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UNIFYING ANTIDISCRIMINATION LAW THROUGH STEREOTYPE THEORY

by
Stephanie Bornstein[*]

Has litigation under Title VII of the Civil Rights Act of 1964 reached the limit of its utility in advancing workplace equality? After four decades of forward progress on antidiscrimination law in the courts, Supreme Court decisions in the last decade have signaled a retrenchment, disapproving of key theories scholars and advocates had pursued to address workplace discrimination in its modern, more subtle and structural forms. Yet sex and race inequality at work endure, particularly in pay and at the top of organizations.

Notably, while the Roberts Court majority appears skeptical that discrimination persists and resistant to recognizing the role of employers in continued inequality, one subset of discrimination cases has enjoyed relative success in the courts: sex discrimination cases relying on the legal theory of sex stereotyping. In particular, plaintiffs alleging that they were discriminated against at work based on the operation of sex stereotypes related to family caregiving responsibilities or transgender status have pushed federal appellate and district courts toward a contemporary understanding of the operation of bias. Despite this unusual success during an otherwise bleak period in antidiscrimination law, advances in caregiver and transgender discrimination lawsuits remain on the margins, siloed in their own category of litigation.

This Article argues that theoretical and doctrinal advances in sex stereotyping cases have broad application, with the potential to reinvigorate employment discrimination litigation under Title VII as a whole. The

[*] Assistant Professor of Law, University of Florida Levin College of Law. For their helpful comments and questions on presentations or drafts of this Article, my sincere thanks to: Catherine Albiston, Samuel Bagenstos, Jessica Clarke, Nancy Dowd, Heather Elliott, Michael Green, Stacy Hawkins, Laura Kessler, Nancy Levit, Shu-Yi Oei, Shalini Ray, Sharon Rush, Sandra Sperino, Amy Stein, Kerri Stone, Deborah Widiss, and Joan C. Williams. My thanks as well to the participants in the 2015 AALS Midyear Meeting on Next Generation Issues on Sex, Gender & the Law; the New Scholars Colloquia at the 2015 SEALS Annual Conference; the 2015 Annual Colloquium on Current Scholarship in Labor & Employment Law; the 2015 Southeastern Junior-Senior Scholars Workshop; and the New & Emerging Voices in Labor & Employment Law Workshop at the 2016 AALS Annual Conference. Thanks, too, to Madonna Snowden and Avery Le for their excellent research assistance.

Article suggests that precedent from pioneering sex discrimination cases can and should be applied to cases alleging discrimination on other bases, including race and national origin. It proposes a more coherent, unified approach to antidiscrimination law that capitalizes on recent courts' recognition of the operation of sex stereotypes at work. In an era in which the advancement of equality has stalled in both the workplace and the Supreme Court, a unified approach to Title VII litigation framed around stereotype theory offers an important path forward for antidiscrimination law.

INTRODUCTION

Has litigation under Title VII of the Civil Rights Act of 1964 reached the limit of its utility in advancing workplace equality? After four decades of forward progress in Supreme Court interpretations of the reach of Ti-

tle VII and similar statutes,[1] decisions during the Roberts Court era have signaled a regression.[2] The Court majority appears to have reached a high point of skepticism about the persistence of intentional sex and race discrimination and of resistance to holding employers responsible for their role in continued workplace inequality.[3] Where, in the past, legal theories that pushed the definition of unlawful discrimination to match modern manifestations of bias were met with some success,[4] Court decisions in the last decade indicate that such advancement has stalled.[5]

No two cases illustrate this trend better than 2009's *Ricci v. DeStefano*[6] and 2011's *Wal-Mart v. Dukes*[7]—decisions in which the Court limited the reach of key legal theories designed to redress more modern, "second

[1] *See infra* Part I.A.

[2] *See infra* Part I.B; *see, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (prohibiting a "mixed-motive" theory of proof for retaliation claims); Vance v. Ball State Univ., 133 S. Ct. 2434 (2013) (limiting who constitutes a "supervisor" for purposes of hostile work environment claims); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (strengthening the "ministerial exception" for employer liability under Title VII); Ricci v. DeStefano, 557 U.S. 557 (2009) (limiting employer efforts to avoid disparate impact claims); Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (prohibiting a "mixed motive" theory of proof under the Age Discrimination in Employment Act); AT&T Corp. v. Hulteen, 556 U.S. 701 (2009) (limiting time for bringing pregnancy discrimination claims); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (permitting mandatory arbitration of statutory discrimination claims); Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007) (limiting time for bringing pay discrimination claims, later abrogated by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5–7 (codified as 42 U.S.C. § 2000e (2012))). The Court has, however, refused to narrow certain pieces of Title VII doctrine related to religious discrimination, *see* Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015), pregnancy accommodation, *see* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015), and anti-retaliation protections, *see* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).

[3] *See infra* Part I.B; *see, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011) ("[L]eft to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."). The Roberts Court cases on affirmative action also bear out this new skepticism, as exemplified by the Chief Justice's notorious statement in opposition to race-based affirmative action that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[4] *See infra* Part I; *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing disparate impact theory); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (recognizing hostile work environment sexual harassment theory); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (recognizing mixed-motive liability and stereotype theory).

[5] *See infra* Part I.A.

[6] 557 U.S. 557.

[7] 131 S. Ct. 2541.

generation" discrimination.[8] For thirty years after Title VII's enactment in 1964, litigation efforts centered on enforcement to prohibit obvious, if not overt, discrimination and harassment. By the mid-1990s, however, workplace discrimination had become less explicit and more subtle, relational, and structural in nature.[9] In response, scholars and advocates breathed new life into Title VII by developing litigation theories that adapted to reach this more covert operation of bias, focusing on liability for employment decisions infected with implicit bias[10] and challenging directly workplace structures that appeared facially neutral but that had disparate effects by sex or race.[11] The use of implicit bias and disparate impact theories as a means of reaching more diffuse, entrenched discrimination gained momentum in the lower courts and in practice from the mid-1990s until the late-2000s, when both theories came before the Roberts Court. In 2009, in *Ricci v. DeStefano*, the Court limited the reach of the disparate impact theory by holding that an employer may not take efforts to remedy a workplace practice that has discriminatory effects on some without risking liability for intentional discrimination against others whom the practice favors.[12] Two years later, in *Wal-Mart v. Dukes*, the Court narrowly circumscribed the use of "social framework" evidence to establish employer liability for workplace practices that fail to prevent the operation of implicit bias and result in discrimination.[13] As a result of these decisions, the two most prominent theories that helped redress workplace discrimination in its increasingly subtle and structural forms have been—while not entirely proscribed—severely hobbled.

Yet employment inequality persists, particularly in pay and at the top of organizational hierarchies. While Title VII litigation radically trans-

[8] This term was coined by Columbia Law Professor Susan Sturm to describe how "[c]ognitive bias, structures of decisionmaking, and patterns of interaction . . . replaced deliberate racism and sexism as the frontier of . . . continued inequality." Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001). The trend of narrowing legal theories designed to remedy second generation discrimination was also reflected in the Court's 2009 and 2013 decisions limiting the availability of the mixed-motive theory of proof for age discrimination and retaliation claims. *See generally* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) (retaliation); Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (age).

[9] *See infra* Part I.A. *See generally* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–99 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199 (1995); Sturm, *supra* note 8, at 468–74.

[10] *See infra* Part II.B.2. *See generally* Krieger, *supra* note 9, at 1241–42.

[11] *See infra* Part II.B.1. *See generally* Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2006).

[12] Ricci v. DeStefano, 557 U.S. 557, 585 (2009).

[13] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011).

formed the ability of women and racial minorities to enter the workforce and to be protected from workplace harassment,[14] equal pay and equal access to advancement opportunities remain elusive, occupational segregation persists stubbornly, and race and sex diversity diminishes the higher you go up the chain of command at many organizations. Data from 2013 on the gender wage gap shows that women engaged in full-time year-round work earn only 78 cents to every dollar that white men earn—a figure that has remained stagnant since 2001.[15] For women of color, the data is worse: in 2013, Latinas earned only 54 cents and African-American women only 64 cents to the dollar.[16] Studies of diversity at the top of a variety of fields show that women and racial minorities are still drastically underrepresented in leadership. Despite making up nearly half of the U.S. workforce, women are only 8.1% of the country's top earners, 4.6% of CEOs in the Fortune 500, and 14 to 16% of corporate executive officers, law firm equity partners, and senior management in Silicon Valley.[17] Likewise, while racial minorities make up one-third of the U.S. workforce, only 4.2% of Fortune 500 CEOs and 5.6% of law firm equity partners are people of color.[18] Segregation among jobs and industries by sex and race appears as intractable as ever: recent studies identified that over 40% of women (or men) would have to change jobs for the U.S. workforce to be fully integrated by gender.[19]

Of course, data on inequality at work does not prove discrimination: Demographic realities, individual choices, and legitimate business decisions all likely contribute to continued workplace disparities by sex and

[14] *See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, AMERICAN EXPERIENCES VERSUS AMERICAN EXPECTATIONS (July 2015), http://www.eeoc.gov/eeoc/statistics/reports/american_experiences/index.cfm (documenting impact of Title VII from 1966 to 2013).

[15] *See* AM. ASS'N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 3 (2015).

[16] *Id.* at 11.

[17] *See* JUDITH WARNER, CTR. FOR AM. PROGRESS, THE WOMEN'S LEADERSHIP GAP: WOMEN'S LEADERSHIP BY THE NUMBERS 1–2 (2014).

[18] *See* CROSBY BURNS, KIMBERLY BARTON & SOPHIA KERBY, CTR. FOR AM. PROGRESS, THE STATE OF DIVERSITY IN TODAY'S WORKFORCE: AS OUR NATION BECOMES MORE DIVERSE SO TOO DOES OUR WORKFORCE 2, 5 (2012); *Despite Small Gains in the Representation of Women and Minorities Among Equity Partners, Broad Disparities Remain*, NALP BULL. (June 2015), http://www.nalp.org/0615research.

[19] *See* CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 5 (2011) (citations omitted); Youngjoo Cha, *Overwork and the Persistence of Gender Segregation in Occupations*, 27 GENDER & SOC'Y 158, 159 (2013); *see also* Darrick Hamilton, Algernon Austin & William Darity Jr., ECON. POLICY INST., *Whiter Jobs, Higher Wages: Occupational Segregation and the Lower Wages of Black Men* (Feb. 28, 2011), http://www.epi.org/files/page/-/BriefingPaper288.pdf; Derek Thompson, *The Workforce Is Even More Divided by Race Than You Think*, ATLANTIC MONTHLY (Nov. 6, 2013), http://www.theatlantic.com/business/archive/2013/11/the-workforce-is-even-more-divided-by-race-than-you-think/281175/.

race. But, as differences in workforce participation rates and educational achievement by sex and race diminish over time, the proportion of persistent inequality that may be attributable to discrimination—whether conscious or not—grows. In 2010, over one-quarter of all Bachelor's, Master's, and Doctorate degrees were earned by racial minorities, up from just over 20% a decade earlier.[20] In 2010, between 53 and 63% of all such degrees were earned by women, with women in every racial category earning more than half of all degrees conferred—up from between 47 and 60% a decade earlier.[21] Arguments that there are not enough qualified women and people of color in the pipeline to work in middle and upper management ring increasingly hollow.

Given this state of affairs in the Supreme Court and in the workplace, it may appear that antidiscrimination litigation under Title VII has run its course as a means of reaching entrenched bias at work. In contrast to the generally bleak picture of the state of antidiscrimination law over the past decade, however, one bright spot offers a way forward. In the same time period that the Supreme Court has restricted two key legal theories for challenging contemporary discrimination, one subset of employment discrimination cases has enjoyed relative success in the courts: sex discrimination lawsuits relying on the legal theory of stereotyping.[22] In particular, plaintiffs alleging that they were discriminated against at work based on the operation of sex stereotypes related to their family caregiving responsibilities or transgender status[23] have pushed federal district and appellate courts toward a modern understanding of the operation of bias in its more covert and structural forms. Yet despite the unusual success of the stereotyping approach during a period in which antidiscrimination law was otherwise narrowed by the Court,[24] advances

[20] *See Fast Facts: Degrees Conferred by Sex and Race*, NAT'L CTR. EDUC. STATISTICS (May 2012), http://nces.ed.gov/pubs2012/2012045.pdf.

[21] *See id.*

[22] By "success" here and throughout the Article, I mean success on a dispositive procedural motion, such as a motion to dismiss or for summary judgment. Because so few employment discrimination cases go to trial, the ability of a plaintiff to defeat a defendant's dispositive motion often proves determinative in the case (for example, by leading to settlement). The development of Title VII doctrine has occurred primarily through federal court decisions on such pleadings. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010).

[23] For conciseness and consistency, I use the term "transgender status" and "transgender discrimination" to refer to all cases alleging discrimination on the basis of gender identity or expression where a plaintiff's self-identity or presentation differs from assigned sex at birth (e.g., many plaintiffs are identified in their cases as "transsexual"). This does not, however, encompass the separate concept of discrimination based on "sexual orientation," which has been treated differently from gender identity under the law of Title VII by many federal courts. *See infra* note 182.

[24] *See infra* Part I.B.3.

in caregiver and transgender discrimination cases remain on the margins, generally regarded as their own category of litigation.

This Article argues that there is still room for progress toward greater workplace equality by drawing on novel litigation theories under Title VII. Doctrinal and theoretical advances in cutting-edge sex stereotyping cases have broad application that can reinvigorate employment discrimination litigation as a whole. The Article identifies how federal courts' understanding of sex stereotypes in the context of motherhood and gender identity demonstrate courts' ability to apply traditional employment discrimination doctrine in a more nuanced and contemporary way. If courts are able to perceive potential discrimination based on such stereotypes, this Article argues, they can and should apply this lens to all cases in which there is evidence of unlawful stereotyping, regardless of the protected classification. Courts' understanding of the operation of impermissible stereotypes at work is essential to the development of antidiscrimination law as a whole because very few employment discrimination cases ever get to a jury—a judge's decision on a motion to dismiss or for summary judgment makes or breaks most cases.[25] By identifying and analyzing court decisions in recent sex stereotyping litigation, the Article aims to construct a more coherent, contemporary approach to recognizing bias in all Title VII cases that can pave a way forward in the era of *Wal-Mart* and *Ricci*.[26]

Recent Supreme Court constraints on implicit bias and disparate impact theories have been in the context of cases seeking class-wide relief, whereas sex stereotyping theories have been successful mostly in cases seeking individual relief. Nevertheless, if courts can recognize how stereotypes operate to disadvantage individual transgender and caregiver plaintiffs at work, the Article argues, this insight can be extended to bolster both individual and class cases alleging similar patterns of stereotyping regardless of protected class. And arguably, the Supreme Court could act to curtail the sex stereotyping approach to Title VII litigation, as it has done with implicit bias and disparate impact theories. Yet, to date, the Court has not overturned expansive appellate court readings of stereotype theory,[27] which the Court itself created in its germinal 1989 case *Price Waterhouse v. Hopkins*.[28]

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[25] *See supra* note 22.

[26] This Article focuses on unification of legal theories across different protected classes under Title VII of the Civil Rights Act of 1964 and related federal statutes. Alignment with antidiscrimination standards under the constitutional law of Equal Protection is beyond its scope. For a discussion of points of "convergence" and "divergence" between Title VII and Equal Protection doctrine, see generally Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201 (2014).

[27] The Supreme Court has left undisturbed numerous federal circuit court cases in which plaintiffs successfully alleged caregiver or transgender discrimination using a sex stereotyping theory. *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011)

In Part I, the Article begins with a brief background on how antidiscrimination efforts have shifted over time, from redressing overt exclusion and harassment in its first three decades, to its second generation phase of remedying more subtle discrimination. Part I then identifies how litigation strategies for responding to second generation discrimination forked into three main paths. One path focused on using disparate impact and accommodation theories to directly challenge workplace structures that fostered discrimination. A second path used the field of implicit bias to broaden the concept of intentional discrimination under the theory of disparate treatment. As Part I explains, both paths now face significant roadblocks erected by recent Supreme Court decisions. Yet a third path developed in the context of sex discrimination cases that has yet to face similar hurdles: stereotype theory. Part I concludes by documenting the development of this parallel track of litigation which, while not entirely unimpeded, has largely withstood the Roberts Court era.

In Part II, the Article picks up this third path of antidiscrimination litigation using stereotype theory, with a focus on plaintiff successes in recent sex stereotyping cases. Part II articulates two theoretical and doctrinal advances from innovative areas of antidiscrimination law—caregiver or family responsibilities discrimination and transgender status discrimination—and argues that courts can and should apply these advances to antidiscrimination law across all protected classes. First, recent sex stereotyping cases have helped establish that an employee need not provide evidence of others outside of the employee's protected class who were treated better to prove intentional discrimination. An employer's adverse action in reliance on impermissible stereotypes may, itself, constitute unlawful discrimination.[29] Second, recent sex stereotyping cases have recast and broadened the types of evidence that may be persuasive in a discrimination case. What courts might once have discounted as mere "stray remarks" or not "direct evidence" of a discriminatory motive may now be reframed as stereotyping evidence under a stereotype theory of liability. These two concepts, of "comparators" and "stray remarks," are doctrinal relics of first generation discrimination law that persist to undermine many plaintiffs' legitimate second generation claims today. In

(transgender status discrimination); Chadwick v. WellPoint, Inc., 561 F.3d 38 (1st Cir. 2009) (caregiver discrimination); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (transgender status discrimination); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (caregiver discrimination).

[28] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); *see infra* Part I.B.3.

[29] *See infra* Part II.A; *see also, e.g.*, *Back*, 365 F.3d at 122 ("[S]tereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."); *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. Equal Emp. Opportunity Commission (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html [hereinafter *Enforcement Guidance*] ("[W]hile comparative evidence is often useful, it is not necessary to establish a violation.").

the context of caregiver and transgender discrimination, however, some federal courts have seen beyond these limitations.

