this shifts the burden to the defendant to establish "that the same decision would have resulted even had the impermissible purpose not been considered."[64] This approach was utilized in a freedom of speech case, decided the same day as *Village of Arlington Heights*, brought by a government employee claiming retaliation in violation of the First Amendment,[65] and in a subsequent Title VII case alleging sex discrimination by an accounting firm, where the Court referred to it as a the mixed-motive defense.[66] In short, this defense recognizes that a decisionmaker may be motivated by both legitimate and illegitimate factors in making a challenged decision.

Applying the mixed-motive defense, the Court in *Price Waterhouse v. Hopkins* held

> that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponder-

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indirect method of proof established in *McDonnell Douglas*, discussed above, where the proof of certain elements triggers a rebuttable presumption of discrimination.

62. Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902-03 (7th Cir. 2006). *But see* Blair v. Henry Filters, Inc., 505 F.3d 517, 523 (6th Cir. 2007) (defining direct evidence as evidence that proves a fact without requiring an inference and referring to circumstantial evidence as indirect evidence).

63. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977).

64. *Id.* at 271 n.21.

65. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (the school district had the burden of showing by a preponderance of the evidence that it would have made the same decision even absent any protected conduct).

66. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

> ance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[67]

A few years later, in 1991, Congress amended Title VII to recognize the mixed-motive theory, but made it only a limited affirmative defense. Based on the statutory mixed-motive defense, if an employer satisfies its burden by showing it "would have taken the same action in the absence of the impermissible motivating factor," this showing restricts the remedy, but the employer does not escape liability.[68] This means an applicant who proves that her gender was a motivating factor in the decision to reject her application is not entitled to an injunction requiring that she be hired, with lost wages, if the employer proves it would have rejected the application even if it had not considered gender. However, she may obtain declaratory relief, injunctive relief, costs and attorney fees.[69]

Addressing the statutory mixed-motive defense in *Desert Palace, Inc. v. Costa*, the Court held that a plaintiff could satisfy her burden to show that an impermissible factor such as sex was a motivating factor for the challenged decision[70] through circumstantial evidence, without any direct evidence.[71] This decision clarified that a plaintiff can shift the burden of establishing the mixed-motive defense to the defendant even when proceeding under the indirect method without direct evidence.

The role of the mixed-motive theory beyond Title VII cases is less than clear. Two decisions, *Mt. Healthy City School District* and *Village of Arlington Heights*, suggest the *Price Waterhouse* version of the theory which enables the defendant to escape liability, applies to cases not based on Title VII. However, a key component of the theory, i.e., that a defendant who meets its burden by showing it would have made the same decision absent the impermissible factor only limits the remedy, is based on a 1991 amendment to Title VII.[72] Therefore, while some circuits have considered the mixed-motive theory in ADEA cases since the 1991 amendment,[73] the application of this

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67. *Id.* at 258. Similarly, the Court in *Mt. Healthy City School District*, held that the employer could avoid First Amendment liability by proving that it would have taken the challenged action "even in the absence of the protected conduct." 429 U.S. at 287.

68. 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

69. *Id.*

70. 42 U.S.C. § 2000e-2(m).

71. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02 (2003).

72. Since the ADA incorporates the Title VII enforcement provisions, including § 2000e-5, the "full" mixed-motive theory should apply in ADA cases. *See* 42 U.S.C. § 12117.

73. *See, e.g.*, Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 520-21 (4th Cir. 2006) (applying the mixed-motive theory, but concluding the plaintiff did not provide sufficient direct or circumstantial evidence to satisfy his burden); Baqir v. Principi, 434 F.3d 733, 744-45 (4th Cir. 2006) (applying the mixed-motive theory and concluding

theory in such cases may be different than in cases based on Title VII, after it was amended in 1991.[74]

D. Comments as Evidence of Discrimination

Proving intentional discrimination is difficult, at least in part because decisionmakers have become quite sophisticated in masking their discriminatory intent. To unmask this intent, plaintiffs in discrimination cases frequently seek to present, either as evidence of illegal discrimination under the direct method or as evidence of pretext under the indirect method, comments made by people associated with the defendant. Such comments present a number of issues, including admissibility, weight, i.e., their role in surviving a challenge to the sufficiency of the plaintiff's evidence, and selection of the appropriate proof scheme.

While admissibility may be challenged based on relevancy and hearsay, neither challenge presents a substantial barrier. Assuming derogatory comments are admissible,[75] an equally important question is whether the comments constitute sufficient evidence of discrimination to allow the plaintiff to survive the defendant's motion for either summary judgment[76] or for judgment as a matter of law.[77] In considering such a motion, the court should review all of the evidence in the record, but "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[78] Further, it is the function of the jury, not the judge, to draw "legitimate inferences from the facts," and the court "must disregard all evidence favorable to the moving party that the jury is not required to believe."[79] Applying this standard in *Reeves*, the Court held that the Court of Appeals erred in overturning the jury verdict because, while acknowledging

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the plaintiff satisfied his burden based on evidence of comments, but the defendant avoided liability by showing it would have taken the same action even in the absence of the discriminatory motive; the court noted that the 1991 amendment to Title VII does not affect the ADEA and, therefore, the defendant avoids ADEA liability when it meets its burden); Machinchick v. PB Power, Inc., 398 F.3d 345, 352-55 (5th Cir. 2005) (describing the court's "integrated" or "modified" *McDonnell Douglas* approach where a plaintiff relies on circumstantial evidence and the mixed-motive theory and suggesting the defendant avoids liability if it meets its burden).

74. *See, e.g.*, *Baqir*, 434 F.3d at 744-45 (1991 amendment to Title VII does not affect the ADEA).

75. The Federal Rules of Evidence and their applicability to this issue will be discussed below in Part IV.B.

76. FED. R. CIV. P. 56.

77. FED. R. CIV. P. 50(a).

78. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). While the Court in *Reeves* was addressing a Federal Rule of Evidence 50(a) motion for judgment as a matter of law, it noted that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law. *Id.*

79. *Id.* at 151.

"the potentially damning nature" of the decisionmaker's age-related comments, it improperly discounted them because they "were not made in the direct context of Reeves' termination."[80]

Reeves, like many other discrimination cases, was litigated under the *McDonnell-Douglas* indirect proof scheme. As discussed above, if the plaintiff utilizing this scheme presents sufficient evidence to establish a *prima facie* case,[81] the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged decision. Assuming the defendant meets this minimal burden, the real issue becomes whether the plaintiff presents sufficient evidence to allow a reasonable jury to find that a discriminatory reason more likely motivated the employer or the reason(s) articulated by the defendant is a pretext for discrimination.[82] the *Reeves* Court confirmed[83] that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[84] Whether this conclusion is appropriate in a particular case "will depend on a number of factors," including the "strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly may be considered on a motion for [summary judgment]."[85] The employer in *Reeves* was not entitled to judgment as a matter of

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80. *Id.* at 152.

81. It is not unusual, at this stage, for the court to express concern about whether the plaintiff has satisfied one or more of the prongs of a *prima facie* case, but assume that she has and then go on to address whether the plaintiff has presented sufficient evidence of pretext.

82. Cases hold that the plaintiff can establish pretext indirectly by showing the employer's reason for the challenged action has no basis in fact, the reason given was not the real reason, or the reason given was not sufficient to warrant the challenged action. *See, e.g.*, Lenoir v. Roll Coater, Inc., 13 F.3d 1130, 1133 (7th Cir. 1994). Cases are split on whether a plaintiff must present facts to rebut each nondiscriminatory reason advanced by the defendant. *Compare* Clay v. Holy Cross Hosp., 253 F.3d 1000, 1007 (7th Cir. 2001) (plaintiff must rebut each reason), *with* Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1021 (8th Cir. 2005) (quoting Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 945 n. 8 (8th Cir. 1994)) (rejecting *Clay* and holding the plaintiff need only "'raise a genuine doubt as to the legitimacy of the defendant's motive'"). A proper understanding of *McDonnell-Douglas* argues in favor of the Eighth Circuit approach because a finding that one reason is a lie allows an inference that it was advanced by the defendant to hide discrimination.

83. Because some circuits were ignoring the holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court decided to address it again.

84. *Reeves,* 530 U.S. at 148. This 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.'" *Id.* at 147 (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

85. *Id.* at 148-49.

law because Reeves, in addition to establishing a *prima facie* case of discrimination and creating a jury issue on the falsity of the employer's articulated reason for the challenged decision,[86] introduced "other evidence" that the decision was motivated by age-based animus. This "other evidence" was the age-related comments of the decisionmaker.[87] *Reeves* was an easy case because the plaintiff (a) established a *prima facie* case, (b) presented sufficient evidence of the falsity of the employer's articulated reason for the challenged decision to create a jury issue, and (c) presented additional evidence - the comments - of an age-based animus.

At least two questions remain after *Reeves*: first, when will the plaintiff be required to present evidence beyond the first two categories – a *prima facie* case and evidence of pretext; and second, will comments indicative of a discriminatory animus alone be sufficient to create a jury question on the pretext issue.[88] As to the former, Justice Ginsburg, in her concurring opinion, stated:

> I write separately to note that it 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 these two categories in order to survive a motion for 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.[89]

Therefore, according to Justice Ginsburg, the combination of the first two categories of evidence should usually be sufficient to create a jury question on the ultimate issue - intent to discriminate.