In Part III, the Article turns to why and how stereotype theory has had a limited reach beyond the context of sex discrimination. It then constructs a universal approach to incorporate developments in this area to the rest of antidiscrimination law—first, by showing how unlawful stereotyping may go unrecognized in race discrimination cases, and then, by illustrating how stereotyping evidence may help to overcome recent constraints imposed on class-wide disparate impact and implicit bias theories by the Supreme Court.

Ultimately, the Article concludes, evolution in the subset of sex stereotyping cases during an otherwise grim period in the advancement of antidiscrimination law has yet to be integrated into mainstream thinking about second generation employment discrimination. With disparate impact and implicit bias theories now constrained by the Supreme Court, the stereotype frame offers plaintiffs a new bridge from first generation doctrine to remedying second generation discrimination. It also suggests a more coherent, modern approach to redressing continued inequality in the workplace that treats long-established social science on gender and racial bias equally—an approach that may prevent Title VII from becoming ossified before its work is complete.

I. THE FRACTURING OF ANTIDISCRIMINATION LAW

For the first three decades after Title VII was enacted in 1964, litigation under the statute made great strides in changing U.S. workplaces by rooting out overt discrimination and exclusion. By the mid-1990s, overt discrimination had declined dramatically, yet more subtle and structural bias remained. Since then, legal theories for pursuing a claim of discrimination have diverged, with plaintiffs following one or more separate paths. From the early 1990s until 2005, many federal courts were receptive to arguments based on the changing nature of bias, and modern legal theories for litigating second generation discrimination gained momentum.[30] In the last decade, however, two of the most promising paths to redress contemporary discrimination have been severely constrained by decisions of the Roberts Court.

A. The Road to Here: The Emergence of "Second Generation" Discrimination

When Title VII was enacted in 1964, it prohibited both overt discrimination in "terms, conditions, or privileges" of work and the adoption of any policies or practices that "deprive[d] any individual of employment opportunities" "because of" a protected classification ("race, color, reli-

[30] *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993); *Price Waterhouse*, 490 U.S. at 250.

gion, sex, or national origin").[31] In cases decided throughout the twenty years after the statute's enactment, the U.S. Supreme Court interpreted these two parallel enforcement provisions to provide the basis for two main causes of action for discrimination—disparate treatment and disparate impact.[32] Using a disparate treatment approach, plaintiffs must prove that the employer engaged in intentional discrimination against them, which plaintiffs can do by providing either direct or circumstantial evidence that the employer cannot rebut with a nondiscriminatory justification.[33] Alternatively, using a disparate impact theory, plaintiffs must prove that the employer adopted a policy or practice that appeared neutral on its face but that resulted in a disproportionately negative impact on members of a protected class, and that the employer's use of that policy is not justified by some "business necessity" that a less discriminatory policy could not also meet.[34] From the mid-1960s to the mid-1980s, cases alleging one or both of these two legal claims made significant headway in redressing discrimination and advancing the employment opportunities of women and racial and ethnic minorities.[35]

By the late 1980s, awareness of antidiscrimination laws had become widespread and workplaces had been opened up to more diverse workforces.[36] The manifestations of discriminatory bias moved from exclusion at the hiring gate to hostile treatment and exclusion from advancement opportunities within the workplace.[37] In particular, in the context of the protected class of sex, hostile treatment of female employees and attitudes that held women to sex role stereotypes led the Supreme Court to recognize two additional ways to prove sex discrimination. In 1986, in *Meritor Savings Bank v. Vinson,* the Court recognized that sexual harassment, including creating a hostile work environment that interferes with a female employee's ability to do her job, constitutes discrimination in the conditions of work—thus creating the harassment theory of proving disparate treatment.[38] Three years later, in the 1989 case *Price Waterhouse*

[31] 42 U.S.C. § 2000e-2(a) (2012).

[32] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[33] *See Hazelwood Sch. Dist.*, 433 U.S. at 305 n.9; *Teamsters*, 431 U.S. at 336; *McDonnell Douglas*, 411 U.S. at 802. The specific framework of proof depends on whether the case is brought as an individual disparate treatment case or by a class alleging that the employer engaged in a "pattern or practice" of intentional discrimination. *Compare McDonnell Douglas*, 411 U.S. at 802–04 *with Hazelwood Sch. Dist.*, 433 U.S. at 304.

[34] *See Griggs*, 401 U.S. at 431.

[35] *See 35 Years of Ensuring the Promise of Opportunity*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/history/35th/history/index.html.

[36] *See id.*

[37] Sturm, *supra* note 8, at 460.

[38] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 (1986).

v. Hopkins, the Court recognized that, where stereotypes of how a female employee should appear and behave as a woman played a role in an adverse employment decision against her, she could allege sex discrimination, thus creating the sex stereotype theory of proving disparate treatment.[39] Neither harassment nor stereotype theory created a new cause of action; instead, both presented new routes for proving disparate treatment that reflected the changing nature of employment discrimination more than two decades after the adoption of Title VII.[40]

Two years later, based in part on recognition of the concept in the *Price Waterhouse* decision, Congress amended Title VII in the Civil Rights Act of 1991 to allow an additional legal option of alleging a mixed-motive theory of disparate treatment.[41] Under a mixed-motive approach, a plaintiff can allege unlawful discrimination when a protected classification played a "motivating factor" in an adverse employment decision, even if it was not the only factor.[42] Bolstered by the additional theories of proof for harassment, stereotyping, and mixed-motives, disparate treatment and disparate impact claims continued to redress employment discrimination throughout the 1990s.[43]

Yet by the late 1990s and into the early 2000s, advances in workplace equality appeared to have stalled.[44] Disparities in employment equality for women and racial minorities continued to persist, particularly apparent in unequal compensation and the lack of diversity at the middle and top of organizations—disparities that continue today.[45] Despite the development of additional legal theories of proof, scholars and employee advocates began to identify that the operation of bias ran deeper, was more ingrained and entrenched in ways that existing theories of Title VII were still unable to reach. In an influential article published in 2001, Susan Sturm put a name to this phenomenon: "second generation" discrimination.[46]

Since then, numerous scholars have identified the features of second generation discrimination (also referred to as "structural" employment

[39] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[40] Also, neither hostile treatment nor stereotyping were always actionable: hostile treatment had to be based on a protected class and be severe or pervasive enough to interfere with work to constitute discrimination, *Meritor*, 477 U.S. at 64, 67, and protected class stereotypes had to actually play a role in an adverse employment decision to violate Title VII, *Price Waterhouse*, 490 U.S. at 250.

[41] Civil Rights Act of 1991, Pub. L. 102–166, S. 107, 105 Stat. 1071 (codified as 42 U.S.C. § 1981 (2012)).

[42] *Id.*

[43] *See 35 Years of Ensuring the Promise of Opportunity*, *supra* note 35.

[44] *See supra* notes 15–19.

[45] *Id.*

[46] Sturm, *supra* note 8, at 460.

discrimination);[47] virtually all employment discrimination claims today involve some second generation components.[48] Second generation discrimination involves bias that is more subtle, suppressed, and implicit—as opposed to explicit or recognized by those who hold it—which means it is often hidden or covert and harder to prove.[49] (For example, implicit biases about gender may affect how a manager perceives an employee's performance: the manager assesses an assertive male employee as a "leader," but an assertive female employee as "difficult" or "bossy.")[50] Second generation discrimination may also be diffuse and structural, embedded in a variety of workplace practices, which means that it is harder to pinpoint as discrete and may compound over time.[51] (Continuing with the example, based on the manager's assessment, the manager appoints the male employee as team leader to develop his potential and encourages the female employee to develop her collaboration skills. Based on this feedback, the male employee reaches for challenging assignments while the female employee spends significant time doing support work for the team.) Lastly, second generation discrimination may be relational, interactional, and contextual, meaning that it is fostered by workplace relationships and culture.[52] (In the example, when the male employee, having shown initiative as a team leader, gets selected for a plum assignment, the female employee picks up the slack so the team will succeed. When the opportunity for a promotion arises, if both employees have similar education and years at work, which is more likely to be judged better qualified for the promotion?)

These complexities make second generation discrimination difficult to litigate under statutory doctrine developed in the 1960s. In particular, as discussed in Part II, below, two outdated concepts developed through case law redressing first generation cases remain enmeshed in Title VII doctrine, posing hurdles to plaintiffs challenging modern discrimination: the "comparator requirement" that expects a similarly situated employee

[47] *See id.*

[48] *See, e.g.*, *id.* at 479; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2–3 (2006); Green, *Discrimination in Workplace Dynamics, supra* note 9, at 131; Sullivan, *Disparate Impact, supra* note 11, at 998–99.

[49] *See, e.g.*, Bagenstos, *The Structural Turn, supra* note 48, at 5–10; Krieger, *supra* note 9, at 1164–65, 1241.

[50] *See, e.g.*, Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOCIAL ISSUES 666–69 (2001); *Ban Bossy: Leadership Tips for Managers*, LeanIn.org & Girl Scouts of USA, http://banbossy.com/wp-content/themes/leanin/ui/microsite/ban-bossy/resources/Ban_Bossy_Leadership_Tips_for_managers.pdf?v=1&77f96d.

[51] *See, e.g.*, Bagenstos, *The Structural Turn, supra* note 48, at 12–13; Green, *Discrimination in Workplace Dynamics, supra* note 9, at 99; Sturm, *supra* note 8, at 468–69.

[52] *See, e.g.*, Green, *Discrimination in Workplace Dynamics, supra* note 9, at 92; Sturm, *supra* note 8, at 470–71.

outside the plaintiff's protected class who was treated better than the plaintiff,[53] and the "stray remarks" doctrine that discounts potentially useful evidence of stereotypical thinking where it is deemed to be too removed from the adverse employment action in question.[54]

What is more, despite the significant shift in how unlawful bias manifests itself in the workplace today, with one small exception,[55] Congress has made no amendment to Title VII since 1991. Thus, for Title VII to continue to be useful in advancing equality at work, modernization of the doctrine has had to occur through the interpretation of the law by the federal courts.

B. Forks and Roadblocks: Three Paths for Litigating Second Generation Discrimination

Over the past 15 years, scholars and employee advocates have worked to frame litigation under the existing doctrine of Title VII to reach bias in its modern forms. Three main paths for litigating second generation claims have emerged.[56] One path attacks the workplace practices that support second generation discrimination head on, using structural litigation theories including disparate impact and accommodation. A second path focuses on using disparate treatment theory to unmask and hold the employer accountable for its policies that allow the operation of unchecked implicit biases in the workplace. While both of these approaches have provided doctrinal advancements and been met with some success, in recent years, both have been constrained by decisions of the Roberts Court.[57] A third path focuses on how impermissible stereotypes factor into workplace decisions and cultures, resulting in unlawful dis-

[53] *See infra* Part II.A.1.

[54] *See infra* Part II.B.1.

[55] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–12, 123 Stat. 5–7 (codified as 42 U.S.C. § 2000e (2012)) (extending time period for filing pay discrimination complaints).

[56] Note that this Article focuses on litigation paths under Title VII, but much scholarship has been devoted to ways to reduce and redress second generation discrimination outside of the context of litigation—for example, through regulatory, employer-driven, tort, and corporate law approaches. *See, e.g.*, Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1420 (2014); Green, *Discrimination in Workplace Dynamics*, *supra* note 9, at 144–51; Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 903–04 (2007); Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1648 (2007); Sandra E. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 786 (2010); Sturm, *supra* note 8, at 459–65. In fact, Susan Sturm's germinal article suggested the limits of a litigation-focused approach. *See id.* at 475–78. Discussion of this scholarship is beyond the scope of this Article's focus on currently available paths of litigation.

[57] *See supra* note 2 and accompanying text.

crimination. This stereotyping approach has also advanced the law, and has not been similarly restricted by the Court. It has, however, had limited application beyond the protected classification of sex, which suggests the potential for its future expansion.

1. Structural Litigation and Disparate Impact Theory

One path for responding to second generation discrimination is to directly litigate the workplace structures that foster second generation discrimination. A decade ago, in separate works, Charles Sullivan and Samuel Bagenstos suggested this could be accomplished by using arguably more "structural" theories of litigation, including disparate impact claims, disparate treatment claims for denial of accommodation, and efforts at affirmative action.[58] The significant benefit of this approach is that it limits the need for a plaintiff to prove that an employer has acted with discriminatory intent—the most difficult part of litigating second generation claims, in which biases are often implicit.[59]

Indeed, decisions by the Roberts Court have borne out the partial success of this strategy. In addition to the main disparate treatment and disparate impact prohibitions described above,[60] Title VII includes two express accommodation requirements: for discrimination because of sex, that pregnant employees be treated "the same" as all other employees "similar in their ability or inability to work";[61] for religious discrimination, that an employer "reasonably accommodate . . . an employee's . . . religious observance or practice" unless it poses an "undue hardship" on the business.[62] In two decisions in its 2015 term, the Supreme Court interpreted these provisions at least partially in favor of employees seeking such accommodations.[63] To the extent that a denial of accommodation in either of these circumstances reflects second generation discrimination—for example, a work policy of denying routine accommodations to only pregnant workers based on implicit assumptions that work and pregnancy are incompatible—this approach provides some redress.[64]

[58] Bagenstos, *The Structural Turn, supra* note 48, at 16–18; Sullivan, *Disparate Impact, supra* note 11, at 984–996.

[59] *See* Bagenstos, *The Structural Turn, supra* note 48, at 44–45; Sullivan, *Disparate Impact, supra* note 11, at 937–38.

[60] *See supra* Part I.A.

[61] 42 U.S.C. § 2000e(k) (2012).

[62] 42 U.S.C. § 2000e(j) (2012).

[63] *See* Equal Emp't Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2034 (2015); Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1355 (2015); *see also* Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term,* 52 IDAHO L. REV. 825, 849–60 (2016).

[64] For a proposal to apply an accommodation approach to all sex and gender discrimination cases, see Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014).

Yet the more broad-reaching theory of disparate impact and related efforts at affirmative action have not fared so well. To begin with, as Sullivan, Bagenstos, and others acknowledge, the disparate impact framework generally appeals less to plaintiffs because it provides no right to a jury trial and limited remedies (compensatory and punitive damages are only available for intentional discrimination under Title VII), and because the employer has a broad affirmative defense where any policy that results in a disparate impact serves a legitimate "business necessity."[65] That said, plaintiffs have successfully litigated disparate impact claims that challenge workplace structures that may foster second generation discrimination—for example, the practice of using subjective decision-making for promotions[66] and policies limiting the use of sick days that disadvantage family caregivers.[67]

More problematic is the Roberts Court's 2009 decision in *Ricci v. DeStefano* circumscribing the reach of disparate impact and limiting its use to accomplish any sort of affirmative effort toward workplace equality.[68] In *Ricci*, the Court held that a fire department with a long history of racial discrimination in hiring went too far when it threw out the results of an employment test that showed a significant disparate impact on African-American applicants.[69] When white applicants sued to force the department to reinstate the test results, the Court majority perceived the fire department's actions as disparate treatment against the white applicants.[70] The Court created a new, heightened standard within disparate impact analysis, forcing an employer to, in effect, prove that its policy or practice created a disparate impact before the employer can take any such affirmative measures.[71] With this, the Court majority hamstrung the reach of disparate impact, while evincing its general hostility toward the theory except as a way to expose or "smoke out" hidden intentional discrimination.[72]

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[65] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); Bagenstos, *The Structural Turn, supra* note 48, at 21–24; Sullivan, *Disparate Impact, supra* note 11, at 968, 993. *See generally* Michael Selmi, *Was the Disparate Impact Theory a Mistake?,* 53 UCLA L. REV. 701 (2006) (describing disparate impact's limitations).

[66] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988).

[67] *See* Abraham v. Graphic Arts Int'l, 660 F.2d 811, 819 (D.C. Cir. 1981) (rule prohibiting leave in excess of ten days as applied to pregnant woman); Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282, 284 (E.D. Tex. 1996) (policy that employees could not use sick days to care for sick children).

[68] Ricci v. DeStefano, 557 U.S. 557, 563 (2009).

[69] *Id.* at 585.

[70] *Id.* at 593.

[71] *Id.* at 584.

[72] *Id.* at 595 (Scalia, J. concurring) ("It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment. . . . But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a

Worth noting, however, is that in the 2015 case *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[73] the Court held, by reference to Title VII, that disparate impact claims were available under the analogous Federal Housing Act. This decision indicates that, despite constraints placed on disparate impact in *Ricci* and warnings by Justice Scalia of a coming conflict with Equal Protection law,[74] disparate impact theory survives another day. Yet, in writing for the *Texas Department of Housing* Court majority, Justice Kennedy was careful to both avoid constitutional matters and continue to read disparate impact narrowly, warning that disparate impact remedies should "strive to . . . eliminate racial disparities through race-neutral means" and be mindful not to "perpetuate race-based considerations rather than move beyond them."[75] Thus, while not entirely lost, the disparate impact path for remedying second generation discrimination has been narrowed.[76]

2. Implicit Bias and Social Framework Theory

The second path for responding to second generation discrimination at work is to allege disparate treatment under Title VII and use the social science of implicit bias to create an inference of discriminatory intent. Linda Krieger first articulated this theory in a path-breaking article published in 1995.[77] Since then, numerous scholars in both law and social science have contributed to its development and popularization.[78] Under

fashion. . . ." (citations omitted)).

[73] 135 S. Ct. 2507, 2521 (2015).

[74] *Ricci,* 557 U.S. at 595–96 (Scalia, J. concurring).

[75] *Tex. Dep't of Hous.,* 135 S. Ct. at 2524.

[76] *See generally* Deborah A. Widiss, *Griggs at Midlife,* 113 MICH. L. REV. 993 (2015) (discussing disparate impact's continued viability); Richard A. Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact after* Ricci *and* Inclusive Communities*, in* Title VII of the Civil Rights Act After 50 Years: Proceedings of the New York University 67th Annual Conference on Labor, 295–318 (2015) (same); Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities*,* 101 CORNELL L. REV. (forthcoming 2016) (same).