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86. The employer met its burden "by offering admissible evidence sufficient for the trier of fact to conclude that [Reeves] was fired because of his failure to maintain accurate attendance records." *Id.* at 142. Reeves then "made a substantial showing that [the employer's] explanation was false." *Id.* at 144. This included evidence (i) that he properly maintained the attendance records, (ii) casting doubt on whether he was responsible for any failure to discipline late and absent workers, (iii) that there had never been a union grievance or employee complaint arising from Reeves' recordkeeping and the employer had never calculated the amount of overpayments allegedly due to Reeves' errors, and (iv) on other occasions when employees were paid for hours they had not worked, the employer simply adjusted their next paycheck to correct the errors. *Id.* at 144-45.

87. The court of appeals had improperly discounted the comments because they "'were not made in the direct context of Reeves's termination.'" *Id.* at 152 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693 (5th Cir. 1999)).

88. For example, the plaintiff establishes a *prima facie* case and presents evidence of comments, but presents no evidence directly undermining the employer's articulated reason(s) for the challenged decision.

89. *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring).

With the exception of a few ADEA cases, the courts generally look for discrimination at the point of decision, asking whether a decisionmaker decided to treat a person adversely because of her or his protected status. As stated by the plurality in *Price Waterhouse*,

> [i]n 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.[90]

In other words, the decisionmaker consciously decided to base the decision, at least in part, on the applicant's or the employee's protected status. While such blatant discrimination still takes place, it does not constitute the universe of discrimination nor, in all likelihood, even the majority of discrimination. Recent psychological research demonstrates that limiting unlawful discrimination to the "old-fashioned" type ignores how discrimination actually works in many situations and leaves much discrimination untouched.

III. PSYCHOLOGICAL RESEARCH ENHANCES OUR UNDERSTANDING OF BIAS

In addressing evidentiary and proof issues familiar to lawyers, such as admissibility, weight and sufficiency of proof, it is helpful to understand what psychologists have discovered about the nature of bias and discrimination. While most reported decisions addressing proof of discrimination do not address theories of human behavior, at least not explicitly,[91] both psychologists and law professors have written quite extensively on behavioral theories and how such theories can assist lawyers, judges and jurors in understanding dis-

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90. 490 U.S. 228, 250 (1989).

91. An exception is found in Justice Brennan's plurality opinion in *Price Waterhouse v. Hopkins*, where he discusses the expert testimony of Dr. Susan Fiske indicating "that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping." *Id.* at 235. Justice Brennan refers to Dr. Fiske's testimony again, indicating she found sex stereotyping in some of the partners' comments and in their evaluations of Ms. Hopkins. *Id.* at 255. Justice O'Connor, in her concurring opinion, also refers to Dr. Fiske's testimony, indicating that her testimony "standing alone, would not justify shifting the burden of persuasion to the employer." *Id.* at 277 (O'Connor, J., concurring); *see also* Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1262-65 (N.D. Cal. 1997) (denying defendant's motion to exclude the testimony of Dr. Fiske); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991) (relying on Dr. Fiske's testimony on the subject of sexual stereotyping).

crimination.[92] Much can be learned about the nature of discrimination from these scholarly publications. In an article published in 1995, Professor Krieger says "[t]he emergence of social cognition theory represented a profound shift in psychologists' thinking about intergroup bias."[93] A "central premise of social cognition theory," according to Professor Krieger, is "that cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment previously attributed to motivational processes."[94] Several aspects of the social cognition approach to discrimination are relevant here. First, stereotyping is a form of categorization used "to simplify the task of perceiving, processing, and retaining information about people in memory."[95] This is a cognitive mechanism used by all people, not just those who are prejudiced.[96] Second, "once in place, stereotypes bias intergroup judgment and decisionmaking" and "they function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."[97] Since the biases are "cognitive rather than motivational," they "operate absent intent to favor or disfavor members of a particular social group."[98] Most importantly, "they bias a decisionmaker's judgment long before the 'moment of decision,' as a decisionmaker attends to relevant data and interprets, encodes, stores, and retrieves it from memory."[99] Third, "[s]tereotypes, when they function as implicit prototypes or schemas, operate beyond the reach of decisionmaker self-awareness" and, therefore, "cognitive bias may well be both unintentional and unconscious."[100] Congress recognized this when considering legislation aimed at

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92. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Krieger, *supra* note 13, at 1168; Krieger & Fiske, *supra* note 13. Many more articles are cited in the articles listed here.

93. Krieger, *supra* note 13, at 1187.

94. *Id.*

95. *Id.* at 1188. *See also Robinson*, 760 F. Supp. at 1502 ("The study of stereotyping is the study of category-based responses in the human thought and perceptual processes. Stereotyping, prejudice, and discrimination are three basic kinds of category-based responses. Stereotyping exists primarily as a thought process, prejudice develops as an emotional or an evaluative process, primarily negative in nature, while discrimination manifests itself as a behavioral response. Discrimination in this context is defined by the treatment of a person differently and less favorably because of the category to which that person belongs. Either stereotyping or prejudice may form the basis for discrimination." (citations omitted)).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*; *see also generally* Hart, *supra* note 92.

disability discrimination.[101] It also recognized that "much of the conduct that [it] sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[102]

Contemporary racial bias has been described as "aversive racism," meaning it is racism that is "more indirect and subtle than the traditional form of prejudice, but its consequences are no less evil."[103] An important aspect of this framework is the conflict between "the denial of personal prejudice and the underlying unconscious negative feelings and beliefs."[104] While "most whites hold strong convictions concerning fairness, justice, and racial equality, . . . [they] also develop some negative feelings toward, or beliefs about, blacks."[105] These negative feelings and beliefs, or biases, "may occur spontaneously, automatically, and without full awareness."[106] Because of the "conflict between the denial of personal prejudice and the underlying unconscious negative feelings and beliefs," aversive racists "will *not* discriminate in situations in which discrimination would be obvious to others and to themselves."[107] Therefore, aversive racists will not discriminate when "the appropriate decision is obvious," such as where a candidate for a position is clearly qualified or not qualified; however, where the appropriate decision is not clear "because of ambiguous evidence about whether the candidate's qualifications meet the criteria for selection or when the candidate's file has conflicting information," bias is expected.[108] In the latter situation, "the aversive

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101. *See* Alexander v. Choate, 469 U.S. 287, 295-97 (1985) ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect."); *see also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610-11 (1993) (quoting EEOC v. Wyoming, 460 U.S. 226, 231 (1983)) (characterizing employer decisions as "based in large part on stereotypes unsupported by objective fact"); Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-60 (1st Cir. 1999) (the "ultimate question is whether an employee has been treated disparately 'because of race,'" and this "is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias").

102. *Alexander*, 469 U.S. at 296-97.

103. John F. Dovidio, Samuel L. Gaertner, Jason A. Nier, Kerry Kawakami & Gordon Hodson, *Contemporary Racial Bias: When Good People do Bad Things*, *in* THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 141, 143 (Arthur G. Miller ed., 2004). Aversive racism "is hypothesized to be qualitatively different from the old-fashioned, blatant kind, and it is presumed to characterize the racial attitudes of most well-educated and liberal whites in the United States." *Id.*

104. *Id.* at 143-44.

105. *Id.* at 144.

106. *Id.*

107. *Id.* at 143-45.

108. *Id.* at 148.

racist can justify or rationalize a negative response on the basis of some factor other than race."[109]

A related theory, referred to as "implicit bias," is also relevant. Implicit bias recognizes that "[m]any mental processes function implicitly, or outside conscious attentional focus," including attitudes and stereotypes.[110] An attitude is an "evaluative disposition," such as a "tendency to like or dislike," and one's implicit attitudes may differ from "explicit attitudes" toward the same subject.[111] "A social stereotype is a mental association between a social group or category and a trait," and the association may or may not "reflect a statistical reality," and it may involve either "favorable or unfavorable traits."[112] A recently developed test, the Implicit Association Test (IAT), that requires those taking it to categorize a series of words or pictures into groups, can "measure a wide variety of the group-valence and group-trait associations that underlie attitudes and stereotypes."[113] The results of the IAT suggest implicit bias is quite pervasive.[114] Jolls and Sunstein say "implicit bias – like many of the heuristics and biases emphasized elsewhere – tends to have an automatic character, in a way that bears importantly on its relationship to legal prohibitions."[115] Because implicit bias is largely automatic, "people are often surprised to find that they show the implicit bias."[116]

The "science of implicit cognition" indicates that people do not always have "conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions."[117] This leads to reasonable questions about the "effectiveness of antidiscrimination laws insofar as they are interpreted to require a showing of intentional discrimination at the time of the challenged decision."[118] However, this article is more limited in scope. It assumes plaintiffs must establish intentional discrimination in order to prevail in most cases based on the antidiscrimination

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109. *Id.* at 145.

110. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 947-48 (2006).

111. *Id.* at 948-49 (such "dissociations" are "commonly observed in attitudes toward stigmatized groups").

112. *Id.* at 949-50.

113. *Id.* at 952-58 (describing the test in detail); *see also* Jolls & Sunstein, *supra* note 92, at 971. For several versions of the IAT, see Project Implicit, https://implicit.harvard.edu (last visited February 19, 2008).

114. Greenwald & Krieger, *supra* note 110, at 955-59; *see also* Jolls & Sunstein, *supra* note 92, at 971-72 ("implicit bias as measured by the IAT has proven to be extremely widespread").

115. Jolls & Sunstein, *supra* note 92, at 973.

116. *Id.* at 975.

117. Greenwald & Krieger, *supra* note 110, at 946.

118. *See, e.g.*, Krieger, *supra* note 13, at 1186-1242; Krieger & Fiske, *supra* note 13, at 1027-52 (2006); Jolls & Sunstein, *supra* note 92; Hart, *supra* note 92, at 745-66.

statutes, as well as the Constitution, but suggests ways of satisfying the intent requirement in light of the fact that much discrimination may be unconscious at the point of decision. Application of the social cognition theory confirms that stereotyping can be evidence of discrimination, but to the extent that stereotyping operates unconsciously, it takes further explanation to show how it is evidence of intentional discrimination.

If proof of intent is necessary to prevail in disparate treatment cases, it is important for the courts to determine whether decisions that result from unconscious stereotyping are insulated from attack. Others have discussed how stereotypes cause discrimination. Social cognition theory views stereotypes

> as social schemas or person prototypes. They operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.[119]

Professor Krieger outlines the process in greater detail[120] and explains why "it becomes clear that stereotypes, person prototypes, and other implicit knowledge structures bias decisionmaking long before the 'moment of decision' upon which [cases] focus Title VII's adjudicative attention."[121] In other words, "[c]ognitive sources of intergroup bias corrupt decisionmaking not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made. Social cognition theory teaches us that interpersonal decisionmaking is an integrated system comprising perception, interpretation, attribution, memory, and judgment."[122]

If the antidiscrimination statute relied upon is interpreted to require proof of intentional discrimination and the stereotyping that causes the discrimination is unconscious, can the plaintiff prevail? Dr. Fiske, an expert witness in *Price Waterhouse*, describes what she calls a nightmare:

> After testifying for the plaintiff in a case of egregious and demonstrable discrimination, a cognitive social psychologist faces the cross-examining attorney. The hostile attorney, who looms taller than Goliath, says, "Tell us, Professor, do people intend to discriminate?" The cognitive social psychologist hedges about not having any hard data with regard to discrimination, being an expert mainly in stereotyping. When pressed, the psychologist admits that stereotypic cognitions are presumed to underlie discriminatory

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119. Krieger, *supra* note 13, at 1199.
120. *Id.* at 1199-1211.
121. *Id.* at 1209.
122. *Id.* at 1213.

> behavior. Pressed still further, the psychologist reluctantly mumbles that, indeed, a common interpretation of the cognitive approach is that people do not stereotype intentionally, whereupon the cross-examining attorney says in a tone of triumph, "No further questions, Your Honor." The plaintiff is led shaking from the courtroom, and the psychologist is left stewing about the misuse of science outside the ivory tower.[123]

To address her nightmare, Dr. Fiske identified three features of intent: (a) it exists "when a person has *options* – that is, a perceived choice among cognitively available alternatives;" (b) it "typically entails a choice between a more dominant alternative and a weaker alternative" and it is "especially obvious when one makes the *hard choice*, by pursuing the nondominant alternative – that is, doing what one would not otherwise do;" and (c) it is "mediated by *motivated attention*," i.e., the "alternatives on which a person emphatically concentrates the mind determines what the person intends."[124] After examining these features in greater detail, Dr. Fiske provides the answer for the cross-examining attorney in her nightmare.

> The cognitive social psychologist could now reply that people probably can help it when they stereotype and prejudge. The idea that categorization is a natural and adaptive, even dominant, way of understanding other people does not mean that it is the only option available. Perceivers make the hard choice to individuate under a variety of circumstances. Because perceivers have options available, they may be said to intend the one they choose. If people stereotype and prejudge, reckless or careless of the consequences, they may be said to do so intentionally.[125]

In a later article, Dr. Fiske discussed the role of motivation in encouraging decisionmakers to be accurate in their assessment of people, i.e., make individual rather than stereotypical judgments based on group membership.[126] While "categorization and stereotypic associations are relatively automatic," these "processes are less automatic than we psychologists all thought," and a "variety of motivations can intervene at surprisingly early stages in the process."[127] Dr. Fiske identifies five "motives that matter" – belonging, shared social understanding, mutual social controlling, enhancing the self, and need for trusting others – all of which are "rooted in people's adaptation to survive

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123. Fiske, *supra* note 18, at 253-54.

124. *Id.* at 256.

125. *Id.* at 277 (citations omitted).

126. Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 118 (2004).

127. *Id.* at 122.

in social groups."[128] Each of these motives "demonstrably affects prejudice and discrimination."[129] She concludes by saying:

> The practical lessons from the research on intent and ordinary bias are that policymakers and managers need to facilitate both information and motivation, to encourage decision-makers' least biased evaluations of other people. Information has to be accurate, relevant, and unambiguous. For example, adequate, relevant information about the qualifications of a new employee from an underrepresented group can override assumptions that the person is an allegedly unqualified affirmative action hire.
>
> In addition, motivations have to encourage people to be accurate. Organizations can facilitate decision-makers' thoughtful reasoning about others by the values that supervisors communicate, accountability to those supervisors, organizational structures that stress teamwork, and encouraging people's better selves. Accountability and interdependence rely on the bald use of incentives. Organizational and individual values rely on more subtle but equally impactful guides to behavior.[130]

Stereotypes thrive in situations where decisionmakers have unbridled discretion to make subjective employment decisions. According to the plaintiffs in cases like *Dukes v. Wal-Mart Stores, Inc.*,[131] this leads to gender-biased discrimination in, for example, compensation and promotions. One of the plaintiffs' experts in *Dukes* submitted a report explaining how "[c]entralized coordination, reinforced by a strong organizational culture, creates and sustains uniformity in personnel policy and practice throughout the organizational units of Wal-Mart," while the "[s]ubjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias."[132] He concluded that "gender bias in the workplace is by no means inevitable, and social science research shows what kinds of policies and practices effectively

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128. *Id.* at 123-24.

129. *Id.* at 124.

130. *Id.* at 125.

131. Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd*, 509 F.3d 1168 (9th Cir. 2007) (certifying a plaintiff class).

132. Declaration of William T. Bielby, Ph.D in Support of Plaintiff's Motion for Class Certification at ¶10, *Dukes*, 222 F.R.D. 137 (No. C-01-2252-MJJ), 2003 WL 24571701. Dr. Bielby describes the situation at Wal-Mart in great detail, discussing the uniformity in personnel policies and discretion in compensation and promotions. *Id.* ¶¶ 11-21, 37-41.

minimize bias."[133] Employers have the option of taking steps to minimize the bias.

> Through deliberate efforts, the effects of stereotypes can be controlled. Research studies show that the effects of stereotypes and out-group bias on evaluative judgments such as those involved in recruitment, hiring, hob assignment, promotion, and assessments of skills and qualifications can be minimized when decision-makers know that they will be held accountable for the criteria used to make decisions, for the accuracy of the information upon which they decisions are based, and for the consequences their actions have for equal employment opportunity. However, . . . at Wal-Mart, personnel decisions regarding promotion and hourly compensation rely significantly on discretionary and subjective criteria, with little monitoring and oversight.[134]

More specifically, Dr. Bielby said true equal employment opportunity accountability has three key elements: "(1) monitoring and analysis of disparities in career trajectories; (2) systematic evaluation of managers on their contributions to the firms' goals regarding diversity and equal employment opportunity; and (3) monitoring and analysis of employees' perceptions of discriminatory barriers and career opportunities."[135] The point is simply that employers can take steps to address the discrimination that results from decisions based on stereotypes rather than an individual assessment.[136] An employer that chooses not to take such steps intentionally maintains a discriminatory system.

In summary, a decisionmaker's failure to make individual, rather than stereotyped, assessments of people is the result of a choice, and organizations (employers) can motivate decisionmakers to make accurate, individual assessments. Comments about a person based on his/her membership in a particular group of people – based on race, sex, age, religion or disability – rather than him/her as an individual are evidence of stereotyping as to a particular group of people. When the comments are derogatory or negative, they suggest a negative perception of that group. Maybe the categorization is "unconscious" at some point in the continuum of processes; however, we have a

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133. *Id.* ¶ 48.

134. *Id.* ¶ 49.

135. *Id.* ¶ 50. He goes on to describe the weaknesses of Wal-Mart's policies and practices as to each of these three elements. *Id.* ¶¶ 51-63.

136. The EEOC appointed a taskforce to study the best equal employment opportunity policies, programs and practices of private sector employers for the purpose of facilitating voluntary compliance with anti-discrimination laws. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1997), *available at* http://www.eeoc.gov/abouteeoc/task_reports/practice.html.

choice: consider and evaluate a person based on individual ability, characteristics, skills, education and other relevant factors, or consider and evaluate a person based on his/her membership in a particular group and then apply to an individual our stereotypical assessment of persons in that group. So, if a supervisor refers to an African-American employee in racially derogative terms, [137] that shows he categorizes African-Americans in a negative manner, i.e., stereotypes. This then provides evidence that the supervisor, consciously or unconsciously, allows his decisions to be influenced by his negative perceptions. Even if the application of his stereotypes to a particular person is called unconscious, he made a conscious (intentional) decision at some point to evaluate African-Americans as members of a group that he views negatively, not as individuals. Thus, the negative effect of the stereotype on a particular decision is intentional.