[77] *See* Krieger, *supra* note 9, at 1164–65.

[78] *See, e.g.*, Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Green, *Discrimination in Workplace Dynamics, supra* note 9; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1003 n.21 (2006) (cataloguing the literature on implicit bias); Ann C. McGinley, ¡Viva La

this approach, evidence on the operation of implicit biases—that is, biases and associations that affect our perceptions and judgments without our conscious awareness—is offered to create an inference of intentional discrimination when workplace decisions have discriminatory results, but the decision makers do not believe they harbor animus.[79] Implicit bias evidence has been used in individual cases and, more commonly, in combination with what is known as "social framework" evidence on the types of organizational structures that are more likely to activate decision makers' implicit biases, to allege class-wide pattern or practice discrimination.[80] Where an employer relies on work structures known to activate unlawful implicit biases—for example, unchecked subjective decision-making for promotions—and there are statistical disparities by protected class in that workforce, this theory argues, the employer should be held liable for intentional discrimination for failing to prevent or correct the operation of implicit bias.[81] The significant appeal of this approach is that it actually addresses part of the underlying cause of second generation discrimination. A number of federal courts have agreed and upheld plaintiffs' cases using implicit bias to allege discrimination on the basis of sex or race.[82]

Evolución!*: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481 (2002); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001). *But see, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999); Amy L. Wax, *The Discriminating Mind: Define It, Prove It,* 40 CONN. L. REV. 979 (2008).

[79] *See* Krieger, *supra* note 9, at 1179–80; Krieger & Fiske, *supra* note 78, at 1004.

[80] *See* Krieger & Fiske, *supra* note 78, at 1005.

[81] *See id.* at 1052–53.

[82] *See, e.g.,* Thomas v. Eastman Kodak Co., 183 F.3d 38, 59 (1st Cir. 1999) ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus") (race discrimination); *see also* Burns v. Johnson, 2016 WL 3675157, *7 (1st Cir. July 11, 2016) ("As this circuit has repeatedly held, stereotyping, cognitive bias, and certain other 'more subtle cognitive phenomena which can skew perception and judgments' also fall within the ambit of Title VII's prohibition" (quoting Thomas, 183 F.3d at 61))(sex discrimination); Pitre v. W. Elec. Co., 843 F.2d 1262, 1265, 1272 (10th Cir. 1988) (sex discrimination); Equal Emp't Opportunity Comm'n v. Inland Marine Indust., 729 F.2d 1229, 1236 (9th Cir. 1984) (race discrimination); Dow v. Donovan, 150 F. Supp. 2d, 249, 263–64 (D. Mass. 2001) (sex discrimination); Kimble v. Wis. Dep't of Workforce Dev., 690 F.Supp.2d 765, 775–78 (E.D. Wis. 2010) (race discrimination). *But see, e.g.,* Tucker v. Ga. Dep't of Pub. Safety, 2009 WL 2135807, *6 (S.D. Ga. 2009) ("At least in this Circuit, a 'subtle bias' claim based on subconscious cognitive stereotypes is not tenable as a disparate treatment claim"). Courts have also recognized the operation of age-related stereotypes in cases alleging disparate treatment under the Age Discrimination in Employment Act, 29 U.S.C. § 621–34. *See, e.g.,* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610–11 (1993); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) (citing Synock v. Milwaukee

Yet despite initial success, this approach now faces an uphill battle. After growing in popularity and acceptance, in both practice and the courts, the social framework piece of the implicit bias theory has suffered a steady backlash from a small group of academics who oppose it, including the coiners of the term "social frameworks."[83] An academic backlash in and of itself may pose no threat to a legal theory, but federal courts—including the U.S. Supreme Court—have taken notice.[84] In its 2011 decision in *Wal-Mart v. Dukes*, the Court rejected certification of a nationwide class of plaintiffs alleging sex discrimination in pay and promotion resulting from widespread unchecked biased subjective decision making.[85] While the *Wal-Mart* decision focused on class certification only, in deciding whether the plaintiff class met the test for "commonality" under Federal Rule of Civil Procedure 23, the Court took a swipe at the implicit bias social framework theory more generally. The Court rejected the plaintiffs' expert social framework evidence, noting that because the expert could not specify what *percentage* of decisions at the company were infected by implicit bias, the testimony "[did] nothing to advance [the plaintiffs'] case" and the Court could "safely disregard" it.[86] Ultimately, the Court viewed the case as lacking the commonality necessary to support class certification because it sought to aggregate the harms of "literally millions of employment decisions at once . . . [w]ithout some glue holding the alleged *reasons* for all those decisions together."[87] In a symposium on the future of systemic disparate treatment in the wake of the *Wal-Mart* decision, Michael Selmi, Noah Zatz, and Tristin Green, in separate pieces, each identified the challenge moving forward as identifying a way to hold the employer *entity* liable for intentional discrimination based on individual employment decisions infected with implicit bias.[88] To succeed, Selmi and Zatz suggested, future cases would need greater "connective tissue" or a more "coherent narrative" of discrimination for plaintiffs to prevail.[89]

Boiler Mfg. Co., 665 F.2d 149, 155 (7th Cir. 1981)); Rand v. New Hampton Sch., 2000 U.S. Dist. LEXIS 6188, *15 (D.N.H. Apr. 24, 2000).

[83] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 n.8 (2011); *see* Mitchell & Tetlock, *supra* note 78, at 1055; John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715 (2008).

[84] *Wal-Mart*, 131 S. Ct. at 2553 n.8.

[85] *Id.* at 2550–61.

[86] *Id.* at 2554.

[87] *Id.* at 2552.

[88] Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011); Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After* Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 477, 481 (2011); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 388 (2011).

[89] Selmi, *Theorizing*, supra note 88, at 481; Zatz, *supra* note 88, at 388.

Yet also worth noting is the uniqueness of the *Wal-Mart* case: the case came before the Court on class certification, not a substantive decision on the merits, and it was the largest class action ever attempted, alleging a pattern or practice of discrimination across a massive nationwide company affecting 1.5 million class members.[90] This means that plaintiffs can, and do, continue to make use of implicit bias evidence to help create an inference of discrimination in cases that can be distinguished from the behemoth *Wal-Mart* case—for example, where fewer managers are responsible for discriminatory decisions shaped by the employer entity.[91] Cases relying on this theory of proof, however, likely need more now; this once-promising path for remedying second generation discrimination has been seriously constrained.

3. Stereotype Theory

The third path for litigating modern forms of employment discrimination is to allege disparate treatment under a stereotype theory, by arguing that an adverse employment decision was made because of the operation of stereotypes[92] associated with a protected class. The legal theory of sex stereotyping as a form of discrimination originated with early Equal Protection doctrine in the context of constitutional law.[93] In a series of cases conceived of and litigated by Ruth Bader Ginsburg in her role as the head of the ACLU Women's Rights Project during the 1970s, the Supreme Court held that, where state or federal law treated men and women differently based on sex stereotypes, such laws violated the Constitution's guarantee of Equal Protection.[94] Through these cases, the Court recognized that differential treatment based on assumptions about how people will or should behave because of their sex—for example, laws that entitled women, but not men, to a caregiver tax credit and presumed that

[90] *See Wal-Mart*, 131 S. Ct. at 2547.

[91] *See, e.g.*, Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 520–21 (N.D. Cal. 2012); Chen-Oster v. Goldman, Sachs & Co., No. 1:10-cv-06950-LBS-JCF, 2012 WL 2912741, at *1–4 (S.D.N.Y. July 17, 2012); *see also supra* Part.III.C.1.

[92] The term "stereotype" has been attributed to Walter Lippman, who, in 1922, used print-setting terminology as an analogy to describe fixed "pictures in our heads." Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 658 (2013) (citing WALTER LIPPMANN, PUBLIC OPINION 3, 89–90 (1922)). The term was more precisely defined for the purposes of social psychology in 1954 by Gordon Allport: "Whether favorable or unfavorable, a stereotype is an exaggerated belief associated with a category. Its function is to justify (rationalize) our conduct in relation to that category." GORDON W. ALLPORT, THE NATURE OF PREJUDICE 191 (1954).

[93] *See* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1306–09 (2012); *see also* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 120 (2010); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1348–52 (2012).

[94] *See* Bornstein, *supra* note 93, at 1306–09.

men, not women, should serve as estate administrators—constituted unconstitutional sex discrimination.[95]

While references to stereotypes appeared in Title VII cases contemporaneously with these developments under Equal Protection law in the 1970s,[96] a sex stereotyping theory of liability under Title VII first appeared in the 1989 Supreme Court case *Price Waterhouse v. Hopkins*.[97] When plaintiff Ann Hopkins, an outstanding employee who was denied a promotion to partner, alleged that the denial was motivated at least in part due to her failure to conform to stereotypes about how she should appear and behave because she was a woman, the Supreme Court agreed.[98] The Court found evidence that the decision makers criticized her for being too "macho" and "masculine," and suggested that, to improve her chances at partnership, she should appear and behave more "femininely," constituted evidence of sex stereotyping to support a claim of sex discrimination.[99] "[I]n forbidding employers to discriminate against individuals because of their sex," the Court held, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[100] Yet merely holding or even expressing stereotypical beliefs in the workplace did not, alone, violate Title VII, the Court noted.[101] To be actionable, a plaintiff must show that the employer "actually relied on her gender in making its decision," which Hopkins had proven by showing that assessment of her work performance was impermissibly influenced by her failure to conform to sex stereotype.[102]

So defined, stereotype theory is a way to frame disparate treatment that can reach second generation discrimination by exposing how workplace structures rely on stereotypes associated with protected class status to disadvantage members of that class. In this way, the legal theory of stereotyping overlaps with, but is distinct from, implicit bias social framework theory. Implicit or cognitive bias is a broad social scientific concept identifying and documenting how past experiences or opinions shape a person's current thought processes without the person's conscious awareness.[103] It encompasses multiple aspects and sources of bias, of

[95] *See* Bornstein, *supra* note 93, at 1302–06 (discussing Reed v. Reed, 404 U.S. 71 (1971) and Moritz v. C.I.R., 469 F.2d. 466 (10th Cir. 1972)).

[96] *See* Bernstein, *supra* note 92, at 681–82 (citing Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

[97] 490 U.S. 228, 250–55 (1989); *see supra* Part I.A.

[98] *Price Waterhouse*, 490 U.S. at 235, 251.

[99] *Id.* at 235.

[100] *Id.* at 251 (citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978); quoting *Sprogis,* 444 F.2d at 1198).

[101] *Id.*

[102] *Id.*; *see also* Bernstein, *supra* note 92, at 682–83.

[103] *See, e.g.,* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition:*

which stereotypes are just one.[104] Where unrecognized by the holder, stereotypes are a subset of the larger concept of implicit bias; but stereotyping may also be closer to the consciousness of the holder, who believes it to be benign.[105] Thus, while stereotyping *evidence* may be relevant to both theories for litigating discrimination under Title VII, their framing of such evidence varies. Social framework theory posits that, where workplace statistics show discrimination and workplace policies are likely to activate implicit bias, an employer entity intentionally discriminates by failing to prevent or correct for the implicit biases of its individual decision makers.[106] Stereotype theory posits, similarly, that an employer entity is liable for individual decisions infected by unlawful stereotypes, whether implicitly or more consciously; but it also exposes how workplaces are designed around norms and cultures that favor certain protected classes.[107] Implicit bias and social framework concepts most commonly arise in class cases, while stereotyping most commonly arises in individual cases. But, as discussed in Part III, below, stereotype theory may offer a framing that bolsters class cases alleged under class-based implicit bias disparate treatment and disparate impact theories.[108]

Attitudes, Self-Esteem, and Stereotypes, 102 PSYCHOL. REV. 4, 4–6 (1995). A general discussion of implicit or cognitive bias is beyond the scope of this Article. For more on this topic, see the sources listed *supra* note 78.

[104] *See* Greenwald & Banaji, *supra* note 103, at 4–6 (identifying and discussing three key categories of implicit cognition: "attitudes, self-esteem, and stereotypes"); Kang, et al., *supra* note 78, at 1132–35 (describing the difference between explicit, concealed, and implicit attitudes and stereotypes).

[105] *See* Kang, et al., *supra* note 78, at 1132–35; Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 978–79 (2014) ("As may be apparent, [implicit bias] theories are also closely related to the concept of stereotyping; indeed, stereotyping likely explains at least some significant portion of the IAT [Implicit Association Test] results. There is extensive literature going back decades on stereotyping, and there are different forms, some more innocuous than others. At least in one respect stereotyping is an overbroad group judgment applied to individuals, and today it seems to have its strongest effect as applied to gender where stereotypes abound."); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 442 (2003) ("[C]ognitive bias is a generic term, which includes many situations that involve stereotyping. Surely commentators cannot mean that stereotyping should not give rise to liability: the Supreme Court established the relevance of stereotyping evidence in glass ceiling cases in 1989, and in maternal wall cases in 2003" (citations omitted)).

[106] *See, e.g.*, Green, *A Structural Approach*, *supra* note 56, at 855.

[107] *See, e.g.*, Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1338–39 (2008) ("When a workplace is designed around masculine norms, gender stereotypes arise in everyday workplace interactions: . . . women can and do successfully litigate sex discrimination by using the stereotypes that arise in everyday interactions as evidence of gender bias.").

[108] *See infra* Part III.C.

Since *Price Waterhouse*, the use of stereotyping to allege disparate treatment under Title VII has gained prominence, most successfully in second generation cases alleging sex discrimination.[109] Noting its rise, legal scholars tracing the development of the sex stereotype theory have attempted to define its contours.[110] Anita Bernstein has suggested that U.S. law finds stereotyping unlawful where stereotypes operate as a constraint on individual freedom.[111] Thus, while stereotyping is "a technology of actionable discrimination" and "a mode by which injustice gains effect," the law would benefit from clarity that stereotyping is unlawful only where it constrains individuals.[112] Kerri Stone has described stereotyping doctrine as lacking in definition and uniformity, leading to disparate results in the many cases citing to *Price Waterhouse*.[113] To remedy this lack of precision, Stone suggests that courts determine if a stereotype is "in play" ("voiced or somehow acted upon" as opposed to "offhand") and, if so, if there is a "sufficient nexus" between that stereotype and the adverse employment action.[114] And, despite its expansion of the protected class of "sex" to include gender identity (and possibly sexual orientation), Kimberly Yuracko has argued that stereotype theory has failed to live up to its transformative promise of sex neutrality and freedom from gender constraints at work.[115] Instead, Yuracko posits, stereotype theory has served primarily as a burden-shifting mechanism that, for a plaintiff to use successfully, risks re-inscribing gender differences.[116]

Indeed, the reach of the stereotype theory has not been universal—most notably, as Yuracko has documented, in its inability to prohibit

[109] *See* Bernstein, *supra* note 92, at 681–84, 689 (describing "the rise of stereotyping as a strong legal claim post-*Price Waterhouse*, in an era when plaintiffs fared worse elsewhere in employment law"); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 656 (2011).

[110] *See* Bernstein, *supra* note 92; Stone, *Clarifying Stereotyping*, *supra* note 109; Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757 (2013).

[111] *See* Bernstein, *supra* note 92, at 671.

[112] *Id.* at 687, 715–21.

[113] Stone, *Clarifying Stereotyping*, *supra* note 109, at 594, 621.

[114] *Id.* at 634–56.

[115] *See* Yuracko, *Soul of a Woman*, *supra* note 110, at 758–62, 770–71. For further discussion of the application of sex stereotype theory to cases alleging sexual orientation discrimination, see generally, for example, Zachary R. Herz, Price's *Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014); Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of* Price Waterhouse v. Hopkins*, and the Prospect of ENDA*, 66 STAN. L. REV. 1333 (2014); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining 'Because of Sex' to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL L. REV. 487 (2011); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination,* 43 U. MICH. J.L. REFORM 713 (2010). *But see infra* note 182.

[116] *See id.* at 786–87.

physical assimilation demands, like sex-differentiated dress and grooming codes.[117] Yet despite its variation and limitations, the potential of using stereotype theory as a framing device to help plaintiffs prove many types of second generation discrimination remains largely undiminished. Notably, in *Price Waterhouse*, the Supreme Court did not limit the application of stereotyping evidence to a particular protected class, yet stereotype theory has been used primarily to allege discrimination on the basis of sex.[118] And, unlike both disparate impact theory and implicit bias social framework theory, the U.S. Supreme Court has not weighed in to limit the stereotype path, despite the fact that several appellate courts have adapted and expanded its *Price Waterhouse* decision in significant new ways.[119] Over the past decade, during the same time period in which the Roberts Court narrowed disparate impact and implicit bias theories (and employment discrimination protections overall),[120] innovative discrimination cases alleging a sex stereotyping theory have gained success in federal district and appellate courts, suggesting a way forward for all modern claims of discrimination.

II. THE UNIFYING LESSONS OF SEX STEREOTYPING CASES

The unusual success of cases alleging sex stereotyping in the last decade, during a period in which other popular theories for litigating second generation discrimination were limited by the Supreme Court, provides an opportunity for reflection. What about sex stereotyping cases led to plaintiffs' successes? Indeed, such cases may be unique in that they involve more marginalized groups within a protected class for whom stereotyping evidence is still often surprisingly open.[121] This overt treatment of plaintiffs harkens back to the first generation of antidiscrimination lawsuits.

Yet caregiver and transgender discrimination cases also push the boundaries of what constitutes discrimination "because of sex" in new

[117] *See id.* at 788–94; Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?,* 104 NW. U. L. REV. 1–19 (2010); *see also, e.g.,* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006).

[118] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("By focusing on Hopkins' specific proof, . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision"); *see also infra* Part III.A.

[119] *See supra* note 27.

[120] *See supra* note 2 and accompanying text.