IV. IMPLICATIONS FOR PROOF OF INTENTIONAL DISCRIMINATION

Social cognition theory adds to our psychological understanding of bias and the role of intent in making discriminatory decisions. This may affect both efforts to avoid discrimination in making decisions and efforts to establish unlawful discrimination when a decision is challenged. For example, an organization interested in avoiding discriminatory decisions should take preventative measures. Those measures should address both the old-fashioned invidious discrimination where a decisionmaker consciously decides to reject a person in a protected group because of her race, gender, age or national origin, as well as what is now understood as unconscious discrimination where a decisionmaker rejects a person in a protected category because of negative, stereotypical views of certain categories of people and the failure to individuate when making such decisions. Currently, laws, rules and policies aimed at preventing discrimination assume that discrimination is the result of a conscious decision made at the point of the decision. Such laws, rules and policies do not work if much discrimination is unconscious, i.e., the decisionmaker is not aware of it at the point of decision. Unconscious discrimination must be addressed in advance through education and training that makes decisionmakers aware of how this type of discrimination works, by establishing the framework for individualized decisionmaking that looks at the qualifications and merit of each candidate, and by providing incentives (motivation) to avoid the discrimination. The failure of an organization to take such preventative steps will have adverse consequences in court when a decision of its

137. *See* Cooper v. Paychex, Inc., Nos. 97-1645, 97-1543, 97-1720, 1998 WL 637274, at *2 n.1 (4th Cir. Aug. 31, 1998) (plaintiff's secretary, who had complained about the plaintiff's performance, used the term "nigger" in referring to African-Americans and called the plaintiff a "lazy black ass").

agent is challenged as discriminatory, as in harassment cases where the lack of a policy affects an employer's defenses.[138]

Litigation in which a plaintiff alleges unlawful discrimination is likely to result in many erroneous decisions if the parties, the court and the jurors are not familiar with unconscious discrimination. This is true because a system developed on one understanding of discrimination cannot be expected to work properly when addressing discrimination that, in many cases, functions very differently. My suggested modifications to the litigation process include:

a) greater use of expert psychological testimony,

b) clarification of the evidentiary role of comments in proving discrimination, and

c) changes in the established proof schemes utilized in discrimination cases, including

(i) greater use of the direct method of proof,

(ii) more appropriate assignment of the burden of proof, and

(iii) treating mixed-motive as an affirmative defense.

These suggestions will be addressed below.

A. Expert Testimony from Psychologists

In order to make better, more reliable decisions in discrimination cases, all participants in the process need to understand the psychology of discrimination. Plaintiffs need to determine their theory early, i.e., decide whether to present the case as one of "old-fashioned" intentional discrimination or one of unconscious discrimination. The parties need to identify and disclose psychologists as expert witnesses; lawyers and judges need to understand the role of such experts and be prepared to address their role and the admissibility of their testimony at a *Daubert* hearing;[139] and these experts must educate the attorneys, judges and jurors in the psychology of discrimination. Further, the

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138. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998) (absence of reasonable care to prevent and promptly correct harassing behavior eliminates an affirmative defense).

139. *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); *see also* Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 191 (N.D. Cal. 2004) (applies a "lower *Daubert* standard" at the class certification stage); Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1259-60 (N.D. Cal. 1997); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 301-03, 327 (N.D. Cal. 1992).

party presenting the expert must offer evidence that corresponds to and supports the expert's description of discrimination. This means that an expert must be retained early in the litigation to inform the discovery process.[140]

While an expert can be very beneficial to a plaintiff, there are barriers. A professor of sociology who testifies about cognitive bias in employment discrimination litigation explains how organized the defense bar is in opposing expert testimony and questions why, in light of the "extensive arsenal available to the defense bar," a "social scientist [would] even consider exposing himself or herself to such intensive criticism."[141] Professor Bielby answers the question by identifying an important reason why social scientists should consider being retained as experts:

> There is a substantial body of scientific knowledge on stereotyping and cognitive bias that really can assist the trier of fact in deciding whether certain kinds of employment discrimination occurred. Relying on that knowledge the expert can, for example, explain to a jury or judge how it is that, under certain circumstances, a highly decentralized personnel system can create company-wide barriers against women, and how, under other circumstances, specific kinds of policies and accountability can minimize the likelihood that such bias occurs to any significant degree.[142]

Given the cost of expert assistance and testimony, as well as the resources it will take to address a *Daubert* motion, attorneys for plaintiffs have to assess carefully whether a case justifies the expenditure of such resources.[143] It may be that the use of experts will be less critical as the "new"

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140. This is demonstrated by the report of Dr. Bielby in *Dukes v. Wal-Mart Stores, Inc.*, in which he identifies the material he received in preparing his report. *See* Declaration of William T. Bielby, Ph.D in Support of Plaintiff's Motion for Class Certification at ¶¶ 6-7, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2003) (No. C-01-2252-MJJ), 2003 WL 24571701.

141. William T. Bielby, *Can I Get a Witness? Challenges of Using Expert Testimony on Cognitive Bias in Employment Discrimination Litigation*, 7 EMP. RTS. & EMP. POL'Y J. 377, 397 (2003).

142. *Id.* Dr. Bielby also identifies benefits to the social scientist, including the fact that an opportunity to apply one's work to the real world informs basic research, "generate[s] new insights into the resiliency of stereotypes and the kinds of accountability that are and are not successful in attenuating their effects," and helps to discover new research questions. *Id.* at 397-98.

143. The Court, in *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991), held that expert witness fees could not be recovered by a prevailing party as part of attorney fees under 42 U.S.C. § 1988. Congress responded, in the Civil Rights Act of 1991, by amending § 1988 and giving the court discretion to "include expert fees as part of the attorney's fee" in actions to enforce 42 U.S.C. §§ 1981 or 1981a. 42 U.S.C. § 1988(c) (2006). The 1991 Act also amended Title VII, 42 U.S.C.

understanding of discrimination becomes more widely known and addressed in court opinions. At that point, these opinions will become a source of education and precedent. So, as is often the case, the early litigation will pave the way for subsequent litigation.

B. Evidentiary Role of Comments

1. Rules of Evidence

Comments made by agents of the defendant are currently used in cases where the plaintiff utilizes the direct method, where the plaintiff relies on the indirect method of proof and attempts to show pretext, and in mixed motive cases.[144] An obvious example of direct evidence of discrimination is when the decisionmaker says, "I will not hire you because of your race, your age, your gender, your disability, or your religion." No inference is required and, if the trier of fact finds that this statement was made, the plaintiff needs no further evidence to prevail. Such a statement alone proves invidious, intentional discrimination; however, cases with evidence of such statements are quite rare today. More common are cases where the plaintiff presents evidence of derogatory comments about a protected group that do not state directly the reason for the challenged decision, but do reveal how the speaker stereotypes members of a protected group. Such statements are made in different contexts, including: (i) a statement made by the decisionmaker in the context of the challenged decision;[145] (ii) a statement made by the decisionmaker, but not made in the context of the challenged decision;[146] (iii) a statement made by someone who played a meaningful role in the challenged decision, but was not the "official" decisionmaker;[147] and (iv) a statement made by someone in the organization who is neither the decisionmaker nor one who

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§ 2000e-5(k), to include expert fees. So, a prevailing plaintiff may recover expert fees, depending on the source of the claim.

144. *See e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

145. *See, e.g.*, Shorette v. Rite Aid of Me., Inc., 155 F.3d 8, 13 (1st Cir. 1998) (discriminatory statements related to the decisional process may be sufficient to prove an employer's alleged discriminatory animus).

146. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000) (decisionmaker told plaintiff he "was so old [he] must have come over on the Mayflower," and he "was too damn old to do [his] job," but not in the direct context of the plaintiff's discharge).

147. *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (we "look to who actually made the decision or caused the decision to be made, not simply to who officially made the decision" and "it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker").

played a meaningful role in the challenged decision.[148] While the weight of the comments in the different categories may vary, all of these comments may be relevant and thus admissible.

The Federal Rules of Evidence inform the admissibility inquiry in a number of ways. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[149] Where the issue is whether the employer intentionally discriminated against an applicant or employee based on any of the factors prohibited by federal law, evidence that the decisionmaker has made derogatory comments about a particular group of persons makes it more probable that the person took the prohibited characteristic into account in making the challenged employment decision about a member of the group.[150]

Rule 403 provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice."[151] Some courts find comments relevant, but exclude them under Rule 403 based on a determination that the danger of unfair prejudice substantially outweighs the probative value.[152] While some derogatory comments may be inflammatory, that does not mean statements containing such terms are *unfairly* prejudicial to the defendant in a discrimination case. In fact, the more outrageous and inflammatory the terms, the stronger the speaker's negative impression of the target group of people and the more likely it is that the speaker uses impermissible factors in making decisions. Thus, the Rule 403 balance favors admissibility.[153]

Sometimes comments, even when made in the context of the challenged decision, are excluded or substantially discounted because the court finds them to be ambiguous. For example, the Seventh Circuit held that use of the

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148. *See, e.g.*, Logan v. Kautex Textron N. Am., 259 F.3d 635, 639 (7th Cir. 2001) (racist comment made by a co-worker does not create an inference that the plaintiff was discharged because of her race, even though the co-worker participated in a vote, along with five others, to discharge her).

149. FED. R. EVID. 401. This is a fairly broad definition of relevant. If the evidence is relevant, it "is admissible, except as otherwise provided by [the Constitution, statute, or rules adopted by the Supreme Court]." FED. R. EVID. 402.

150. If such past comments are treated as character evidence, which is generally not admissible under Federal Rule of Evidence 404(a), the comments constitute "acts," which are admissible to prove motive or intent, pursuant to Federal Rule of Evidence 404(b).

151. FED. R. EVID. 403.

152. *See, e.g.*, Steger v. Gen. Elec. Co., 318 F.3d 1066, 1079 (5th Cir. 2000); Greenfield v. Sears, Roebuck & Co., No. 04-71086, 2006 WL 2927546, at *6-*9 (E.D. Mich. Oct. 12, 2006). *But see* Mattenson v. Baxter Healthcare Corp., 438 F.3d 763, 769-71 (7th Cir. 2006); Cummings v. Standard Register Co., 265 F.3d 56, 64 (1st Cir. 2001); Abrams v. Lightolier, Inc., 50 F.3d 1204, 1214-15 (3d Cir. 1995).

153. It should be excluded only "if its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403.

term "bitch" may not be evidence of sex discrimination because it does not necessarily suggest anything derogatory about females.[154] First, this seems wrong. According to one dictionary, "bitch" is slang for "a. A mean or spiteful woman [and] b. A promiscuous woman."[155] Second, the jury, not the judge, should determine whether the use of this term is evidence of sex discrimination. Ambiguity in statements is normally a matter for the jury to resolve.[156] Therefore, the jury should decide whether the term "bitch" is evidence of sex discrimination and, if so, the amount of weight to give it. Assume the decisionmaker in a sex discrimination case made the statement, "I had to fire the bitch," in the context of explaining an employment decision to the Director of Human Resources. Even if one believes that comment is ambiguous, that comment alone should be sufficient to get the claim to the jury because a reasonable juror, based solely on this comment, could conclude that the employee's gender was a motivating factor in her discharge.[157]

Even if a discriminatory comment is relevant, the plaintiff still has to establish that the comment should not be excluded as hearsay. The hearsay rules recognize at least two ways of proving state of mind. Derogatory comments constitute circumstantial evidence of state of mind of the speaker and are not hearsay because they are not being offered for the truth of the matter asserted. For example, the statement, "older employees" are "set in their ways" and need to be "replaced with younger people" in order for the "company's business to progress,"[158] shows the declarant's state of mind and should be admissible to prove age discrimination in a reduction-in-force case, even though the declarant did not make the statement in the context of selecting workers to be laid off as part of the reduction in force. The statement

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154. *See, e.g.*, Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (reference to plaintiff as "sick bitch" was, in context, not a sex- or gender-related term; "there would not be an automatic inference from his use of the word 'bitch' that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender").

155. WEBSTER'S II NEW RIVERSIDE DICTIONARY (revised edition 1996).

156. *See, e.g.*, Phelan v. Cook County, 463 F.3d 773, 782 (7th Cir. 2006) (quoting Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990)) (if the discriminatory nature of the supervisor's comments – plaintiff's problems stemmed from the fact that she was trying to work "in a man's world," and "[i]f you leave right now, it will make a better life for you" – is ambiguous, "'the task of disambiguating utterances is for trial, not for summary judgment'").

157. While the decisionmaker usually denies having used the derogatory term, he could testify and attempt to convince the trier of fact that his use of the term is not indicative of stereotyping or intent to discriminate and the jury might accept this testimony. Even if he admits using the term and gives an explanation, the jury is not required to accept the explanation and would be justified in ruling in favor of the plaintiff.

158. Castle v. Sangamo Weston, Inc., 837 F.2d 1550, 1553 (11th Cir. 1988).

shows that the speaker thinks stereotypically about older workers and views them negatively.[159]

Statements directly indicating state of mind fit within a hearsay exception, Rule 803(3), which provides: "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule.[160] While Rule 803(3) only provides an exception to the hearsay rule and does not address relevance, it supports the argument that what people say can be used to determine their state of mind, motive or intent. When a statement indicating state of mind is made while the declarant is an agent of the employer, it is not necessary to rely on the Rule 803(3) exception because the statement is defined as nonhearsay by Rule 801(d)(2)(D).[161] This rule makes any statement of an agent of a party nonhearsay, as long as the statement is within the scope of the agency and made during the existence of the relationship. If the person making the statement is a party, then the statement is nonhearsay pursuant to Rule 801(d)(2)(A).[162]

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159. There are other common examples of circumstantial evidence of state of mind. When the mental competency of the accused in a criminal case is at issue, the following statement made by the accused, "I am bin Laden," is admissible as evidence of incompetence because it is not offered to show that the accused is in fact bin Laden, but rather as circumstantial evidence of incompetence. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 738 (3d ed. 2003). Although not offered for the truth of the matter asserted, one could argue that hearsay risks are present because relevance depends on the sincerity of the speaker, *i.e.,* it tells nothing about competency if the speaker was joking. Similarly, in a will contest where the disfavored beneficiary claims the favored beneficiary improperly influenced the testator, the testator's statement made prior to signing the will, "I am really proud of Sally [the favored beneficiary] for representing the local residents in challenging the power company's pollution of the drinking water," is admissible if offered by the favored beneficiary to show the state of mind of the testator. This is not a direct statement of the testator's state of mind and it is not offered to prove that the testator was proud of Sally, or that Sally represented the residents well, but it is relevant circumstantial evidence on the question of the testator's state of mind in making the will, i.e., Sally was favored not because of duress but because the testator likes her.

160. An example of such a statement is "I plan to reduce the age of the workforce by getting rid of the older workers through a reduction-in-force and later replacing them with younger workers."

161. "A statement is not hearsay if . . . offered against a party and is . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." FED. R. EVID. 801(d)(2)(D); *see, e.g.*, Lewis v. City of Chi., 496 F.3d 645, 651 (7th Cir. 2007).

162. "A statement is not hearsay if . . . offered against a party and is . . . (A) the party's own statement, in either an individual or a representative capacity." FED. R. EVID. 801(d)(2)(A).

2. Weight to be Given to Comments

The psychological research addressed above helps us understand and assess the value of comments in proving discrimination. For our purposes, the following points are most important: first, derogatory or negative comments about a person's group, made in the context of making a decision about that person, are evidence that her group status played a role in the decision; second, a person's comment attributing characteristics to an individual based on her group membership, e.g., female, constitutes evidence of stereotyping, regardless of when the comment is made in relation to the challenged decision;[163] third, such evidence of stereotyping constitutes direct evidence of discrimination,[164] i.e., evidence that gender played a role in the challenged decision;[165] and fourth, even if a decisionmaker's use of stereotypes in making a particular decision was not deliberate or fully conscious, at some point the decisionmaker made a deliberate choice to base decisions on stereotypes instead of individual assessments, thus satisfying the intent requirement.[166] Each of these points will be discussed below.

First, because a plaintiff utilizing the direct method may rely on circumstantial evidence,[167] a derogatory comment, such as a racial slur made by a decisionmaker about African-Americans in the context of making the challenged decision, constitutes evidence of a race-based animus because that would be a reasonable inference.[168] It would be up to the trier of fact to determine whether to draw that inference and the weight to give to it - a determination that may be influenced by the comment's proximity to the challenged decision. But there can be no doubt that such a comment is probative on the question of whether race played a role in the challenged decision. As stated in *Price Waterhouse* in the context of gender discrimination, "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a 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*

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163. This was recognized by at least five Justices in *Price Waterhouse v. Hopkins*. *See* 490 U.S. 228, 234-37, 251-52, 255-56 (1989) (plurality opinion); *id.* at 277-78 (O'Connor, J., concurring).

164. *See supra* note 55 and accompanying text.

165. The Court recognized this in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-54 (2000). *See also Price Waterhouse*, 490 U.S. at 251-52 (plurality opinion).

166. *See* Fiske, *supra* note 18, at 254.

167. *See, e.g.*, Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902-03 (7th Cir. 2006).

168. *See, e.g.*, Phelan v. Cook County, 463 F.3d 773, 782 (7th Cir. 2006); Volovsek v. Wis. Dep't of Agric., Trade & Consumer Prot., 344 F.3d 680, 689-90 (7th Cir. 2003).

that gender played a part."[169] Similarly, in *Reeves*, the Court indicated that the lower court "failed to draw all reasonable inferences in favor of [the plaintiff]. For instance, while acknowledging 'the potentially damning nature' of Chestnut's age-related comments, the court discounted them on the ground that they 'were not made in the direct context of Reeves's termination.'"[170]

Second, when a decisionmaker makes a derogatory comment about a group, either in or out of the context of a challenged decision, it is reasonable to infer that the decisionmaker has a negative, stereotypical view of that group.[171] Further, one can reasonably infer that this perceived negative group characteristic will adversely affect the decisionmaker's evaluation or assessment of an individual member of that group. Assume that Boss, in a casual conversation outside the workplace, refers to African-Americans as "niggers," females as "bitches," older persons as "old bastards" or Mexican-Americans as "wetbacks." Most people hearing this conversation will form an opinion about how Boss views, and is likely to treat, members of the groups referred to in such derogatory terms. You would not expect Boss, no matter the context in which he refers to African-Americans as "niggers," to treat African-Americans on their individual merit when Boss is making work-related decisions.[172] In fact, the assumption would be the opposite – African-Americans will be disadvantaged when Boss is making decisions in the workplace. If this is true, then a derogatory comment made by Boss to a stranger in a casual conversation outside of the workplace should be admissible as evidence of race, sex or age discrimination in a case challenging an employment decision made by Boss.