[121] For example, one employer in a sex stereotyping case told a transgender plaintiff that it was "inappropriate," "unsettling," and "unnatural" for the plaintiff, born biologically male, to present as a woman. Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011). Another employer told a visibly pregnant woman, "I was going to put you in charge of that office, but look at you now." Moore v. Ala. State Univ., 980 F. Supp. 426, 431 (M.D. Ala. 1997).

and contemporary ways—making them a sort of bridge between first and second generation forms of discrimination. While the stereotyping evidence may be easier to spot in such cases, the development of the legal framework *applied* to this evidence is decidedly modern—and translatable to cases alleging discrimination on other protected bases.

Two developments in the law stand out: (1) a route for creating an inference of discrimination without "comparator" evidence, and (2) a way to include, as stereotyping evidence, evidence that might otherwise be discounted as "stray remarks." To date, these advances have not been broadly applied to employment discrimination law as a whole. This is a mistake, this Part argues: the social science on bias should be recognized similarly, regardless of protected class. Sex stereotyping cases provide valuable insights into the operation of bias in its modern forms that can provide coherence and continued relevance to all litigation under Title VII.

A. A Bridge from Comparators to Comparisons

First generation case law suggested that to prove intentional discrimination, an employee plaintiff must point to a similarly situated coworker outside of the plaintiff's protected class (i.e., of a different race, sex, national origin) who was treated better than the plaintiff. Over time, such "comparator" evidence became expected and even required by some federal courts, posing a challenge for plaintiffs alleging second generation discrimination, particularly in an era of occupational segregation.[122] Yet through a series of recent sex stereotyping decisions, the so-called comparator "requirement" has evolved to allow plaintiffs with stereotyping evidence to create an inference of discrimination even when they lack comparators.

1. The "Comparator Requirement"

Shortly after the enactment of Title VII, in the 1973 case *McDonnell Douglas Corp. v. Green*, the U.S. Supreme Court set out its now well-known three-stage burden-shifting framework for proving a circumstantial case of intentional employment discrimination.[123] The employee plaintiff must first establish a rebuttable presumption of discrimination by making out a four-pronged prima facie case; the burden then shifts in the second stage to the employer defendant to offer a legitimate nondiscriminatory reason for the adverse action it took against the plaintiff; and, in the third stage, the burden shifts back to the plaintiff to prove that the defendant's proffered reason is merely a pretext for discrimination.[124]

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[122] *See infra* notes 130–34 and accompanying text.

[123] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[124] *Id.* at 802–04.

In illustrating how to meet this framework, the Court suggested that comparative evidence could be relevant at both the first and third stages. In the first stage, to prove his prima facie case of race discrimination in hiring, the plaintiff must show not only that he (1) was a member of a protected class (here, an African-American), (2) applied and was qualified for the position, and (3) was not hired, but also that (4) the job remained open to applicants *with similar qualifications*.[125] And in the third stage of the burden-shifting framework, comparative evidence could help prove pretext. Where the defendant in *McDonnell Douglas* had cited the plaintiff's civil rights protests against it as its legitimate nondiscriminatory reason for not hiring the plaintiff, the Court explained that "evidence that white employees involved in acts . . . of comparable seriousness . . . were nevertheless retained or rehired" would be "[e]specially relevant" to proving pretext.[126]

While suggesting the value of comparative evidence, the Court cautioned, in a footnote, that because facts vary in discrimination cases, the formulation of the four prongs of the prima facie case "is not necessarily applicable in every respect to differing factual situations."[127] It reiterated this point several years later in *Furnco Construction Corp. v. Waters*, noting that the proof described in *McDonnell Douglas* "was not intended to be an inflexible rule," but rather to establish that, in the prima facie stage, the plaintiff bears the burden of creating an inference that the defendant's actions were based on discrimination.[128] The Supreme Court also cited comparative proof in the 1976 case of *McDonald v. Santa Fe Trail Transportation Co.*: while looking to whether an employee outside of the protected class was treated better than the plaintiff when both had engaged in workplace misconduct of "comparable seriousness," the Court noted that an inference of discrimination did *not* require "precise equivalence in culpability."[129]

Despite the Supreme Court's caveats, over the next three decades, lower federal courts interpreted the role of comparative evidence to develop what is now known as the "comparator requirement."[130] In a num-

[125] *Id.*

[126] *Id.* at 804.

[127] *Id.* at 802 n.13.

[128] Furnco Const. Corp. v. Waters, 438 U.S. 567, 575–76 (1978) ("[A] Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'" (citing Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977))).

[129] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976).

[130] *See* DIANNE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 111–13 (8th ed. 2010); Bornstein, *supra* note 93, at 1327–33, 1338–39; Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745 (2011); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated*

ber of federal courts, a plaintiff may only succeed in proving the pretext stage of an employment discrimination case by providing evidence that a coworker from outside of the relevant protected class (a "comparator") was treated better—for example, that a woman alleging that she was denied a promotion because of sex discrimination show that the promotion went to a man, or that a Latino alleging national origin discrimination prevented his hire show that a white candidate got the job instead.[131] In several federal courts, this comparator requirement comes even earlier, as a necessary component for a plaintiff to meet the fourth prong of his first stage prima facie case.[132]

Moreover, in jurisdictions that require comparator evidence, the mandate that a comparator be "similarly situated" has also proved limiting to plaintiffs. Court interpretations vary as to what makes a given comparator *similar enough* to the plaintiff to infer discrimination based on the difference in the parties' protected class status.[133] Yet some courts require the plaintiff be "nearly identical" to the comparator before the plaintiff will be entitled to an inference of discrimination.[134]

To be sure, other federal courts have properly understood that comparators are one, but not the only, way for a plaintiff to create an inference of discrimination—the Supreme Court's ultimate purpose in creating the plaintiff's prima facie case.[135] Yet for discrimination plaintiffs in those courts that adhere to the comparator requirement, the ability to provide a convincing comparator can often be determinative.[136]

The comparator requirement is an outdated remnant of first generation discrimination doctrine that fails to recognize how bias operates in modern workplaces, thus unnecessarily curbing the ability of Title VII to

Concept in Employment Discrimination Law, 67 MO. L. REV. 831, 839 (2002); Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 203 (2009); Williams & Bornstein, *supra* note 107, at 1350–52.

[131] *See* AVERY ET AL., *supra* note 130, at 111–13; Goldberg, *supra* note 130, at 747 n.49 (citing cases in the 2d, 6th, and 8th Circuits); Sullivan, *The Phoenix, supra* note 130, at 194, 208 (as cited in Goldberg).

[132] AVERY ET AL., *supra* note 130, at 111–12; Goldberg, *supra* note 130, at 747 n.48 (citing cases in the 5th, 6th, 7th, 8th, and 11th Circuits).

[133] Avery et al., *supra* note 130, at 112–13.

[134] *Id.* at 112–13 (citing Perez v Tex. Dep't of Crim. Justice, 395 F.3d 206, 213 (5th Cir. 2004)).

[135] *Id.*

[136] *See, e.g.*, Goldberg, *supra* note 130, at 750 ("In much of discrimination law . . . comparators have taken on an importance beyond their service as a potentially useful heuristic for seeing discrimination. They constitute, to many courts, a threshold requirement of a discrimination claim and, in that sense, part of discrimination's very definition. On this view, discrimination occurs only when an actor has differentiated between two groups of people because of a protected trait, which means that the absence of a comparator signals the absence of discrimination." (footnote omitted)).

redress second generation discrimination.[137] Modern scientific understandings of stereotyping tell us that unlawful biases based on a person's sex, race, or national origin may play a role in employment decision regardless of how the decision maker treats other employees.[138] An example of this phenomenon is the success of a member of a protected class who is perceived to be, in the words of Devon Carbado and Mitu Gulati, "racially palatable" ("good black") rather than "racially salient" ("too black").[139] If one African-American employee whose appearance or manner seems more "palatable" to the white working culture of the employer receives a promotion, that should not bar the discrimination claim of another African-American employee whose race is more "salient" (i.e., "too black"). If one employee is disadvantaged by racial stereotypes, that is discriminatory, even if others are not.

The comparator requirement also poses a particular problem to redressing unlawful discrimination in an economy marked by steep occupational segregation. A plaintiff who works in a heavily segregated occupation (for example, a dental hygienist who believes she experienced sex discrimination) may not be able to provide comparator evidence of someone outside of the protected class who was treated better than she (in the example, a man) because none exists (in 2015, 96.4% of dental hygienists were women).[140] Yet even in an all-female work environment, one female employee can experience sex discrimination when she is penalized in relation to gender stereotypes when others are not—for example, if she is perceived as too feminine or nice or, conversely, too masculine or aggressive, to be promoted.

2. Caregiver Discrimination Without Comparators

In a series of cases in which plaintiffs alleged that they were discriminated against on the basis of their family caregiving responsibilities, a number of courts have exposed the fallacy of the comparator require-

[137] *See, e.g.*, *id.* at 753–72 (detailing the many problems that requiring a comparator poses for both first and second generation discrimination cases).

[138] *See, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 206–44 (1977) (discussing "tokenism"); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 12 J. CONTEMP. LEGAL ISSUES 701, 719–28 (2001) (discussing intra-group differences and "identity performance"); *see also, e.g.*, Chadwick v. WellPoint, Inc., 561 F.3d 38, 42 n.4 (1st Cir. 2009) ("[D]iscrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group" (citing Connecticut v. Teal, 457 U.S. 440, 453–54 (1982), Brown v. Henderson, 257 F.3d 246, 252 (2d Cir.2001)).

[139] *See generally* DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA 1–20 (2013) (describing and documenting the idea of racial performance and "Working Identity").

[140] BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANN. AVERAGES tbl.11 (2015), http://www.bls.gov/cps/cpsaat11.pdf. (Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity).

ment, holding clearly that a plaintiff alleging sex stereotyping need not provide evidence of a comparator to create an inference of discrimination.[141] The U.S. District Court for the District of Minnesota held that a plaintiff—a mother who was told that mothers should "do the right thing" and stay home—could create an inference of sex discrimination without providing comparator evidence because an employer's "veiled assertion that mothers . . . are insufficiently devoted to work, or that work and motherhood are incompatible" is inherently "gender-based" treatment, thus "properly addressed under Title VII."[142] Another federal district court in Illinois allowed an inference of discrimination despite the lack of a comparator when the plaintiff was denied a traveling sales position for which she applied based on the assumption that, as a new mother, she would not want to travel.[143] The Seventh Circuit held similarly in two cases—one in which a new mother was fired and her employer suggested it would give her more time at home with her children,[144] and another in which a mother who specifically sought out a promotion she knew required her to relocate was passed over on the assumption that she would not want to move her family.[145] In each of these cases, the court found that the plaintiff's allegation that the employment decision was infected by gender stereotypes was sufficient to create an inference of discrimination regardless of comparator evidence.[146]

[141] *See* Bornstein, *supra* note 93, at 1327–30, 1327 n.205; Goldberg, *supra* note 130, at 799, 799 n.236; Williams & Bornstein, *supra* note 107, at 1349–52; *see also* Stone, *Clarifying Stereotyping, supra* note 109, at 639. Of course, misapplication of the comparator requirement occurs in sex discrimination cases as well; for a discussion of courts misapplying it to men alleging sex stereotyping claims, see Bornstein, *supra* note 93, at 1338–43.

[142] Plaetzer v. Borton Auto., Inc., No. Civ.02–3089 JRT/JSM, 2004 WL 2066770, at *1, *6 n.3 (D. Minn. Aug. 13, 2004).

[143] *See* Stern v. Cintas Corp., 319 F. Supp. 2d 841, 853, 862–65 (N.D. Ill. 2004).

[144] *See* Sheehan v. Donlen Corp., 173 F.3d 1039, 1043 (7th Cir. 1999).

[145] *See* Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).

[146] For additional cases so holding, see also Bornstein, *supra* note 93, at 1327 n.205 (citing Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (involving an employer who reacted angrily to the plaintiff's pregnancy); Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) (involving an employer who commented derogatorily about the plaintiff's pregnancy); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55–56 (1st Cir. 2000) (involving an employer who implied that the plaintiff could not manage both a job and a family); Troy v. Bay State Comput. Grp., Inc., 141 F.3d 378, 380–81 (1st Cir. 1998) (involving an employer who suggested that the plaintiff was unable to perform her job due to her pregnancy); Barbano v. Madison County, 922 F.2d 139, 143 (2d Cir. 1990) (involving an employer who questioned an applicant about her plans to get pregnant based on a desire not to hire a woman who would get pregnant and quit); Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 726 (8th Cir. 1982) (involving an employer who implied that the plaintiff was less available and dedicated to the job because she had a family)).

A landmark decision by the Second Circuit, in the 2004 case *Back v. Hastings on Hudson Union Free School District*, provides an example of a sex stereotyping plaintiff succeeding without a comparator in a field impacted by occupational segregation.[147] The plaintiff was a well-performing school psychologist who, after she had a child, experienced declining performance evaluations, resulting in her unexpectedly being denied tenure.[148] The court rejected the defendant school's argument that she should lose on summary judgment unless she could produce evidence of "similarly situated men" that the school had treated better than her.[149] Requiring a male comparator may have posed a particular challenge as the plaintiff was the only school psychologist and 85% of the school's teachers were women, 71% of whom were mothers.[150] The court held that, while comparative evidence may have been helpful, it was not required: "what matters is how [plaintiff] *Back* was treated." [151] According to the court, "stereotypical remarks about the incompatibility of motherhood and employment" made by the female decision makers who denied her tenure was evidence enough that "'gender played a part' in [the] employment decision."[152] Thus, the court held, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[153]

In an important statement about the role of comparative evidence in proving discrimination, the EEOC highlighted this development in Enforcement Guidance it issued on the topic of caregiver discrimination in 2007.[154] Citing *Back* and other sex stereotyping cases related to family responsibilities, the Guidance explained that, when proving intentional sex discrimination using circumstantial evidence, "while comparative evidence is often useful"—in this context, "evidence showing more favorable treatment of male caregivers than female caregivers"—it is only one type of evidence from which an inference of discrimination may be drawn and is "not necessary to establish a violation."[155] In summarizing case law on caregiver discrimination and articulating its own internal position on proof required, the EEOC stated clearly that evidence of unlaw-

[147] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 126 (2d Cir. 2004).

[148] *Id.* at 114–16.

[149] *Id.* at 117–22.

[150] *Id.* at 122. While disregarding the necessity of comparative evidence, the court also noted that the proper comparison would be to school administrators, not all teachers. *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See* Williams & Bornstein, *supra* note 107, at 1352; *Enforcement Guidance*, *supra* note 29.

[155] *Enforcement Guidance*, *supra* note 29.

ful stereotyping "may support an inference of discrimination even absent comparative evidence about the treatment of men with children."[156]

Two years later, in its 2009 decision in *Chadwick v. WellPoint, Inc.*, the First Circuit showed how far this advance could go, upholding a plaintiff's case at summary judgment despite the defendant employer's evidence of arguably an *anti*-comparator: the person who received the promotion for which the plaintiff, a mother alleging sex discrimination, was passed over was also a mother.[157] The court held that the plaintiff, an outstanding employee with four children—6-year old triplets and an 11-year old—could create an inference of discrimination based on her superior qualifications and statements by decision makers evincing concern about her competing work and family responsibilities.[158] The court was not persuaded by the fact that the person promoted over the plaintiff was the mother of a 9- and a 14-year old, noting that "the stereotype that [the plaintiff] complains of would arguably be more strongly held as to a mother of four children, three of whom were only six-years old, than as to a mother of two older children."[159] Moreover, the court noted, not discriminating against one member of a protected class does not excuse discrimination against another given that Title VII requires a focus on the treatment of employees as individuals.[160]

Most compellingly, the Supreme Court itself weighed in again about the nature of comparative evidence in a recent caregiver discrimination case—its 2015 decision in *Young v. UPS*.[161] In *Young*, the Court considered the scope of accommodations required by Title VII's mandate, as amended by the Pregnancy Discrimination Act (PDA).[162] The PDA is the one piece of Title VII that does, in fact, require a *comparison*, yet not a *comparator*. To establish a violation, a pregnant employee must show that the employer failed to treat her "the same . . . as" other nonpregnant employees who were similar in their "ability or inability to work."[163] While the plaintiff in Young did not expressly plead her case using a sex stereotyping theory, she alleged that stereotypes about pregnant women's abilities to work and need for accommodations played a role in the defendant employer's decision to exclude pregnant women from a policy allowing other workers access to light duty positions.[164]

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[156] *Id.*

[157] Chadwick v. WellPoint, Inc., 561 F.3d 38, 42 n.4 (1st Cir. 2009).

[158] *See id.* at 46.

[159] *Id.* at 42 n.4.

[160] *See id.*

[161] 135 S. Ct. 1338, 1343–44 (2015).

[162] *Id.* at 1345.

[163] *Id.*

[164] *See* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Young v. United Parcel Serv., Inc. at 24 (D. Md. 2010) (No. DKC 08 CV 2586), 2010 WL 10839226.

In *Young,* when articulating what a plaintiff alleging pregnancy discrimination must show, the Court once again revisited the framework of proof for intentional discrimination:

> [Under] the McDonnell Douglas framework . . . an individual plaintiff may establish a prima facie case by "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion" . . . . The burden of making this showing is "not onerous" . . . . *Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways.*[165]

Tellingly, even in the context of a claim under Title VII that requires comparisons—that is, that seeks an answer to the question of whether pregnant employees were treated "the same . . . as" other employees—the Court made clear that there was no comparator "requirement" and that, if a comparator was offered, he or she need not be similar to the plaintiff "in all . . . ways."[166]

The Court's statement in *Young* is the clearest statement yet that federal courts should no longer consider the lack of comparator evidence fatal to a discrimination case. Yet it, too, risks being overlooked because it was made in the context of a caregiver discrimination case. Indeed, the Court articulated that a portion of the *Young* decision was limited to the context of pregnancy discrimination: after making its generally applicable statement about *McDonnell Douglas* proof, the Court went on to spell out the prongs of a prima facie case of denial of pregnancy accommodations, noting that the prongs as they described them are "limited to the Pregnancy Discrimination Act context."[167] In this context, the Court described the fourth prong of the prima facie case, whereby the plaintiff must create an inference of discrimination, as requiring evidence that the defendant accommodated any others "similar in their ability or inability to work."[168] Notably, the Court said nothing at all about the workers being "similarly situated" in general; the comparison is limited solely to pregnant and nonpregnant employees' physical work capabilities. Moreover, while the Court stated that this prong, as defined, is limited to cases of pregnancy—as opposed to all claims of—discrimination, the Court also described it as "consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's" case in a discrimination lawsuit under Title VII.[169] Thus, the Court's general discussion in

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[165] *Young*, 135 S. Ct. at 1353–54 (citations omitted) (emphasis added).