In other contexts, such a comment would be admissible. For example, consider a situation similar to that presented in *Wisconsin v. Mitchell*, where the state seeks an enhanced sentence against the accused, an African-American, because it believes the criminal act was directed at the victim, a Caucasian, because of the victim's race.[173] Assume the state has a witness

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169. *Price Waterhouse*, 490 U.S. at 251.

170. *Reeves*, 530 U.S. at 152. Chestnut told Reeves that he "was so old [he] must have come over on the Mayflower," and that he "was too damn old to do [his] job," when Reeves was having difficulty starting a machine. *Id.* at 151.

171. If a decisionmaker makes a negative comment about a group, we can infer that she stereotypes individual members of that group and that such negative stereotyping will disadvantage members of that group when considered by this decisionmaker.

172. Of course, the employer could attempt to overcome the inference and present evidence to show that Boss follows the law when making decisions on behalf of the employer and is not influenced by the attitude reflected in the comments.

173. Wisconsin v. Mitchell, 508 U.S. 476 (1993) (Mitchell's sentence for aggravated battery was enhanced, pursuant to Wisconsin's penalty-enhancement statute, because he intentionally selected his victim because of race; application of the enhancement statute did not violate the First Amendment, which does not prohibit the

who for the past several years has worked with the accused and is prepared to testify that the accused commonly uses a derogatory term in the workplace when referring to Caucasians. These workplace comments, which are unrelated to the criminal act, show a negative view of Caucasians. One with such a view is more likely than one without such a view to take adverse actions against Caucasians based on their race. Therefore, the comments are relevant in determining whether a Caucasian victim of a violent criminal act was selected because of his or her race. Of course, the trier of fact remains free to conclude that the act in issue was not motivated by race. Similarly, the Boss' comments, made to a stranger in a casual conversation, should be admissible in an employment discrimination case challenging an employment decision made by Boss. In short, outside of the courtroom, people would generally rely on statements such as these in attempting to determine the intent of a person in making a decision. To the extent that relevancy is a common sense notion,[174] this argues in favor of admissibility, with the trier of fact determining the weight of the evidence in any particular situation.

Third, one who engages in stereotyping is evaluating people based on their group membership, rather than their individual characteristics and merit. For example, if a "stereotyper" is deciding who to hire, candidate A, who is a member of a group that is viewed positively by the "stereotyper," is likely to be selected over candidate B, who is a member of a group that is viewed negatively by the "stereotyper," even if candidate B is better qualified based on objective factors. This suggests candidate B did not get the job because of her or his group membership. If B's group membership is "protected" by statute or the Constitution, it seems that B has established discrimination and should get the job as a remedy, unless the employer shows it would have made the same decision even absent the stereotyping.[175] However, if the law

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evidentiary use of speech to prove motive or intent). *But see* Dawson v. Delaware, 503 U.S. 159 (1992) (holding it was reversible error to instruct the jury that the defendant was a member of the Aryan Brotherhood, a "white racist gang," because it was irrelevant and violated the first amendment).

174. Relevance requires a "relation between an item of evidence and a matter properly provable in the case," and the existence of such a relationship is to be determined by "principles evolved by experience or science, applied logically to the situation at hand." In ruling upon relevancy, the court must draw on its own experience, knowledge, and common sense in assessing whether a logical relationship exists between proffered evidence and the fact to be proven.

MUELLER & KIRKPATRICK, *supra* note 159, at 154-55 (quoting FED. R. EVID. 401, Advisory Committee Notes).

175. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (a Title VII "mixed-motive" case in which the plurality said "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender;" the two concurring Justices, White and O'Connor, do not appear to disagree with this); *see also* 42 U.S.C. § 2000e-2(m) (2006) (codifying the "mixed-motive" theory of liability and providing

relied upon by B requires a showing of intentional discrimination, there is a further question discussed below - whether such stereotyping is evidence of intentional discrimination in making this particular decision given the fact that the stereotyping may have been the result of unconscious negative feelings and beliefs about a protected group.

Fourth, as stated above, stereotyping is a form of categorization that operates absent an intention to favor or disfavor a particular member of a group and these stereotypes bias a decisionmaker's judgment before the point of an actual decision. This means a challenged decision may have been the result of the operation of a decisionmaker's biased judgment, but not an intentional or conscious decision to discriminate against the individual who is challenging the decision. In the employment hypothetical discussed above, there was never an individualized assessment of candidate B's qualifications because the decisionmaker saw no need to make such an assessment in light of his negative perception of candidate B's group, which trumped individual merit. So, candidate B was the victim of her group membership because she was dealing with a decisionmaker who makes decisions about individuals based on their group membership and who had a negative perception of her group.

If the law relied upon by candidate B in challenging the decision requires her to show purposeful or intentional race discrimination, can she succeed? Yes, according to Dr. Fiske, because the decisionmaker intentionally made a decision, at some point, not to "individuate" in selecting from among applicants for a position. Even though "categorization is a natural and adaptive, even dominant, way of understanding other people, that does not mean that it is the only option available."[176] Whatever a decisionmaker knows or understands about stereotyping, and how it may operate unconsciously, a decisionmaker knows that he makes decisions about people without individuating.

Assuming any negative comment made by a decisionmaker about a group is relevant in determining whether a member of that group was a victim of discrimination, the next question is whether such a comment alone is sufficient to create a jury question on the discrimination issue. Assume a fifty-five-year-old employee (plaintiff) is discharged during a reduction-in-force (RIF). She is told she was selected rather than one of the other employees in her department, whose ages range from thirty-three to forty-eight, because the

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that "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"); Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (holding that the plaintiff does not have to present direct evidence, as opposed to circumstantial evidence, in order to receive a mixed-motive instruction, *i.e.*, the "plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice'").

176. Fiske, *supra* note 18, at 277.

employer determined that while her performance was satisfactory, her rating was the lowest. In fact, the latest performance evaluation shows her rating was slightly lower than others. Further assume that the supervisor who selected the plaintiff, during a meeting of management officials at which the need for a RIF was announced, said "older employees" are "'set in their ways'" and need "'to be replaced with younger people' in order for the company's business to progress."[177] If the court utilizes the indirect proof scheme and the summary judgment record contains sufficient evidence to establish a *prima facie* case of age discrimination, the employer has articulated the legitimate, nondiscriminatory reason given above, and the only evidence of pretext is the supervisor's statement,[178] is the employer entitled to summary judgment? This depends on whether the trial judge believes a reasonable juror could infer, from the supervisor's comment, that the employer's articulated reason for selecting the plaintiff for discharge is pretextual. If the answer is yes, then the case must be presented to the jury to determine whether the articulated reason is false and, if so, whether the employer is masking age discrimination. So, the question is whether the inferences the jury might draw from the plaintiff's *prima facie* case, combined with the circumstantial evidence in the form of the age-related comment, is sufficient to support a finding of age discrimination in the selection of the plaintiff for discharge. This depends on how much the comment tells us about "the employer's mental processes."

The comment, "older employees" are "set in their ways" and need to be "replaced with younger people," while not made in the context of selecting the plaintiff for discharge, certainly tells us how that supervisor views older workers. Even without applying psychology, common sense suggests that one who views older workers in that manner is likely to take age into account when provided an opportunity to eliminate one or more workers as part of a RIF. The same is true when the supervisor responsible for a challenged employment decision makes derogatory comments about a class of persons prior to making the employment decision. A derogatory comment based on the race, national origin, gender, religion, disability or age of a class suggests, at a minimum, that the maker views members of that class as less desirable than others. While one may be able to rise above such a bias, particularly when making a decision governed by a law prohibiting discrimination against the class at issue, all that means is evidence of the derogatory comment is not conclusive on the discrimination issue. The real issue here is not whether the trier of fact should infer discriminatory motive from a comment such as the one above; rather, the issue is whether a reasonable jury could infer a dis-

177. Castle v. Sangomo Weston, Inc., 837 F.2d 1550, 1553 (11th Cir. 1988).

178. Note that the statement is admissible as nonhearsay, pursuant to Federal Rule of Evidence 801(d)(2)(D), assuming someone who heard it supplies a declaration. *See, e.g.*, Lewis v. City of Chi., 496 F.3d 645, 651 (7th Cir. 2007). Also, note that the statement was not made in the context of discharging the plaintiff; rather, it was made during a meeting announcing the RIF.

criminatory motive from the comment.[179] Federal judges are very willing to take discrimination cases away from the jury, even after verdict.[180] It may be that comments are often discounted by the federal courts because they are so powerful in determining intent and, if the cases are submitted to the jury, the jurors are likely to apply common sense and find discrimination based on such comments. Such a common sense inference is supported by the psychological research discussed above.

In employment cases alleging a violation of a federal antidiscrimination statute, the entity (employer) is the appropriate defendant and is liable for any relief obtained by the plaintiff.[181] That means the wrongdoing of an employer's agents is generally imputed to the entity[182] and, therefore, the employer has an incentive to "encourage" its decisionmakers to avoid making employment decisions that can lead to liability under the antidiscrimination statutes. An obvious step for employers to take is to require individual assessments of candidates[183] and provide decisionmakers with the training,

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179. *See, e.g.*, Lewis v. City of Chi., 496 F.3d 645, 651-52 (7th Cir. 2007) (holding that a statement by one involved in a challenged decision – indicating he took the plaintiff's name off the list for a training program because she is female and "it was going to be a working trip, and he thought it would be dangerous and that [she] would thank him for it later" – was sufficient to preclude summary judgment).