[166] *See id.* at 1345, 1353–34.

[167] *Id.* at 1355.

[168] *Id.* at 1354.

[169] *Id.* at 1355.

Young of *McDonnell Douglas* proof—which made no mention of a comparator requirement—applies regardless of protected class.[170]

3. Transgender Discrimination Per Se

While sex stereotyping cases alleging caregiver discrimination helped establish that comparator evidence is no longer required to infer discrimination, sex stereotyping cases alleging transgender status discrimination provide examples of this legal advance applied.

The area of transgender status discrimination has evolved rapidly in the last decade. Early cases brought by gender "non-conformers" alleging discrimination were rejected as beyond the reach of Title VII's prohibitions against sex discrimination. Cases alleging discrimination on the basis of gender identity were lumped in with those alleging sexual orientation discrimination, and both were held to be outside of Title VII's protected class of "sex."[171] This rationale changed after the Supreme Court's recognition of stereotyping in the 1989 *Price Waterhouse* case, in which the Court held that evidence that the plaintiff's failure to conform to a feminine gender stereotype played a role in her being denied a promotion could create an inference of sex discrimination.[172] Between 1997 and 2002, based on *Price Waterhouse* and another Supreme Court decision—*Oncale v. Sundowner Offshore Services, Inc.*,[173] holding that a heterosexual man who was sexually harassed by other men could sue under Title VII—a handful of circuit court cases laid the groundwork for

[170] *See id.* at 1353–54. Still, despite the limited comparison the Court described in the pregnancy accommodation context, even the EEOC's own Enforcement Guidance on Pregnancy Discrimination, revised in the wake of the *Young* decision, muddles the issue. Before explaining the Court's description of a prima facie case for pregnancy accommodation, the EEOC notes that, to make out a prima facie case using circumstantial evidence, "a plaintiff must produce evidence that a *similarly situated worker* was treated differently or more favorably than the pregnant worker." *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, U.S. Equal Emp't Opportunity Comm'n (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IC (emphasis added). This mistakes the Court's definition in *Young* of the fourth prong of the prima facie case for pregnancy discrimination, which requires that the comparative evidence relate only to whether another employee was *similar in their physical work capabilities*—and requires nothing at all about the workers being generally "similarly situated." Unfortunately, this shows just how long of a shadow has been cast by the comparator requirement developed in the context of first generation discrimination case law, despite the Court's repeated statements that no such evidence is required.

[171] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir.1979); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); *see also* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (discussing the abrogation of these cases by Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

[172] *See* Price Waterhouse v. Hopkins, 490 U.S. at 250–55; *supra* Part I.B.3.

[173] 523 U.S. 75, 79 (1998).

transgender discrimination claims.[174] These early cases permitted men harassed for being "too effeminate" to allege sexual harassment under Title VII, even when the source of the harassment was their homosexuality, and despite many courts' views that sexual orientation discrimination was excluded from the protected class of "sex."[175]

Then, in a germinal 2004 decision, *Smith v. City of Salem*, the Sixth Circuit held that a fire lieutenant who was suspended because of her stated gender identity as "transsexual" could rely on a *Price Waterhouse* stereotyping theory to state a claim under Title VII's prohibition for sex discrimination.[176] To do so, the circuit court rejected the district court's characterization that the plaintiff's reliance on sex stereotyping was merely "an end run around [the] 'real' claim" of status discrimination "based upon . . . transsexuality," overturning its holding that "Title VII does not prohibit discrimination based on an individual's transsexualism."[177] This, the circuit court held, was an incorrect interpretation of the law relying on outdated pre-*Price Waterhouse* decisions, an error of law because that rationale had been "eviscerated" by the Supreme Court in *Price Waterhouse*:[178]

> By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.[179]

Applying this interpretation, the Sixth Circuit held that Smith, who alleged it was her failure to conform to stereotypes about how a person born biologically male should look and act that "was the driving force behind" the employer's adverse actions, had stated a cognizable claim of sex discrimination under Title VII.[180] Since the *Smith* decision, courts of appeals in the First, Sixth, Ninth, and Eleventh Circuits and federal district courts in at least 10 states and the District of Columbia have held similarly that discrimination on the basis of a gender identity constitutes

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[174] *See* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *rev'd on other grounds*, 523 U.S. 1001 (1998).

[175] *See Rene*, 305 F.3d at 1064–65; *Nichols*, 256 F.3d at 869, 874–75; *Schwenk*, 204 F.3d at 1192–93; *Doe*, 119 F.3d at 566, 580–81.

[176] *Smith*, 378 F.3d at 573.

[177] *Id.* at 571.

[178] *Id.* at 573–74.

[179] *Id.* at 573.

[180] *Id.* at 572.

sex discrimination under Title VII.[181] In 2012, the EEOC also formally stated its adoption of this position.[182]

As the sex stereotyping theory of transgender discrimination is currently recognized, discriminating against an employee because of her gender identity or transgender status is sex discrimination *per se*, regardless of any comparator or comparative evidence.[183] Because the adverse employment action in these cases is motivated by the mere fact of the plaintiff's failure to conform to expected gender stereotypes, the plaintiff may create an inference of sex discrimination based on stereotyping evidence alone. Thus, transgender discrimination cases provide a body of

[181] *See* Glenn v. Brumby, 663 F.3d 1312, 1314, 1316–20 (11th Cir. 2011) (citing holdings in the 1st, 6th, and 9th Circuits, and in district courts in D.C., N.Y, Pa., and Tex.); *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, U.S. Equal Emp't Opportunity Comm'n, http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (citing holdings in the 1st, 6th, 9th, and 11th Circuits and in district courts in Mich., N.C., Ala., Md., Minn., Tex., Pa., N.Y., and Ind.).

[182] *See* Macy v. Holder, Appeal No. 0120120821, *7–8 (U.S. Equal Emp't Opportunity Comm'n Apr. 20, 2012); *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm. Note that, in 2015, the EEOC formally stated its position that discrimination because of an employee's sexual orientation is also impermissible sex discrimination in violation of Title VII. *See id;* Baldwin v. Dep't of Transportation, Appeal No. 0120133080, *6 (U.S. Equal Emp't Opportunity Comm'n July 15, 2015) ("[W]e conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII"). To date, a few federal courts have been receptive to this position, *see Baldwin, supra,* at *7, 10 (citing cases in U.S. district courts in Colo., Conn., D.C., Mass., Or., and W. Wash.). Yet many more have expressly rejected this position as "bootstrapping" the separate category of "sexual orientation" onto the protected category of "sex," even after *Price Waterhouse* and *Smith. See, e.g.*, Hively v. Ivy Tech Comm. Coll., 2016 WL 4039703, *2–4 (7th Cir. July 28, 2016) (reaffirming the 7th Circuit's "unequivocal . . . holding that Title VII does not redress sexual orientation discrimination," even after the EEOC's *Baldwin* decision, and citing to similar holdings in the D.C., 1st, 2d, 3d, 4th, 5th, 6th, 8th, and 10th Circuits). For this reason, separate discussion of cases alleging discrimination on the basis of sexual orientation (as opposed to transgender status/gender identity) under a sex stereotyping theory is beyond the scope of this Article. To the extent that sexual orientation discrimination cases may succeed based on a similar sex stereotyping rationale, however, the lessons for employment discrimination law would be the same. For a discussion of applying *Price Waterhouse* sex stereotyping theory to cover claims of sexual orientation discrimination, see the sources listed in note 114, *supra.*

[183] *See Glenn*, 663 F.3d at 1316 (citing Ilona M. Turner, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007); Taylor Flinn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001)). *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (refusing to hold that "transsexuals" as a class are protected under "sex").

precedent in which federal courts have routinely allowed plaintiffs' cases to survive past the pleading stage despite providing little or no comparative evidence.

Several cases provide examples. While the Sixth Circuit in *Smith* described the plaintiff's prima facie case in the traditional way, listing the fourth prong of the prima facie case as a showing that the plaintiff "was treated differently from similarly situated individuals outside of his protected class," the court nevertheless held that the plaintiff had satisfied this prong with proof that "he would not have been treated differently, on account of his non-masculine behavior . . . had he been a woman instead of a man."[184] In another Sixth Circuit case, *Barnes v. City of Cincinnati*, the court responded to the defendant's argument that the plaintiff, alleging sex discrimination in promotion, had failed to produce required evidence that "other employees of similar qualifications who were not members of the protected class received promotions" with a broad view of the necessary evidence.[185] The plaintiff "need not demonstrate an exact correlation with [an] employee receiving more favorable treatment," the court held; it was enough that the plaintiff was the only employee in a seven-year period to not make it through the probationary period, including one employee who performed worse.[186]

After discussing both *Smith* and *Barnes*, a federal district court in Michigan held, with no discussion of comparative evidence, that when a plaintiff who announced a gender transition was told that what the plaintiff "was 'proposing to do' was unacceptable" and then fired, the allegation that "failure to conform to sex stereotypes was the driving force behind" the employer's firing *alone* was enough to survive a motion to dismiss.[187] Likewise, after identifying that the prima facie case required a plaintiff to show that "her employer treated similarly situated employees outside her class more favorably" or that, when she was fired, "she was replaced by someone outside her protected class," a Georgia federal district court found that the employer's statements that "he was very nervous about [the plaintiff's] situation," "did not want her to wear a dress to work," and was concerned about the impact on coworkers and the business were "adequate to permit an inference of discrimination," with no mention of a comparator.[188]

Transgender discrimination cases provide examples of the application of the *McDonnell Douglas* burden-shifting framework as it was made

[184] *Smith*, 378 F.3d at 570.

[185] Barnes v. City of Cincinnati, 401 F.3d 729, 736–37 (6th Cir. 2005).

[186] *Id.*

[187] Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc. 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

[188] Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1197–98 (N.D. Ga. 2014) (citation omitted).

clear in the caregiver discrimination context: a plaintiff with stereotyping evidence need not provide comparator evidence to create an inference of impermissible discrimination.

B. A Bridge from Stray Remarks to Stereotyping Evidence

The second development from recent sex stereotyping cases that can help modernize antidiscrimination doctrine as a whole is on what constitutes "direct evidence" of intentional discrimination and, alternatively, what evidence can be disregarded as mere "stray remarks." First generation case law established that a plaintiff may prove intentional discrimination through either direct evidence, which establishes a discriminatory motive without the need for inferences, or circumstantial evidence, which requires the plaintiff to follow the *McDonnell Douglas* framework to create an inference of discrimination.[189] By the 1990s, despite the strong persistence of cultural stereotypes about sex, race, and other protected classes, direct statements by an employer that a protected class motivated its adverse employment decision were virtually nonexistent. Courts began to distinguish statements evincing stereotypical beliefs from those that served as direct evidence of discrimination, referring to the former as "stray remarks."[190] Since then, the so-called "stray remarks doctrine" has gained strength and influence, allowing courts to discount the evidentiary value of such statements. Yet given the more subtle and structural nature of bias today, any evidence that exposes hidden bias should not be discounted at the pleading stage. Innovative cases alleging sex stereotyping have helped break down these categories, broadening what may be useful stereotyping evidence and revisiting what constitutes "direct evidence" of discrimination.

1. Direct Evidence and the "Stray Remarks" Doctrine

In the series of cases establishing how to prove intentional discrimination under Title VII, the Supreme Court created two different routes of proof based on the type of evidence a plaintiff was able to proffer, direct or circumstantial.[191] These two routes continue to shape Title VII litigation today. If, as in the vast majority of cases, the plaintiff employee has no "smoking gun" but only circumstantial evidence of discrimination by the defendant employer, the plaintiff proceeds under the three-part burden-shifting *McDonnell Douglas* framework described previously.[192] If, however, the plaintiff can provide direct evidence of discrimination, the

[189] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989); Brown v. E. Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993); Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081–82 (11th Cir. 1990).

[190] *Price Waterhouse*, 490 U.S. at 277.

[191] *See supra* Part II.A.1.

[192] *See id.*

burden of persuasion shifts immediately to the defendant to prove that discriminatory animus was *not* the motivation for the adverse employment action being challenged because it would have taken the same action regardless of the plaintiff's protected class.[193] The Court defines "direct evidence" as that which proves discrimination standing by itself, without a factfinder needing to draw an inference or make a presumption that discrimination motivated the decision.[194] So defined, direct evidence requires essentially an admission by the employer that the plaintiff's protected class motivated its decision—for example, that the employer did not want to hire a woman or promote an African American.[195] Thus the usefulness of the direct evidence route of proving intentional discrimination became virtually nonexistent almost as soon as the Court articulated it: no thinking employer aware that Title VII exists would make such an admission.

The direct evidence method of proof was revived, however, by the emergence of the stereotype theory in the Supreme Court's 1989 decision in *Price Waterhouse*.[196] As described previously, in *Price Waterhouse*, the Court held that evidence that an employer relied on impermissible sex stereotypes in making an adverse employment decision against the plaintiff could constitute evidence of discrimination "'because of' sex."[197] In a separate concurrence, Justice O'Connor expressed her opinion that plaintiff Ann Hopkins had provided direct evidence of sex discrimination.[198] Hopkins had showed that the decision makers who denied her a promotion did so at least in part based on their belief that she was too "macho" and should walk, talk, and dress "more femininely."[199] As Justice O'Connor saw it,

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made . . . [and] heard several of [the decisionmakers] make sexist remarks in discussing her suitability for partnership. [And a]s the decisionmakers exited the room, she was told by one of those privy to the decisionmaking pro-

[193] *See Price Waterhouse*, 490 U.S. at 250–56; *see also, e.g.*, *Brown*, 989 F.2d at 861.

[194] *See Price Waterhouse*, 490 U.S. at 250–56; *see also, e.g.*, *Earley*, 907 F.2d at 1081–82.

[195] *See, e.g.*, *Earley*, 907 F.2d at 1081–82 (holding that "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate" suffice as direct evidence) (quoting Carter v. City of Miami, 870 F.2d 578, 582 (1989)).

[196] *See Price Waterhouse*, 490 U.S. at 250–56.

[197] *Id.* at 241; *see also supra* Part I.B.3.

[198] *Price Waterhouse*, 490 U.S. at 271–75 (O'Connor, J., concurring in the judgment); *see also* McGinley, *supra* note 78, at 472 (describing how, under *Price Waterhouse*, "overt stereotyping by a decision maker [is] virtually the equivalent of direct evidence of discrimination").

[199] *Price Waterhouse*, 490 U.S. at 235.

> cess that her gender was a major reason for the rejection of her partnership bid.[200]

While essential to Justice O'Connor's agreement with the Court's holding in favor of Hopkins (due to the mixed-motives nature of the case), this finding was not part of the plurality's opinion, which held that Hopkins could prevail even with circumstantial evidence.[201] Still, Justice O'Connor helped lay the groundwork to establish that stereotyping evidence could, in certain circumstances, serve as direct evidence of discrimination.

Yet in the very same concurrence, Justice O'Connor also noted that, to constitute direct evidence and justify shifting the burden of persuasion of nondiscrimination to the employer, such stereotyping had to be closely tied to the adverse employment decision and not be "stray remarks."[202] Neither, she stated, could "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process" constitute enough direct evidence to shift the burden similarly—for example, a "perfectly neutral and nondiscriminatory . . . mere reference to 'a lady candidate,'" she wrote, would not be enough.[203]

With this statement, Justice O'Connor sparked what has come to be known as the "stray remarks doctrine," whereby evidence that reveals impermissibly stereotypical beliefs may nonetheless be discounted for evidentiary purposes.[204] As it has been interpreted by many federal courts, the stray remarks doctrine holds that express statements about the plaintiff's protected class do not constitute direct evidence of discrimination when made outside the context of the relevant adverse employment decision (usually temporally) or by someone other than the relevant decision maker, or even if the remarks are considered to be too few or "isolated."[205] Yet as scholars and even some jurists have noted, the doctrine has gone far beyond the initial suggestion that stray remarks are not *direct* evidence.[206] Where such indirect evidence may not shift the burden of *persuasion* to the defendant, it should still serve as probative circumstantial

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[200] *Id.* at 272–73 (O'Connor, J., concurring in the judgment) (emphasis omitted).

[201] *See id.* at 241–42 (majority opinion).

[202] *Id.* at 277 (O'Connor, J., concurring in the judgment).

[203] *Id.*

[204] *See* Kerri Lynn Stone, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine after* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219 (2002); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).

[205] *See* Stone, *Proving an Employer's Intent*, *supra* note 204, at 242–43; *see also, e.g.*, Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998); Jones v. Bessemer Carraway Med. Ctr., 151 F.3d 1321, 1323 n.11 (11th Cir. 1998); Bevill v. UAB Walker Coll., 62 F. Supp. 2d 1259, 1272 n.10 (N.D. Ala. 1999).

[206] *See* Stone, *Taking in Strays*, *supra* note 204, at 150.

evidence from which the factfinder may infer discrimination to shift the burden of *production* in the *McDonnell Douglas* framework.

To be sure, application of the stray remarks doctrine has not been consistent, and a number of courts have signaled its lessening value.[207] A decade after *Price Waterhouse*, in 2000, the Supreme Court weighed in on the issue in the age discrimination case *Reeves v. Sanderson*.[208] While the Court criticized the appellate court's evaluation of the plaintiff's evidence because it discounted the value of statements evincing age-related stereotypes, it did not clearly reject the stray remarks doctrine outright.[209] After *Reeves*, some federal courts revisited and distanced themselves from the doctrine;[210] nevertheless, in most courts, the concept of stray remarks persists to devalue potentially valuable evidence today.[211]

As a result, in some cases involving evidence of impermissible stereotyping, particularly sex stereotyping cases of women perceived to be "too masculine" like Ann Hopkins, indirect stereotyping evidence has still helped create a circumstantial inference of discrimination.[212] Yet in too many others, particularly those involving racial stereotypes, the stray remarks doctrine continues to be misapplied to discount evidence that may expose hidden bias—often a key factor in litigating second generation discrimination.[213]

2. Caregiver Discrimination and Stereotyping Evidence

In the context of recent cases alleging caregiver discrimination, plaintiffs have been more successful in converting what might otherwise be considered "stray remarks" into valuable circumstantial evidence from which to infer discrimination. By including a stereotype theory argument in their intentional disparate treatment claims, caregivers have broadened the lens of what is probative of discrimination, creating a wider net of relevant stereotyping evidence. Also, because at the core of unlawful sex stereotypes about caregivers is the idea that being a mother (or active, thus "effeminate" father) is incompatible with being a good worker,[214] even statements made outside of the temporal proximity of an ad-

[207] *See id.* at 190; Stone, *Proving an Employer's Intent*, *supra* note 204, at 246–47.

[208] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

[209] *See* Stone, *Proving an Employer's Intent*, *supra* note 204, at 251; Stone, *Taking in Strays*, *supra* note 204, at 171.

[210] *See* Stone, *Taking in Strays*, *supra* note 204, at 172–73.

[211] *See id.*; Stone, *Proving an Employer's Intent*, *supra* note 204, at 252.

[212] *See* Stone, *Taking in Strays*, *supra* note 204, at 175–77.

[213] *See id.* at 182–83; *see also* Catherine Albiston, Kathryn Burkett Dickson, Charlotte Fishman & Leslie F. Levy, *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1293–95 (2008) (discussing how so called "stray remarks" actually "may provide a 'glimpse' or a 'window' into the true, but partially repressed, attitudes" of the employer).

[214] JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 65–70 (2000) (describing the "ideal worker" norm).

verse employment decision still relate to a plaintiff's *suitability for the job*, which allows courts to view them as *not* "stray."

Several cases in which plaintiffs allege sex discrimination based on their family caregiving responsibilities provide examples. In its holding, in *Back v. Hastings on Hudson School District*, that a caregiver alleging sex discrimination under a sex stereotyping theory need not provide comparator evidence, the Second Circuit also addressed the notion of stray remarks.[215] When overturning the district court's grant of summary judgment against the plaintiff, the court of appeals relied on evidence of alleged statements made by supervisors over the course of a year asking the plaintiff, a new mother, to space out her childbearing, suggesting "that this was perhaps not the job . . . for her if she had 'little ones,'" and questioning her continued commitment to work.[216] All of this was relevant stereotyping evidence about the plaintiff's "inability to combine work and motherhood" that could create an inference of discrimination—evidence that "[t]he district court [had] inaccurately characterized as 'stray remarks.'"[217]

In another case, the Fifth Circuit overturned a district court's judgment as a matter of law in favor of the defendant employer in a sex discrimination case brought by an employee who was terminated while pregnant.[218] In doing so, the court rejected the district court's assessment that a supervisor's purported statement that "she had a business to run and could not handle having a pregnant woman in the office" was "nothing more than stray remarks" because the supervisor was not the ultimate decision maker.[219] Likewise, in a sex discrimination case brought by a mother who was fired the day before her probationary period of employment was to end, the First Circuit reversed the district court's characterization of key sex stereotyping evidence as "stray."[220] Instead, the court of appeals held, evidence that her supervisors questioned her "ability to balance . . . work and parental responsibilities" should she have another child, and comments made in the context of hiring *other* employees that the company "preferred unmarried, childless women because they would give 150% to the job" were valid circumstantial evidence and not, as the district court had held, "'stray remarks,' insufficient to enable a jury to conclude . . . pretext."[221] Indeed, the plaintiff could even "point[] to

[215] Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117 (2d Cir. 2004).

[216] *Id.* at 115.

[217] *Id.* at 119, 124 n.12.

[218] *See* Arismendez v. Nightingale Home Health Care, Inc., 493 F.3d 602, 612 (5th Cir. 2007).

[219] *Id.* at 607.

[220] Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000).

[221] *Id.* at 51, 55.

comments made by others . . . that illustrate a discriminatory attitude in the company as a whole" such as comments regarding "the company's treatment of female employees with children."[222] While none of these statements proved discrimination alone, the court of appeals held, a fact-finder "could reasonably rely upon" all of this stereotyping evidence to infer discrimination.[223]

Even a statement open to multiple interpretations may be found not stray when it could be an expression of "benevolent" stereotyping—seemingly well-meaning stereotyping that nevertheless redounds to the detriment of the employee being stereotyped.[224] In *Chadwick v. Wellpoint*, when holding that the plaintiff had enough evidence to survive summary judgment despite the fact that another mother received the promotion she was denied, the First Circuit highlighted a general statement made several months prior to the promotion decision (albeit by a decision maker): "Oh my—I did not know you had triplets. Bless you!"[225] The court could have disregarded this statement as stray.[226] Instead, it found the statement relevant to the strength of the sex stereotypes against the plaintiff, essential to the plaintiff's ability to create an inference of discrimination despite comparative evidence that favored the employer (that the promotion went to another mother).[227]

By including a stereotyping frame that ties stereotypes related to the protected class "because of sex" to a general suitability for work, caregiver discrimination cases have helped expand the narrow lens of the "stray remarks" doctrine. Caregiver discrimination cases show that courts can and should stop discounting the value of evidence of stereotypical thinking more broadly in the workplace. Instead, these cases show, such proof is useful stereotyping evidence that helps shine a light on hidden second generation discrimination.

3. Transgender Discrimination and Direct Evidence of Stereotyping

In the context of cases alleging transgender discrimination, courts have not only rejected the characterization of stereotyping evidence as "stray remarks," but—to the contrary—have held that such evidence may provide *direct* evidence of intentional discrimination against transgender

[222] *Id.* at 55–56.

[223] *Id.* at 56.

[224] *See, e.g.*, Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491 (1996).

[225] Chadwick v. WellPoint, Inc., 561 F.3d 38, 42 (1st Cir. 2009).

[226] *See id.* at 47 n.10. The district court had gone even further, finding the statement to be "a friendly exclamation"; the appellate court disagreed, believing it "suggest[ed] pity rather than respect." *Id.*

[227] *See id.* at 42–43 n.4 (noting that "the stereotype that [the plaintiff] complains of would arguably be more strongly held as to a mother of four children, three of whom were only six years old, than as to a mother of two older children").

employees. As described previously, a plaintiff who can provide direct evidence need not prove a prima facie case under the *McDonnell Douglas* framework; the direct evidence alone establishes a discriminatory motive, shifting the burden immediately to the defendant to justify its behavior.[228] Not only does direct evidence remove a significant procedural hurdle for the plaintiff, but the characterization of the plaintiff's proof as direct evidence makes it less likely that the defendant will be able to persuade a factfinder that its motives were nondiscriminatory.[229]

Cases in which plaintiffs allege sex discrimination based on their transgender status demonstrate courts' rejection of the stray remarks doctrine in the transgender discrimination context. In *Glenn v. Brumby*, the Eleventh Circuit began its analysis of the plaintiff's case in the usual way, by stating the rule that "[a] plaintiff can show discriminatory intent through direct or circumstantial evidence."[230] Yet instead of moving on to the *McDonnell Douglas* burden-shifting framework and the prima facie case, the court explained that, where a transgender plaintiff was fired because of the employer's belief that it was "inappropriate," "unsettling," and "unnatural" for the plaintiff, born biologically male, to present as a woman, the decision was based on "the sheer fact of the transition."[231] As such, the plaintiff had provided "ample *direct evidence*" of sex discrimination such that a Title VII analysis "would end [t]here."[232]

Similarly, a Texas federal district court described how evidence that a decision to rescind an employment offer from an applicant because she presented herself as female during the interview process but was later discovered to be born a biological male could constitute direct evidence of sex discrimination.[233] The court explained that rescinding the job offer due to what the employer described as the plaintiff's "misrepresentation" during the interview process could evince animus against the plaintiff for "inconsisten[cy] with . . . preconceived notions of what a male should look and act like."[234] This, the court explained, "qualifies as direct evidence" because it "directly links the adverse employment action at issue with the alleged unlawfully discriminatory motive"—here, plaintiff's fail-

[228] *See supra* Part II.B.1.

[229] *See id.*

[230] Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

[231] *Id.* at 1314, 1321.

[232] *Id.* at 1321 (emphasis added). Because this case was brought by a public employee alleging a constitutional violation of equal protection under 42 U.S.C. § 1983, rather than under Title VII, the court continued on, holding similarly under equal protection. The cited portion of its analysis is applicable to Title VII cases. *See id.;* Lautermilch v. Findlay City Schs., 314 F.3d 271, 275 (6th Cir. 2003).

[233] Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

[234] *Id.* at 662.

ure to conform to gender stereotypes.[235] Despite the defendant's explanation that it was the dishonesty behind the "misrepresentation" and not the plaintiff's transgender status that motivated its decision, the court held that the factual question regarding direct evidence was enough for plaintiff to survive defendant's challenge on summary judgment.[236]

Of course, to be considered direct evidence, bias based on a plaintiff's failure to conform to gender stereotypes must still be linked to the adverse employment decision such that discriminatory motive is clear without the need for an inference. Thus, a Georgia federal district court held that an employer's statements during a meeting that he "did not want [plaintiff] to wear a dress to work" and that he was "very nervous" about the plaintiff's gender transition and its potential effects on the business did not amount to direct evidence of discrimination when the plaintiff was terminated two months later.[237] While the court agreed that the statements "reflect[ed] a discriminatory attitude," they were not made contemporaneously or in connection with the termination decision; the factfinder would still have to make "an inferential leap between fact and conclusion," so the statements were not direct evidence.[238] But tellingly, the statements were allowed to stand as circumstantial evidence from which one could infer sex discrimination—the statements were not discounted or excluded as stray remarks irrelevant to the employer's motivations.[239]

The formulation of transgender discrimination as sex discrimination *per se* provides a context that may be uniquely likely to generate direct stereotyping evidence of discrimination. Still, the fact that at least some federal courts have understood that reliance on stereotypes can constitute direct evidence represents a step toward the recognition of modern forms of unlawful bias. Echoing Justice O'Connor's perspective in her *Price Waterhouse* concurrence,[240] courts in transgender discrimination cases have now clearly held that evidence that an employer relied directly on *stereotypes related to* a protected class—not just the protected class itself—is enough to constitute direct evidence of discrimination.

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[235] *Id.*

[236] *Id.* at 662–63. Note, however, that the court also denied plaintiff's cross-motion for summary judgment, due to open questions of material fact regarding the interpretation of defendant's explanation. *Id.*

[237] Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1192–98 (N.D. Ga. 2014).

[238] *Id.*

[239] *Id.* at 1197; *supra* Part II.B.1.

[240] *See supra* Part II.B.1.

C. Identifying Universal Patterns of Stereotyping at Work

In addition to providing concrete doctrinal advantages on comparators and stray remarks, sex stereotyping cases provide theoretical advances for Title VII litigation by providing a framework for spotting unlawful bias in its modern forms. The facts involved in cutting edge sex stereotyping cases combine elements of both first and second generation discrimination, which makes actionable discrimination easier for courts to perceive in this context. Under stereotype theory, decisions infected with impermissible stereotypes related to a protected class constitute decisions "because of" that protected class.[241] Thus failing to promote an employee because she is perceived to be less committed to work as a mother, or because she is perceived not to fit in as a transgender woman becomes overt, first generation-style discrimination. Yet recognizing caregiver and transgender discrimination also required courts to see how stereotypes about suitability for work that stand in contrast to workplace norms and cultures are rooted in protected class status.

A vast body of research has documented numerous patterns of stereotyping that operate to disadvantage women at work.[242] At its core, however, the actionable legal harm that arises in cutting-edge sex stereotyping cases can be grouped roughly into one of two basic types of cases—models that can be applied to stereotyping regardless of protected class. In one model, an individual employee is penalized based on the assumption that she *will* conform to a negative stereotype of her group—known in social science as "descriptive" stereotyping.[243] For example, a mother is passed over for promotion because she is assumed to be less competent or less committed to work. Groups stereotyped as lower in competence often find themselves held to different or higher performance standards than others whose competence is assumed, forcing them to continually prove their competence.[244] In the second model, an individual employee is penalized based on the assumption that she *should* conform to a stereotype associated with her group and fails to do so—known as "prescriptive"

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[241] *See supra* Part I.B.3.

[242] *See, e.g.,* Williams, *supra* note 105, at 412–35 (citing and summarizing in detail the social science on patterns of gender stereotypes at work).

[243] *See, e.g.,* Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder,* 57 J. Soc. Issues 657, 657–74 (2001); Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. Soc. Issues 683, 690–92 (2004); Yuracko, *Soul of a Woman, supra* note 110, at 763–64 (referring to this as "ascriptive" stereotyping); Herz, *supra* note 115, at 398–403, 405–07 (same).

[244] *See, e.g.,* Joan C. Williams & Rachel Dempsey, What Works for Women at Work: Four Patterns Working Women Need to Know 23–58 (2014) (naming and describing this phenomenon as "Prove-It-Again" bias); Martha Foschi, *Double Standards for Competence: Theory and Research*, 26 Ann. Rev. Sociol. 21, 21–42 (2000).

stereotyping.[245] For example, a pregnant woman is fired because her employer believes she should focus on her family instead of work, or a transgender woman who was born biologically male is not hired for failing to dress and act masculine. Underlying both models is a perception that the employee lacks "fit" with either the job or the workplace culture, in ways that implicate protected class status.[246] Caregiver and transgender discrimination cases provide doctrinal paths for redressing these patterns, in which the perception and assessment of the employee's competence and suitability for work is negatively affected by protected class stereotypes.

As described in Part III below, although the specific stereotypes associated with different protected classes may vary, the way in which such stereotypes affect the workplace and lead to adverse employment actions follow similar patterns; as such, all should be similarly actionable.

III. THE PROMISE OF UNIFICATION

For Title VII doctrine as a whole to benefit from advances in sex stereotyping cases, and in the interest of doctrinal coherence, courts should recognize unlawful stereotyping similarly across all protected classes. This means that, where any plaintiff alleges disparate treatment because of a protected class, courts recognize the value of evidence evincing stereotypical beliefs and attitudes. Regardless of whether based on sex or race, the social science of stereotyping is the same, and stereotypes may manifest similarly in work structure and cultures. All discrimination case law may benefit from the modern approach to proof some courts have taken in sex stereotyping cases—an approach that more accurately reflect the operation of bias in the workplace today.

A. Extending Stereotype Theory Beyond Sex

When, in *Price Waterhouse*, the Supreme Court first recognized the role that stereotyping could play in an adverse employment action under Title VII, the Court did not expressly limit its rationale to discrimination based on the protected classification of sex. While the focus of the decision was on sex stereotyping, the Court's analysis included a discussion of the concept within the broader frame of Title VII as a whole.[247] Thus

[245] *See, e.g.*, Heilman, *Description and Prescription*, *supra* note 243, at 657–74; Ridgeway & Correll, *supra* note 243, at 690–92; Yuracko, *Soul of a Woman*, *supra* note 110, at 763–64; Herz, *supra* note 115, at 398–403, 405–407.

[246] *See, e.g.*, Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORG. BEHAV. 270 (1983); Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOCIOL. REV. 999 (2012); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267–70 (2000).

[247] Price Waterhouse v. Hopkins, 490 U.S. 239, 253 (1989).

plaintiffs may allege discrimination based on any protected class using a stereotype theory.[248]

Yet to date, stereotype theory has been used most robustly to allege sex discrimination under Title VII. Far fewer cases alleging race or national origin discrimination articulate their case using a *Price Waterhouse*-style stereotyping frame.[249] And those that do are more likely to be unsuccessful,[250] often because evidence of racial or ethnic stereotyping is more likely to be discounted as mere "stray remarks."[251] This lack of precedent, in turn, makes it less likely that other plaintiffs alleging race or national origin discrimination will include stereotype theory in their disparate treatment claims.

For doctrinal advances in sex stereotyping to be applied in a way that unifies and modernizes antidiscrimination law, it is useful to uncover and overcome the source of this disparity. The difference in how courts view stereotyping on the basis of sex as opposed to race or national origin likely stems, at least in part, from the constitutional law of Equal Protection.[252] To prove race discrimination in violation of the Constitution's guarantee of Equal Protection under the Fifth or Fourteenth Amendment requires proving that a state action had a discriminatory purpose;

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[248] *See id.* at 253–54. Separate from Title VII, courts have also recognized age-related stereotyping under the Age Discrimination in Employment Act. *See supra* note 82.

[249] In a recent Westlaw search of all federal cases citing *Price Waterhouse,* 667 cases included references to stereotypes or stereotyping. When narrowed to identify cases discussing Title VII and race or gender stereotypes, only 58 cases referenced race or racial stereotypes, while 413 referenced sex or gender stereotypes (search conducted June 1, 2016).

[250] Recent data on caregiver discrimination cases (also known as "family responsibilities discrimination" or "FRD" cases) show a particularly high success rate for plaintiffs. In a dataset of over 4400 of such cases, plaintiffs had an overall success rate of 52% in all FRD cases filed (60% in cases filed by mothers) and of 67% in all FRD cases that went to trial (75% in trials in federal court), as compared to a plaintiff success rate of 28–36% in all types of employment discrimination cases that went to trial in federal court. Cynthia Thomas Calvert, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016* 4, 18, 21 & nn.47–48, 24 & nn.58–59 (Center for Worklife Law, UC Hastings College of the Law 2016), http://www.worklifelaw.org/pubs/FRDupdate2016.pdf. *See also generally* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment,* 81 NOTRE DAME L. REV. 889 (2006)

[251] *See supra* Part II.B.1.; *infra* Part III.B. *But see generally* Yuracko, *The Antidiscrimination Paradox, supra* note 117 (challenging the contention that, in the context of appearance/performance of race or gender at work, Title VII doctrine has diverged to provide a more "expansive" reading of sex than race discrimination).