180. This is consistent with a general trend in civil litigation in federal court. Summary judgment is the primary tool, but there are other tools. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (giving judges extensive discretion in determining whether an expert is allowed to testify); Cooper Indus. v. Leatherman Tool, 532 U.S. 424 (2001) (holding that factual findings related to an award of punitive damages are not insulated on appeal by the clearly erroneous standard).

181. Respondeat superior liability is not available in cases based on 42 U.S.C. § 1983; rather, liability is imposed on the entity only if the challenged action was taken pursuant to entity "policy." *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690-92 (1978).

182. There is a limited exception in some harassment cases; in *Faragher v. City of Boca Raton*, the Court determined that where "no tangible employment action is taken," an employer may raise an affirmative defense to liability or damages subject to proof of two elements: a) that it exercised reasonable care to prevent and correct promptly any harassing behavior, and b) the plaintiff failed to take advantage or any preventive or corrective opportunities provided by the employer. 524 U.S. 775, 807 (1998); *see also* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545-46 (1999) (holding that an employer cannot be held vicariously liable for punitive damages, under 42 U.S.C. § 1981a(b)(1), where decisions of its managerial agents are contrary to its good faith efforts to comply with the employment discrimination statute).

183. In determining that the University of Michigan law school admissions policy was narrowly tailored, the Court in *Grutter v. Michigan*, stressed that the policy required "individualized consideration" of all applicants "to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." 539 U.S. 306, 337-38 (2003). Similarly, an employer can require that all applicants be given "individualized con-

detailed job descriptions that identify the relevant qualifications, and evaluative forms needed to make such assessments. The leaders of institutions and organizations that do not require such individualized consideration of applicants make a choice to allow their decisionmakers to make decisions based on their stereotypes, i.e., to intentionally discriminate.

C. Modified Proof Scheme

The current proof schemes utilized in discrimination cases in which plaintiffs allege disparate treatment are the direct method and the indirect method, with a mixed-motive defense available to the defendant. These proof schemes were developed without taking into account psychologists' current understanding of discrimination and how a decisionmaker may discriminate without being fully aware of the fact that he is categorizing people, often unconsciously, and then making decisions based on the categorization or stereotyping. Further, the direct method is frequently interpreted to require direct evidence, thereby excluding circumstantial evidence. If the direct method allows the use of both direct and circumstantial evidence, then there is really no need for the indirect method because the presumption it creates goes away in nearly all cases. This leaves the plaintiff with a direct method case that includes any inferences reasonably drawn from the *prima facie* case under the indirect method. The mixed motive defense simply recognizes that many decisions are motivated by more than one factor and that the antidiscrimination statutes were intended to eliminate the prohibited factors from the decisionmaking process. These proof schemes do not take into account the current understanding of discrimination, including the role of intent and its location in the decisionmaking process. Following is an attempt to address some of these issues and suggest a modified approach to cases alleging disparate treatment in violation of antidiscrimination statutes and the Equal Protection Clause.

1. Elimination of the distinct methods

If the direct method of proof allows the use of both direct evidence and circumstantial evidence,[184] most cases with any chance of success under the indirect method have at least an equal chance of success under the direct method. This is true because even when a court utilizes the Supreme Court's articulation of the indirect method, the presumption created by the *prima facie* case rarely survives the minimal burden of production that shifts to the defendant, i.e., to produce admissible evidence that the plaintiff was rejected

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sideration" so that their race, or other protected group membership, does not become the "defining feature" of their applications. *Id.*

184. *See* Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902-03 (7th Cir. 2006).

for a legitimate, nondiscriminatory reason. Rarely, if ever, does a defendant lose because it failed to satisfy this burden. So, in reality, the primary advantage to the plaintiff of the indirect method, the presumption, disappears in most cases and "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[185] Many cases are resolved in favor of the defendant, on summary judgment, either at the first step, because the plaintiff fails to establish a *prima facie* case, or at the third step, because the plaintiff fails to present sufficient evidence that a discriminatory reason more likely motivated the defendant or that the defendant's articulated reason(s) was not its true reason(s), but was a pretext for discrimination.

Reeves and *Hicks* establish that while the plaintiff loses the benefit of the presumption created by the prima facie case, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'"[186] This provides no advantage over the direct method, because it too includes inferences if it allows the use of circumstantial evidence. At the third step, the plaintiff must provide sufficient evidence to support a finding that a discriminatory reason more likely motivated the employer or that the defendant's asserted justification is false (a pretext). The trier of fact may, based on the evidence of pretext combined with the *prima facie* case, find unlawful discrimination.[187] Of course, the plaintiff may present other evidence of discrimination, such as the comments in *Reeves*. Therefore, all evidence relied upon by the indirect method plaintiff, in both step one and step three, is either direct or circumstantial evidence. The net effect of the indirect method, therefore, is to force the defendant to do what it must, as a practical matter, do anyhow, i.e., give a nondiscriminatory reason(s) for the challenged decision.[188] If this is correct, meaning the indirect method actually does nothing for either party in most cases, why use it?[189]

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185. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)..

186. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 255 n.10).

187. *Reeves*, 530 U.S. at 148.

188. Presumably, this reason(s) will have to be disclosed during discovery so the presumption does not require the defendant to do anything it will not be required to do during the course of the litigation. In addition, the reason(s) is usually articulated in response to an EEOC charge or an application for unemployment compensation benefits.

189. In a case alleging a violation of the ADA, the court in *Timmons v. General Motors Corp.* recognized the practical similarity of the plaintiff's burden under the direct and indirect methods of proof, stating: "[w]hat is always true, however, is that whatever evidence or method of proof the plaintiff resorts to, he must put together a case that permits the inference that the employer has acted against him based on his disability." 469 F.3d 1122, 1127 (7th Cir. 2006).

2. Assigning the burden of proof

In most civil litigation, the plaintiff has the initial burden of going forward with the evidence and presenting sufficient evidence for a reasonable jury to find for the plaintiff on each element of the claim by a preponderance of the evidence.[190] If the plaintiff does not satisfy that burden, then judgment as a matter of law in favor of the defendant is appropriate.[191] If the plaintiff satisfies the initial burden, then the burden of production shifts to the defendant and the amount of evidence needed to satisfy that burden depends on the strength of the plaintiff's case. For example, if the plaintiff's evidence is so strong that a reasonable jury could not decide in favor of the defendant, then plaintiff is entitled to judgment as a matter of law unless the defendant produces sufficient evidence to allow a reasonable jury to rule in favor of the defendant. If the defendant satisfies its burden of production, the plaintiff may, but is not required to, present rebuttal evidence. However, if the evidence presented by the defendant is so strong that a reasonable jury could no longer decide in favor of the plaintiff, then the burden of production shifts to the plaintiff to bring the evidence back into the jury range and avoid judgment as a matter of law. Throughout, the plaintiff retains the burden of persuasion, while the burden of production, which is managed by the court, shifts. The law may create presumptions that benefit one party or the other during that trial process.[192]

Not all civil cases follow this "normal" path.[193] Nothing prevents the courts, in discrimination cases litigated under the direct method, from shifting the burden of persuasion under certain circumstances. This is particularly true in mixed-motive cases where the "employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another."[194] In *Price Waterhouse*, a mixed-motive case, after the plaintiff proved that "her gender played a motivating part in an employment decision," the Court shifted the burden of persuasion to the defendant to prove "it would have made the same decision even if it had not taken the

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190. This is commonly referred to as presenting a prima facie case.

191. FED. R. CIV. P. 50(a).

192. In civil cases litigated in federal court, the effect of presumptions is governed by Federal Rule of Evidence 301, except where state law supplies the rule of decision as to a claim or defense and then state law also governs the effect of presumptions. *See* FED. R. EVID. 302.

193. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 263-64 (1989) (O'Connor, J., concurring) (discussing tort cases in which the burden of persuasion is shifted to the defendants to prove they did not cause the plaintiff's injury).

194. *Id.* at 246 (plurality opinion). *See also* concurring opinions of Justice White, *id.* at 259-60, and Justice O'Connor, *id.* at 263-68.

plaintiff's gender into account."[195] Similarly, in *Mount Healthy City Board of Education v. Doyle*, the Court held that if the plaintiff in a First Amendment case shows that protected expression played a role in the employer's decision to discharge him, the burden of persuasion shifts to the employer to show it would have made the same decision even if it had not been motivated to retaliate against the employee for exercise his First Amendment rights.[196] In another case, *Castaneda v. Partida*, based on the stark statistical disparity[197] established by the plaintiffs, the Court shifted the burden of proof "to the State to dispel the inference of intentional discrimination."[198] Sometimes it is difficult to determine whether "burden of proof" means "burden of persuasion" or "burden of production,"[199] but it is quite apparent that it means burden of persuasion in the mixed-motive cases.