[252] *But see* Yuracko, *The Antidiscrimination Paradox, supra* note 117, at 46–47 (suggesting that, to the extent gender identity receives greater protection than racial identity at work, it is due more to "culture, history, and, perhaps, biology" than to law: "Sex [and gender are] treated as rich and complex in ways that race is not . . . . Race . . . is viewed as a mere technical difference of skin tone unassociated with meaningful differences in behavior or self-presentation.").

unlike under Title VII, a disparate impact theory of liability is not available.[253] Legal scholars have suggested that this animus-oriented approach and a commitment to colorblindness under the Constitution has limited Equal Protection's ability to reach the full scope of race discrimination.[254] Stephen Rich has noted that the "discriminatory purpose doctrine" of Equal Protection, which "requires evidence of malice, or animus," is "ill-suited to address 'second generation discrimination' that frequently results from unconscious stereotyping."[255] Likewise, Jerry Kang has suggested that a focus on "intent to harm minorities" and "facial racial classifications" has hindered Equal Protection doctrine's ability to redress the important harms of implicit racial bias and stereotyping.[256]

In contrast, sex discrimination cases under Equal Protection law have long recognized that acting on the basis of sex stereotypes constitutes intentional discrimination. Indeed, the recognition of sex stereotyping under Title VII in *Price Waterhouse* grew out of earlier Equal Protection cases holding that it was impermissible sex discrimination for state and federal governments to enact laws that relied on gender stereotypes.[257] While early constitutional sex discrimination cases addressed *explicit* (rather than implicit) sex stereotypes, the idea that relying on sex stereotypes could constitute a constitutional discriminatory purpose set the stage for the expansion of sex stereotyping law under Title VII; the same was not the case for racial stereotyping.

To the extent that Equal Protection doctrine spillover has hampered courts' ability and willingness to recognize actionable racial stereotyping in the context of Title VII, this is unnecessary. Equal Protection and Title

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[253] Washington v. Davis, 426 U.S. 229, 244–48 (1976).

[254] *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317–388; Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1781–89, 1853 (2012); Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism about Equal Protection*, 66 ALA. L. REV. 627, 646–48 (2015); Jerry Kang & Kristin Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 464, 464–90 (2010); Rich, *supra* note 26, at 203, 230–32. Anita Bernstein has also suggested that the constitutional law of stereotyping has not gone as far as the Thirteenth Amendment allows: its prohibition on the "badges and incidents" of slavery could plausibly support legislation to prohibit racial stereotyping. Bernstein, *supra* note 92, at 705–711 (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 (1968)).

[255] Rich, *supra* note 26, at 231.

[256] Kang, *supra* note 254, at 646–48. For a discussion of how sexual orientation has been treated under Equal Protection doctrine, *see generally* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016) (identifying what Russell describes as "LGBT exceptionalism" in constitutional law, whereby Supreme Court jurisprudence has provided advantages in cases involving the rights of gays and lesbians unavailable to other protected classifications, like race and sex).

[257] *See supra* notes 93–95 and accompanying text; *Price Waterhouse*, 490 U.S. at 251 (citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

VII doctrine are different, and courts in Title VII cases need not be similarly limited by adherence to a colorblindness ideal that obfuscates actionable racial stereotyping at work.[258] The Supreme Court itself has identified these differences, by recognizing that disparate impact claims are actionable under Title VII—and, most recently, under the Fair Housing Act modeled on Title VII—despite its unavailability under Equal Protection.[259]

Moreover, as a matter of doctrine and precedent, this is incorrect: a coherent and robust modern approach to Title VII should recognize the doctrinal differences between Title VII and Equal Protection and apply stereotype theory consistently, regardless of protected class. Legal scholars—combined with recent sex stereotyping case law—have paved the path for doing so. In the context of caregiver discrimination, Joan C. Williams has identified that most workplaces are gendered, designed around a masculine norm of the "ideal worker" who is unencumbered and always available for work.[260] Because of this, as Williams and I have addressed in previous work, "gender stereotypes arise in everyday workplace interactions":

> In a workplace that assumes an ideal worker without childbearing or childrearing responsibilities, a worker who gives birth and returns to work as a mother will be treated as defective . . . . In a workplace shaped by masculine norms, women can and do successfully litigate sex discrimination by using the stereotypes that arise in everyday interactions as evidence of gender bias.[261]

Sociologist Cecilia Ridgeway's research identifying how people use sex and gender as a "primary frame for organizing" how they relate to others supports this approach.[262] The gender frame "spreads gendered meanings" throughout society, including the workplace, which embodies "stereotypic assumptions."[263] And, Ridgeway explains, "[w]hen structures and procedures embody stereotypic gender assumptions, they themselves become independent agents of bias in the workplace."[264]

In a parallel fashion, Devon Carbado and Mitu Gulati's work suggests, in effect, that most workplaces are raced.[265] While often espousing a

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[258] *See generally* Rich, *supra* note 26 (describing how Equal Protection and Title VII doctrine have points of both convergence and divergence—for example, unlike Equal Protection, "Title VII's prohibitions against race discrimination in employment have no animus requirement," *id.* at 231.).

[259] *See* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516–26 (2015); Washington v. Davis, 426 U.S. 229, 244–48 (1976).

[260] *See* WILLIAMS, *supra* note 214, at 65–70.

[261] *See* Williams & Bornstein, *supra* note 107, at 1338–39.

[262] *See* RIDGEWAY, *supra* note 19, at 7.

[263] *Id.* at 94–95.

[264] *Id.* at 96.

[265] *See generally* Carbado & Gulati, *supra* note 138 (describing the phenomenon of

commitment to diversity and "colorblindness," most predominantly white workplaces start from certain institutional norms, in which many racial and ethnic minorities find themselves as "Outsiders" who must adopt a "Working Identity" to succeed at work:

> [R]acial stereotypes often conflict with institutional criteria . . . [T]he existence of negative racial stereotypes (particularly as they conflict with institutional norms) creates an incentive for employees to work their identity to negate those stereotypes . . . [266]

Racial minorities, like caregivers, may encounter stereotyping from their very lack of "fit" with the institutional norms around which the workplace is designed; moreover, they may be held to different standards of performance and forced to re-prove their competence.[267] They should, likewise, be able to litigate race discrimination using everyday stereotyping as evidence of racial bias.

Of course, as described previously, not all stereotyping is discriminatory or illegal, and stereotype theory may not reach all aspects of gender or race performance, identity, or difference.[268] But when employees are penalized at work based on stereotypes that affect perceptions of their competence or suitability for work, they should be similarly actionable, regardless of protected class.

Some courts have successfully recognized the application of a *Price Waterhouse*-style stereotyping theory to race discrimination. The First Circuit's decision in *Thomas v. Eastman Kodak* provides an example.[269] After years of employment with excellent performance, the plaintiff—the only African-American woman in a department of six—was assigned a new supervisor who undercut and criticized the plaintiff at every turn, denied and blocked her opportunities for advancement, and assessed her with "inaccurately low scores on her annual performance appraisals" that ultimately led to her termination.[270] The court recognized that the plaintiff was "alleg[ing] a more subtle type of disparate treatment," focused on "[t]he role of . . . stereotyping . . . discussed most thoroughly in that branch of disparate treatment law developed apart from the *McDonnell Douglas* . . . framework . . . known as the *Price Waterhouse* framework."[271] Based on both stereotyping and comparator evidence, the court reversed summary judgment against the plaintiff, stating clearly that "[s]tereotypes or cognitive biases based on race are as incompatible with Title VII's

"Working Identity").

[266] *Id.* at 26; *see also id.* at 1–35, 134–48.

[267] *See supra* notes 243–46.

[268] *See supra* notes 40, 102, 115–117 and accompanying text.

[269] 183 F.3d 38, 59 (1st Cir. 1999).

[270] *Id.* at 45–46.

[271] *Id.* at 58–60.

mandate as stereotypes based on age or sex, [thus] here too, 'the entire spectrum of disparate treatment' is prohibited."[272]

Likewise, in *Kimble v. Wisconsin Dept. of Workforce Development*, the U.S. District Court for the Eastern District of Wisconsin held in favor of an African-American male plaintiff who alleged intersectional sex and race discrimination in pay on the basis of both comparator and stereotyping evidence.[273] The court cited both *Thomas* and *Price Waterhouse* and discussed the literature on stereotyping and implicit bias, before finding that his supervisor "seemed to regard plaintiff as if he were 'veiled with images of incompetency,'" which supported the plaintiff's inference of discrimination.[274] Despite this clear precedent, successful application of the stereotyping approach beyond the protected class of sex remains limited.[275]

B. Revisiting Comparators and Stray Remarks

To move the modern stereotyping frame beyond sex discrimination cases more concretely, courts can and should apply the specific doctrinal advancements on comparators and stray remarks to all employment discrimination cases. First, based on the development of the law on comparators in caregiver and transgender discrimination cases, all plaintiffs alleging intentional discrimination regardless of protected class should have the opportunity to create an inference of discrimination and survive the pleading stage without "comparator" evidence. Circuits that still cling to the comparator concept, insisting that the *McDonnell Douglas* framework *requires* a comparator at either the prima facie or pretext stage, should be bound by precedent on comparators, most recently in the Supreme Court's 2015 decision in *Young v. UPS*. In *Young*, the Court said, once again and definitively, that comparators are *not* required to create an inference of discrimination under Title VII.[276] Moreover, even in the context of the one limited piece of the statute that requires comparisons—that pregnant women be treated "the same . . . as" employees with similar physical ability or inability to work—the Court said that the statute does *not require* that employees be otherwise similarly situated, "similar in all but the protected ways."[277] Where a plaintiff alleging disparate treatment lacks comparator evidence but produces relevant evidence of stereotyping relating to the protected class, caregiver and transgender

[272] *Id.* at 42, 59, 60.

[273] 690 F.Supp.2d 765 (E.D. Wis. 2010).

[274] *Id.* at 768–69, 770–71,775–78 (citation omitted).

[275] *See supra* notes 249–51 and accompanying text.

[276] Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015).

[277] *Id.*

discrimination precedent hold that this may create an inference of discrimination.[278]

Thus a plaintiff who believes that stereotypes about his race or national origin played a role in an adverse employment action he experienced, particularly if those stereotypes relate to his work capabilities or commitment, suitability for promotion, or ability to fit in with the work culture, may use a stereotype theory and stereotyping evidence to create an inference of discrimination, just as caregiver and transgender plaintiffs have done with evidence of sex stereotyping. Counterfactual application of this theory to examples of cases in which race discrimination plaintiffs have lost on summary judgment due to lack of comparator evidence illustrate the incoherence of such holdings.

In one case, the Sixth Circuit upheld summary judgment against the plaintiff, a black doctor of African national origin, who alleged that he was discriminated against because of his race and national origin when the hospital at which he worked terminated his fellowship.[279] After describing his requirement to prove, as the fourth prong of his prima facie case, that he "was replaced by someone outside the protected class or was treated differently than similarly-situated, nonprotected employees," the court held that, because no such comparator existed, he could not proceed with his race discrimination claim.[280] The only other similarly situated employee was African-American; because the other doctor was "of the same racial group," the court held, he could not serve as a "nonprotected employee" to satisfy the plaintiff's required proof.[281] In another case, the Sixth Circuit upheld summary judgment against a plaintiff who alleged race discrimination when he was singled out, given poor performance reviews, and suspended for errors he alleged were attributed to him but were actually the fault of his coworker and supervisor.[282] Again, the court took the narrowest view of the comparator requirement, finding that the plaintiff's white coworker who did the exact same job could not serve as a comparator because the coworker was only in that position on a temporary basis.[283] In neither of these two cases did the court make any mention of creating an inference of discrimination: both plaintiffs

[278] *See id.*; *supra* Part II.A.2. (caregiver discrimination); Part II.A.3. (transgender discrimination).

[279] Adebisi v. Univ. of Tenn., 341 F. App'x 111, 112 (6th Cir. 2009).

[280] *See id.*

[281] *See id.* Note the court held that this comparator was suitable to meet the fourth prong of the prima facie case for plaintiff's national origin discrimination claim but upheld summary judgment on that claim, too, based on plaintiff's failure to prove pretext. *Id.* at 113.

[282] Zanders v. Potter, 223 F. App'x 470, 470–71 (6th Cir. 2007).

[283] *Id.*

lacked similarly situated comparators, so both plaintiffs lost on summary judgment.[284]

Indeed, it is entirely possible that neither plaintiff had evidence on which to legitimately support including a stereotype theory or frame as part of his claims; neither case decision makes any mention of stereotyping. On the other hand, both cases involved subjective assessments of the plaintiffs' performance, and both plaintiffs believed they were singled out and subject to unfair scrutiny due to their race.[285] If the plaintiffs offered any evidence that racially stereotyped perceptions of their work abilities played a role in their adverse actions, they should have been able to create an inference of discrimination with the stereotyping evidence, even in the absence of comparators. What is more, because both plaintiffs were in the Sixth Circuit and both decisions were made after that court's 2004 decision in *Smith v. City of Salem*, the court was bound by *Smith* and subsequent Sixth Circuit precedent in which plaintiffs alleging transgender discrimination were able to create an inference of discrimination based on a stereotype theory with little or no comparative evidence.[286]

Current social science research shows us how individuals can be harmed by stereotyping even if other members of their protected class are not.[287] This insight, coupled with the persistence of race and gender segregation in our workforce,[288] makes moving beyond the comparator requirement is essential to modernizing Title VII doctrine to reach discrimination in its current forms. In her work extensively documenting the rise and continued grip of the comparator requirement, Suzanne Goldberg describes how cases alleging harassment or stereotyping provide a useful "contextual" approach, whereby courts "look[] to all of the surrounding circumstances for the ways in which the protected traits may have operated to affect employer decisionmaking," and argues similarly that this contextual approach should be a "legitimate analytic option in all cases."[289] Significant court of appeals and even Supreme Court precedent in contemporary sex stereotyping cases now provide the model for doing so.

Likewise, where plaintiffs provide evidence of stereotypical beliefs in the workplace, courts can and should follow advances in the law in caregiver and transgender discrimination cases to view such evidence as relevant stereotyping evidence, rather than discounting it as "stray remarks." All plaintiffs alleging intentional discrimination regardless of protected class should be able to benefit from courts' understanding, in the care-

[284] *Adebisi*, 341 F. App'x at 112–13; *Zanders*, 223 F. App'x at 470–71.

[285] *Adebisi*, 341 F. App'x at 113; *Zanders*, 223 F. App'x at 470.

[286] Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004); *supra* Part II.A.

[287] *See supra* note 138.

[288] *See supra* notes 14–18 and accompanying text.

[289] *See* Goldberg, *supra* note 130, at 779–80, 808.

giver context, of how stereotypes that relate to a plaintiff's suitability or "fit" at work may relate to an adverse employment decision, even if not temporally proximate or expressed by the ultimate decision maker. Moreover, the treatment of gender stereotyping as *direct* evidence of discrimination in some transgender discrimination cases offers the possibility of returning direct evidence to its rightful status: should a plaintiff have evidence that an adverse action was taken because of a stereotype associated with a protected class, courts should recognize that as twenty-first-century direct evidence.

Again, applying this insight counterfactually to cases in which plaintiffs had useful stereotyping evidence discounted as stray remarks illustrates its value to coherence in the doctrine of Title VII. For example, the U.S. District Court for the District of New Jersey granted summary judgment against an African-American plaintiff who was terminated from his position as a regional sales representative at a medical packaging company.[290] The plaintiff employee alleged disparate treatment on the basis of comparative evidence, claiming that the defendant employer misconstrued the plaintiff's performance and did not terminate "similarly situated white employees."[291] In its analysis of pretext, the court noted that, "although [the p]laintiff made no arguments about this issue in his briefs," there was "evidence in the record" that the plaintiff's supervisor "made a comment . . . of a racial nature."[292] As the evidence showed, the supervisor had made remarks to the plaintiff, shortly after he was hired, "to the effect that black men know how to post-up in the low post [in basketball], but do not know the medical packaging business."[293] Yet just as quickly as it identified this stereotypical statement, the court found it to be "simply a stray remark, which no reasonable jury could find" supported proof of pretext in the case.[294]

To be sure, there was significant evidence in the case documenting plaintiff's performance problems, which was the defendant's proffered legitimate nondiscriminatory reason for the termination.[295] Still, the plaintiff's comparative theory of disparate treatment turned on a double standard in how performance (competence) was measured: he believed he should have been judged on improvement over the prior year's sales as opposed to total sales in the abstract, and he alleged that white employees with similar relative performance were not terminated.[296] And yet

[290] Taylor v. Amcor Flexibles Inc., 669 F. Supp. 2d 501, 511 (D.N.J. 2009), as cited in Stone, *Taking in Strays*, *supra* note 204, at 164.

[291] *Taylor*, 669 F. Supp. 2d at 505.

[292] *Id.* at 511.

[293] *Id.* The phrase "post-up in the low post" is a reference to a basketball maneuver.

[294] *Id.*

[295] *Id.* at 507–11.

[296] *Id.* at 506–07.

he neither alleged stereotyping nor even highlighted the supervisor's statement, which *the court* found concerning enough to highlight itself before granting summary judgment.[297] Had the plaintiff included a stereotype theory, alleging not only that his race but that racial stereotypes—here clearly related to his knowledge of and suitability for work in his field because he was black—led to his disparate treatment, precedent from the sex stereotyping cases should have governed. Viewed under the broader lens of stereotyping evidence, this statement—made by *the very decision maker* who assessed his performance and terminated him—was anything but stray.