Given the psychological research discussed above in Part III, there is justification for shifting the burden of persuasion to the defendant whenever the plaintiff offers evidence sufficient to support a finding that the defendant's agents who make decisions (a) engage in stereotyping, and (b) have a negative view of persons in the plaintiff's protected group. Of course, psychological research shows that most, if not all, people categorize based on race, gender, age, national origin and other characteristics. Therefore, expert testimony would satisfy the first prong. Group-based comments by decisionmakers, or their tolerance of such comments by others in the workplace, also would satisfy this prong. The second prong could also be supported by expert testimony, as in *Price Waterhouse*, as well as more specific and direct evidence – e.g., comments made by decisionmakers. When comments are offered to show that decisionmakers have a negative view of a group, or groups, of people, it does not matter when or where the comments were made; proximity to the challenged decision should only affect the weight the trier of fact gives to the comments. Similarly, comments made by decisionmakers not involved in the challenged decision show that stereotyping is accepted by the defendant, but the trier of fact might assign less weight to such

195. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); *see also* 42 U.S.C. § 2000e-2(m) (2006); Desert Palace, Inc. v. Costa, 539 U.S. 90, 97 (2003).

196. 429 U.S. 274, 287 (1977).

197. Although the "population of the county was 79.1% Mexican-American, . . . over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American." Castaneda v. Partida, 430 U.S. 482, 495 (1977).

198. *Id.* at 497-98.

199. *See* Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272-78 (1994) (discussing the history of the meaning of "burden of proof" and indicating when it is used with a reference to the standard of proof it usually means burden of persuasion.

comments than the comments of those who actually made the challenged decision.[200]

If the plaintiff presents sufficient evidence to support a finding of a) and b), the burden of persuasion should shift to the defendant to establish an affirmative defense by showing:

> (i) the decisionmaker individuated in making the challenged decision, thereby trumping the negative stereotype, and there was a nondiscriminatory reason for the decision,
>
> (ii) even if the decisionmaker did not individuate, an individualized assessment of the candidates would have resulted in the same decision,[201] or
>
> (iii) the decisionmaker(s) acted contrary to company policy and training in failing to make an individual decision, instead of stereotyping.[202]

The effect of the defendant meeting its burden, i.e., presenting sufficient evidence for the trier of fact to find (i), (ii) or (iii), depends on which prong(s) it satisfies. If the defendant satisfies the first prong, by showing the decisionmaker(s) in fact individuated and there was a nondiscriminatory reason for rejecting the plaintiff, then the defendant wins. There would be no liability because neither the plaintiff's race nor the decisionmaker's stereotyping was a factor in the decision. However, if the defendant satisfies the second prong, by showing it would have reached the same decision even if the decisionmaker had individuated, it should still be held liable but the relief should be limited and not include lost wages and benefits, injunctive relief requiring the defendant to hire or reinstate the plaintiff, or punitive damages.[203] Even the limited relief allowed goes beyond *Price Waterhouse* and *Mt. Healthy*,[204] as

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200. The same is true of comments made by those who are not decisionmakers; if the evidence shows such comments are tolerated by decisionmakers, it is up to the trier of fact to decide what weight to give to such comments.

201. This is essentially the mixed-motive defense discussed in the next subsection.

202. *See supra* notes 131-36 and accompanying text.

203. Compensatory damages would be available if, for example, the plaintiff shows mental or emotional distress resulting from a decision based on a negative stereotype of her group. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 266 (1978) (authorizing compensatory damages resulting from a deprivation of procedural due process, even where the challenged decision was correct).

204. In these cases, the Court held that establishing the mixed-motive defense defeats liability.

well as the 1991 amendment to Title VII.[205] The reason for such relief – declaratory relief, limited injunctive relief, compensatory damages, costs and fees – even though the stereotyping did not result in a different decision, is to compensate the plaintiff for any injury resulting from the stereotyping, usually mental and emotional distress, and give the defendant an incentive to take strong preventative measures. Finally, if the defendant satisfies the third prong, by showing the decisionmaker acted contrary to company policy and training in failing to make an individual assessment, it is still liable but not for punitive damages.[206]

3. Mixed-motive as a defense

A mixed-motive should be viewed strictly as an affirmative defense to be raised by the defendant.[207] Plaintiffs do not have to anticipate affirmative defenses and should not have to do so in discrimination cases. The mixed-motive theory does not provide plaintiffs with an alternative proof scheme; rather, it provides defendants with at least a partial defense. If the plaintiff shows that a prohibited factor was a motivating factor in the challenged decision, then the plaintiff prevails but the relief may be diminished if the defendant has pleaded and carries its burden of persuasion showing it would have made the same decision even if it had not taken into account the prohibited factor.[208] This is consistent with *Desert Palace*, in which the Court clarified that circumstantial evidence alone, which is sufficient for a reasonable jury to conclude that race, color, religion, sex or national origin was a "motivating factor" in the challenged decision, shifts the burden of persuasion to the de-

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205. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (allowing the court, where both parties have met their burden in a mixed-motive case, to award declaratory and injunctive (excluding hiring or reinstatement) relief and costs, including fees, but not damages).

206. This adopts the *Kolstad v. American Dental Association* approach, where the defendant's policy and good faith efforts to comply with the law eliminate only punitive damages, 529 U.S. 526, 545-46 (1999), rather than the *Faragher v. City of Boca Raton* approach, where the defendant's policy eliminates liability. 524 U.S. 775, 807-08 (1998).

207. *See supra* note 194 and accompanying text.

208. While the Supreme Court cases recognizing the mixed-motive theory, *Price Waterhouse* and *Desert Palace*, both involved claims based on Title VII, which was amended in 1991 to codify the mixed-motive theory, lower courts have extended the theory to ADEA cases. *See, e.g.*, Machinchick v. PB Power, Inc., 398 F.3d 345, 352 (5th Cir. 2005). *Price Waterhouse* was decided two years before Title VII was amended and both the plurality and Justice White, in his concurring opinion, found support for shifting the burden in a retaliation case alleging a violation of the First Amendment. Price Waterhouse v. Hopkins, 490 U.S. 228, 248-49, 258-59 (1989) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). Therefore, while there is support for the mixed-motive analysis in cases other than those based on Title VII, the law is further developed in Title VII cases.

fendant to show that it would have made the same decision in the absence of the prohibited motivating factor. In a Title VII case, if the defendant is successful in establishing this affirmative defense, it is not absolved of liability; rather, the remedies available to the plaintiff are limited.[209] Discrimination cases not based on Title VII should not be bound by its statutory exclusion of damages.[210]

4. Application of proof scheme

To illustrate, assume a male (Jack) was selected to fill a position as an emergency medical technician (EMT) over a female (Mary), even though their objective qualifications were equal. The person who made the decision is a male (Bill). In responding to the charge filed with the EEOC, the employer stated that while both Jack and Mary are qualified, Jack was selected because his prior EMT experience was more relevant to the duties of the open position. While investigating the charge, the EEOC representative spoke to a number of employees who worked under the supervision of Bill and one of them reported that she heard Bill say, several months before Jack was selected, that he believes males make better EMTs because they are stronger and less emotional in stressful circumstances. This comment, whenever it was made, shows that Bill has a negative stereotyped impression of female EMTs. Utilizing the indirect method, Mary can establish a *prima facie* case and the employer has a legitimate, nondiscriminatory reason – better qualifications – so the issue will be whether a discriminatory reason more likely motivated the employer or the employer's reason is a pretext for sex discrimination. To show pretext, Mary will rely primarily on the comment made by Bill. Under the direct method, Mary relies primarily on the comment made by Bill, which should be sufficient to shift the burden of persuasion to the employer to show that it would have made the same decision even absent the stereotyping by its agent, Bill. Under either method, Mary should survive summary judgment because a reasonable jury could find that Bill based his decision on his stereotypical view of women; in other words, he did not consider Mary as an individual but rather judged her based on his preconceived notions of women as EMTs.

Now assume that the comment was not made by Bill but rather by Bill's supervisor, the general manager, who played no direct role in the challenged decision.[211] Evidence of the general manager's comment may still be suffi-

209. The restriction on remedies is codified in Title VII. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2006).

210. *See supra* note 203 and accompanying text.

211. Courts recognize that persons without a direct role in or formal authority to make a decision may influence the decision. *See, e.g.*, Brewer v. Bd. of Tr. of the Univ. of Ill., 479 F.3d 908, 917 (7th Cir. 2007) ("we have held that where an employee without formal authority to materially alter the terms and conditions of a plaintiff's employment nonetheless uses her 'singular influence' over an employee who

cient to satisfy the plaintiff's burden, for at least two reasons: first, if there is evidence that Bill was aware of the comment, or a similar comment made by the general manager at another time, when he made the challenged decision, that is sufficient for a trier of fact to find that Bill was motivated to stereotype in order to please his supervisor; and second, the comment, whenever it was made, could lead to a finding that the employer, through its high-ranking officials, discounts the value of female EMTs and, therefore, does not hire them because they are female. Of course, the employer would have an opportunity to present evidence in an effort to show that the stereotype reflected in the comments did not affect the challenged decision or, even if it did, it would have made the same decision even absent the negative stereotype directed at female EMTs.

V. CONCLUSION

Laws passed in an attempt to deal with traditional, old-fashioned discrimination should be revisited and modified to reflect the current psychological understanding of discrimination. Even short of a legislative change, proof schemes developed by the courts need to be revisited and modified to reflect the current understanding. If either of these changes is made, organizations will be motivated to revise their efforts to prevent even unconscious discrimination and encourage their decisionmakers to make decisions based on individual assessments rather than taking short-cuts and basing decisions on an individual's group status.

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does have such power to harm the plaintiff for racial reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation of Title VII").