In her detailed analysis of the stray remarks doctrine, Kerri Stone explains how the concept of stray remarks is out of step with modern understandings of the reality of social cognition.[298] The fact that courts not only disqualify stray remarks from serving as direct evidence but also generally discount the inferential value of such remarks, Stone argues, "fails to comport with an informed understanding of how human beings cultivate, harbor, and express bias against others."[299] The insistence on temporal proximity of any comment evincing bias is particularly illogical, Stone notes, because of the very fact that much of this discrimination is subconscious or implicit: "the utterance of a comment in another context lends credence to the theory that the decision maker's bias carried over from her life outside of work into her professional life."[300] Numerous courts have been able to recognize the importance of taking a broader view of stereotyping evidence in the context of sex discrimination cases; they can and should apply this approach to all discrimination cases regardless of protected class.

C. Removing Roadblocks with Stereotype Theory

Beyond its ability to overcome the comparator requirement and the stray remarks doctrine, applying a stereotype frame to cases pled under the two other theories for litigating second generation discrimination—disparate treatment involving implicit bias and disparate impact—may serve as an important response to recent constraints placed on those theories' by the Roberts Court.

1. Stereotyping as the "Glue" for Implicit Bias Class Cases

As described previously, in *Wal-Mart v. Dukes*, the Supreme Court rejected plaintiffs' social framework proof that the company's policy of relying on unchecked subjective decision making fostered implicit bias re-

[297] *Id.*

[298] Stone, *Taking in Strays*, *supra* note 204, at 182–89; *see also* Albiston et al., *supra* note 213, at 1293.

[299] Stone, *Taking in Strays*, *supra* note 204, at 183.

[300] *Id.* at 184, 188.

sulting in sex discrimination.[301] The Court majority found plaintiffs lacked evidentiary "glue" to link the decisions together—as scholars later described it, a lack of some "connective tissue" or a "coherent narrative" of discrimination.[302]

Indeed, it was stereotyping evidence that plaintiffs used as this glue when they later pursued the same claims but across a smaller region of the company. On remand after the Supreme Court's 2011 *Wal-Mart* decision, when the same plaintiffs narrowed their case to focus on a smaller region of mostly California stores, they included sex stereotyping evidence evincing "a culture and philosophy of gender bias shared by the relevant decision makers."[303] As described by the California federal district court hearing the new version of the case, the plaintiffs provided evidence that, at a required training, California store managers were told the lack of women in Wal-Mart senior management was "attributable to men being 'more aggressive in achieving those levels of responsibility,'" and were "cautioned that efforts to promote women could lead to the selection of less qualified candidates."[304] The plaintiffs also offered evidence of statements by the company CEO "that could be interpreted as communicating that men had traits that were more likely to make them successful."[305] Despite the fact that "the basic theory of Plaintiffs' claims has changed little," the addition of stereotyping evidence was responsive enough to the Supreme Court's holding—which "rested not on a total rejection of plaintiffs' theories, but on the inadequacy of their proof"—for the district court to deny a motion to dismiss the case.[306]

Likewise, other recent cases alleging a pattern or practice of sex discrimination, including those filed against pharmaceutical companies Novartis and Daiichi Sankyo and financial giant Goldman Sachs, have survived challenges by alleging an implicit bias theory *with* a stereotyping frame. Plaintiffs in these cases used stereotyping evidence to bolster their statistical evidence, arguing both that workplace structures allowed implicit bias to infect many individual employment decisions and that those

[301] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–57 (2011). *See* Part I.B.2.

[302] *Wal-Mart Stores*, 131 S. Ct. at 2552; Selmi, *Theorizing*, *supra* note 88, at 481; Zatz, *supra* note 88, at 388, 390–91.

[303] Order Denying Motion to Dismiss at 8, Dukes v. Wal-Mart Stores (N.D. Cal. Sept. 21, 2012), (No. C 01-02252 CRB).

[304] *Id.*

[305] *Id.*

[306] *Id.* After surviving the motion to dismiss, however, the plaintiffs again lost on their motion for class certification, as the court held that the class was still too big to meet commonality required for class treatment. Dukes v. Wal-Mart Stores, 964 F. Supp. 2d 1115, 1125, 1127 (N.D. Cal. 2013). For most cases, the ability to survive a motion to dismiss would still be a significant victory; after twelve years of litigation with no settlement, the *Wal-Mart* plaintiffs were in a unique position.

decisions were made within a work culture of gender stereotyping.[307] The Novartis plaintiffs alleged stereotyping evidence including: one manager's expressed preference not to hire young women because "[f]irst comes love, then comes marriage, then comes flex time and a baby carriage"; another's alleged encouragement of a pregnant employee to get an abortion; and a third's urging employees during a training "to avoid getting pregnant."[308] The Daiichi Sankyo plaintiffs described "a sales strategy built upon gender stereotypes," alleging that "pregnant women and working mothers with young children [did] not fit within the stereotypical role promoted by [that] strategy," and that female employees were "actively discouraged from having children"—warned that they'd be "committing 'career suicide'" if they became pregnant or sought pregnancy leave or reduced schedules.[309] And the Goldman Sachs plaintiffs successfully distinguished their claims from the *Wal-Mart* case by both their smaller class size and by identifying several work policies known to foster sex stereotyping, including "360-degree review" performance evaluation and "tap on the shoulder" promotion selection systems.[310] Tellingly, each of these successful cases included class-wide claims of caregiver discrimination and evidence of a culture of impermissible stereotypes that linked protected class status (sex, motherhood) to a lack of suitability for work.

2. Stereotyping to "Smoke Out" Intent in Disparate Impact Cases

Less obvious, but still important to recognize, is the potential for the role of stereotypes in disparate impact claims—particularly given the Roberts Court majority's view that disparate impact theory should be applied narrowly and is most properly used as a way to "smoke out" disguised intentional discrimination.[311] Stereotyping evidence, traditionally associated with disparate treatment, serves a different role in disparate impact cases, which, as described previously, do not follow *McDonnell*

[307] *See* Wellens v. Daiichi Sankyo, Inc., No. 13-cv-00581-WHO, 2014 WL 2126877, at *1 (N.D. Cal. May 22, 2014); Chen-Oster v. Goldman, Sachs & Co., No. 1:10-cv-06950-LBS-JCF, 2012 WL 2912741, at *1–4 (S.D.N.Y. July 17, 2012); Velez v. Novartis Pharm. Corp., 244 F.R.D. 243, 260–61 (S.D.N.Y. 2007); *see also Daiichi Sankyo Gender Pay, Promotion and Pregnancy Discrimination Class Action*, Sanford Heisler Kimpel, LLP, http://www.sanfordheisler.com/cases/daiichi-sankyo-gender-discrimination-class-action; *Goldman Sachs Gender Discrimination Class Action*, Goldman Gender Case, http://goldmangendercase.com/; *Novartis Pharmaceutical Gender Discrimination Class Action*, Sanford Heisler Kimpel, LLP, http://www.sanfordheisler.com/cases/novartis-pharmaceutical-gender-discrimination-class-action. *But see* E.E.O.C. v. Bloomberg L.P., 778 F.Supp.2d 458 (S.D.N.Y. 2011) (holding that stereotyping evidence was insufficient to support plaintiffs' pattern or practice sex discrimination case).

[308] *Velez*, 244 F.R.D. at 267–68.

[309] *See* Wellens v. Daiichi Sankyo, Inc., Complaint, No. C 13 0581, 2013 WL 497246 (N.D.Cal., February 11, 2013).

[310] *See Chen-Oster*, 2012 WL 2912741, at *2–4.

[311] *See supra* Part I.B.1; *supra* note 72.

Douglas burden-shifting but instead require plaintiff to show that an employer's facially neutral policy creates an adverse impact on members of a protected class, and that the practice is neither justified by a business necessity nor can be replaced by an alternative, less discriminatory practice.[312] Yet stereotypes may play a part in various stages of this framework—for example, if how the defendant employer justifies the policy as something that is a business necessity reflects not a real "necessity" but rather the product of stereotyped thinking, or if the employer's view that a less discriminatory alternative practice will not suffice relies on stereotypical beliefs rather than reality.

The Third Circuit case *Lanning v. Southeastern Pennsylvania Transportation Authority* (SEPTA) suggests an example.[313] In *Lanning*, female applicants for transit authority police positions alleged sex discrimination under a disparate impact theory, challenging the requirement that, to be hired, applicants must run 1.5 miles in 12 minutes.[314] Plaintiffs demonstrated that only 12% of female applicants as compared to 60% of male applicants could pass this screening test, but that officers hired prior to the institution of the requirement were not held to the same standard.[315] The court's analysis focused on whether SEPTA could meet the "business necessity" defense allowed to employers under the disparate impact theory.[316] As the court defined it, to be a "business necessity," a test cut-off score with disparate results must "measur[e] the minimum qualifications necessary for successful performance of the job," which the court held SEPTA had not proven.[317] "A business necessity standard that wholly defers to an employer's judgment as to what is desirable in an employee," the court noted, "is completely inadequate in combating covert discrimination based upon societal prejudices."[318]

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[312] *See id.*

[313] 181 F.3d 478 (3rd Cir 1999).

[314] *Lanning*, 181 F.3d at 482.

[315] *Id.* at 483–86.

[316] *Id.* at 490–94.

[317] *Id.*

[318] *Id.* at 490. In a subsequent decision, the Third Circuit affirmed judgment in favor of SEPTA, holding that, after "allow[ing] the parties to expand the record in keeping with our newly-announced standard…SEPTA produced…competent evidence to support the finding" that its test did, in fact, "measur[e] the minimum qualifications necessary…thus…showing business necessity." Lanning v SEPTA, 308 F.3d 286, 288–93 (3d Cir. 2002). However, relying on *Lanning*, other plaintiffs have survived summary judgment where they showed that a physical ability test based on assumptions had a disparate impact by sex. *See, e.g.*, Easterling v. Connecticut, 783 F.Supp.2d 323, 343 (2011) (noting that defense expert "stated that 'it's reasonable to assume [that] higher levels of fitness correlate with more positive outcomes and fewer negative outcomes,' but did not provide any evidence" to support assumption); United States v. City of Erie, 411 F.Supp.2d 524, 555, 558–59 (2005) (noting that defense expert "assume[d] one of the facts that Title VII requires the City to prove").

Other plaintiffs have succeeded in challenging employers' assumptions of what constitutes a "necessary" employment practice by exposing stereotyped thinking. When a postal worker alleged that a policy prohibiting use of sick leave to care for sick family members had a disparate impact by sex, she included evidence that, prior to the imposition of this policy by a new postmaster, she had successfully used sick leave to care for her sick child without incident.[319] A Texas federal district court denied the employer's motion for summary judgment and ordered additional briefing in her case.[320] When female workers at a specialty glass plant alleged that the ranking system used to determine who would be laid off had a disparate impact on women, they included evidence that the discretionary system was used within a work context marked by gender stereotyping, including supervisors who "were . . . often dismissive of women in the workplace, derisively referring to certain tasks as 'women's work.'"[321] A Pennsylvania federal district court agreed, denying summary judgment for the employer and holding that the evaluation system failed the business necessity defense against a disparate impact claim.[322] The ranking system, the court explained, "built in a bias towards the skills men had obtained in a workplace that was largely sex-segregated," so that "a jury could…find that the [system] was designed to perpetuate the long-term biases in the factory and did not adequately measure who could actually perform the new jobs."[323]

As these cases demonstrate, where a policy or practice that has a discriminatory impact is based on assumptions about what makes someone suitable for work, stereotyping evidence may be useful in overcoming an employer's "business necessity" defense and unmasking biases built into workplace structures.

CONCLUSION

Looking to the success of cases on the margins of antidiscrimination law provides a unique perspective from which to see doctrinal and theoretical innovations. At a time when the Roberts Court has acted to limit disparate impact and implicit bias-based disparate treatment theories, federal courts faced with caregiver and transgender discrimination cases have been able to recognize the unlawful impact of protected class stereotypes in the workplace. Relying on stereotypes to make decisions is not

[319] *See* Roberts v. U.S. Postmaster Gen., 947 F. Supp. 282, 284 (E.D. Tex. 1996).

[320] *Id.* at 284, 287–89; *see also* Abraham v. Graphic Arts Int'l, 660 F.2d 811, 819–20 (D.C. Cir. 1981) (denying summary judgment where rule prohibiting leave over ten days had a disparate impact by sex/pregnancy).

[321] Equal Emp't Opportunity Comm'n v. Schott N. Am., Inc., 2008 WL 4452715, *4–8 (M.D.Pa. Sept. 29, 2008).

[322] *Id.* at *12–14.

[323] *Id.* at *14.

in and of itself always harmful, and many stereotypes are based on demographically accurate information. But when protected class stereotypes involve assumptions about an individual's work competence, commitment, or fit, Title VII prohibits them—regardless of how an employer treats anyone else in the workplace. Caregiver and transgender discrimination cases have demonstrated this line, and have provided new pathways of proof that may benefit all plaintiffs alleging second generation discrimination.

Of course, relying on stereotype theory and stereotyping evidence as a means to unify and revive antidiscrimination litigation is not without its own limitations. Critics would argue that stereotyping is not a panacea to constraints in antidiscrimination law for a number of reasons. First, not every plaintiff can produce stereotyping evidence. The reason why such strong "loose lips"[324] evidence exists in caregiver and transgender cases is that mothers and transgender employees are at the margins of what is protected by Title VII (which also explains why such cases have been marginalized). People are more likely to express stereotypical beliefs about gender than about race—particularly ideas about motherhood, femininity, and masculinity—because those beliefs are, on some level, more culturally embedded and socially acceptable.[325] Second, even when a plaintiff might have evidence of stereotypes associated with race or national origin, it is more likely that such stereotyping evidence will be discounted as bias "in the air" and not related to the adverse employment decision or evidence from which to infer discrimination.[326] Third, as suggested by Suzanne Goldberg in discussing alternatives to the comparator requirement, allowing plaintiffs to survive summary judgment on the basis of stereotyping evidence could open the floodgates to more cases getting further along in the litigation process, causing employers and the courts to incur associated costs.[327]

A stereotyping approach will not miraculously solve these problems. Still, social science tells us that stereotypes of all kinds are still very strongly held and that people commonly rely upon stereotypes when making subjective assessments and decisions.[328] Applying a stereotyping

[324] *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 92, 107 (2003) (naming and describing "loose lips" evidence).

[325] *See* Selmi, *Evolution, supra* note 105, at 979 ("One important difference with gender stereotypes is that they are less likely to be implicit in nature if by implicit we mean that the person who holds the stereotype is unaware of doing so. A person may be unwilling to admit fidelity to the gender stereotype, but that is not the same as being unaware of its force.").

[326] *See* Goldberg, *supra* note 130, at 787 & n.197 (citing Carbado & Gulati, *supra* note 138).

[327] *Id.* at 811.

[328] *See* Krieger, *supra* note 9, at 1186–90, 1241–44.

lens to an employment discrimination case does not necessarily require unearthing the rare overt statement of stereotyping that may not exist in a race or national origin case; by applying the same theory of why and when caregiver and transgender stereotyping at work is unlawful, the approach becomes clear. When a protected class stereotype infects perceptions of an employee's work—for example, assessment of the employee's competence, suitability for leadership, or "cultural fit"—and the result is an adverse employment action, courts should recognize that as illegal discrimination. That is the harm that lies under the surface of much covert second generation discrimination. Courts have been able to recognize these connections and the social science of stereotyping in sex stereotyping cases; they can and should do so for all such cases, regardless of protected class.

To the extent that an "everybody stereotypes" approach risks opening the floodgates to questionable discrimination claims, such concerns are unfounded. While everybody may stereotype, *Price Waterhouse* tells us that stereotyping is only unlawful and actionable under Title VII when it plays a role in an adverse employment decision.[329] Any plaintiff alleging a stereotype theory still has to use stereotyping or comparative evidence to create an inference of discrimination to survive through the pleading stage. The comparator requirement and stray remarks doctrine are so ingrained in the consciousness of federal court judges that if a plaintiff has convinced a court to infer discrimination with stereotyping evidence alone, that plaintiff has a legitimate claim that should not be dismissed.

And, should the number of cases and associated costs to courts and employers rise by any noticeable measure, that is not necessarily a bad thing.[330] The Title VII litigation frameworks were not created by the Supreme Court so that most employment discrimination plaintiffs would lose on summary judgment; they were created to root out cases in which it was unlikely that impermissible consideration of a protected class motivated the employer's actions. Were more cases to survive the pleading stage based on stereotyping evidence, employers would have an important incentive to take stereotyping seriously and make greater efforts to reduce reliance on stereotypes in workplace decision making. The ultimate result would be to reinvigorate Title VII and its ability to reach workplace attitudes and practices that continue to stand as significant barriers to equality in employment.

Recent plaintiff successes in pioneering sex stereotyping cases suggest the potential for evolution in antidiscrimination law. Transgender

[329] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–55 (1989); *supra* Part I.B.3.

[330] *See* Goldberg, *supra* note 130, at 811 ("I would argue . . . these costs are more than matched by the benefit of having open jurisprudential discussion and debate about the proper reach of discrimination doctrine. . . . A move to a contextual evaluation would open the possibility of conversation and perhaps lead to refinement of the jurisprudence.").

and caregiver discrimination cases demonstrate that stereotypes operate in similar ways to disadvantage employees based on a perceived lack of competence or suitability for work. Caregiver discrimination cases have also helped unearth that many workplace structures are inherently gendered—that is, that many work norms, policies, and practices embody and foster reliance on gender stereotypes.[331] Combining these two insights offers a modern way to recognize entrenched bias in the workplace. Regardless of the protected class in question, all courts can and should apply the lessons provided by recent leading-edge sex stereotyping cases—cases that demonstrate how, even fifty years after Title VII's enactment, litigation under the statute continues to spark progress toward ever greater workplace equality.

[331] *See* Williams & Bornstein, *supra* note 107, at 1338–39.