1993

Gender Sterotyping in Employment Discrimination: Finding a Balance of Evidence and Causation under Title VII

Tracy L. Bach

Note

Gender Stereotyping in Employment Discrimination: Finding a Balance of Evidence and Causation Under Title VII

Tracy L. Bach

During a job interview, the potential employer asks the female applicant whether her husband approves of her seeking the job, when she will have her next child, and how she has arranged her child care. Although she is qualified for the position, the employer does not hire her. On learning that the company hired a man, she sues for employment discrimination based on gender stereotyping. Whether the applicant will win her case depends on her ability to prove that the employer not only asked her these questions but also relied on her responses to make the hiring decision. The degree of causation and the kind of evidence necessary to link gender stereotyping with a finding of employment discrimination depends largely on which federal circuit hears her case.

In *Price Waterhouse v. Hopkins*,[1] the Supreme Court attempted to clarify the law on gender stereotyping in employment decisions. Since *Price Waterhouse*, however, the federal circuits have implemented different standards of causation linking stereotyping with discrimination. The different standards the courts employ seriously affect a woman's ability to prove employment discrimination based on gender stereotyping[2] and have led to disparate results for the same discrimina-

1. 490 U.S. 228 (1989).

2. Some commentators argue that the way in which the federal courts apply civil rights laws has a tremendous impact on the willingness of individuals to bring suit to enforce legal ideals of eradicating discrimination: "[T]he federal courts of appeals have much to say about the all-important ground rules of civil rights litigation, since they are called upon to interpret Supreme Court precedent and to decide fundamental questions in the absence of Supreme Court precedent." Lewis M. Steel & Miriam F. Clark, *The Second Circuit's Employment Discrimination Cases: An Uncertain Welcome*, 65 ST. JOHN'S L. REV. 839, 841 (1991).

tory conduct. Moreover, the 1991 Civil Rights Act,[3] while explicitly modifying *Price Waterhouse*'s causation standard, fails to adequately define the relationship between discriminatory animus and actionable Title VII claims. While courts now accept that gender stereotyping provides grounds for an employment discrimination claim, and that the standard of causation plays a pivotal role in the case's outcome, a dispute remains as to which analytical framework courts should employ to determine causation.

To date, the many commentators who have analyzed *Price Waterhouse* have concluded that its resolution of Title VII causation issues lacks clarity.[4] No commentators, however, have looked beyond this case to review its effect on the lower courts' approach to employment discrimination claims alleging gender stereotyping. Moreover, no one has yet addressed the relationship between causation and evidence, and proposed an approach to Title VII gender stereotyping cases that links the two.

This Note highlights the inconsistent standards courts utilize and develops a framework for applying Title VII's "because of" clause in a manner that unifies several existing approaches to causation and evidence. Part I defines gender stereotyping and places it within the evolution of employment discrimination law from the passage of the Civil Rights Act of 1964 to that of 1991. Part II describes the varying standards courts presently apply when determining what factors motivated an employer's decision. Part III analyzes the courts' search for proximate cause in employment discrimination and proposes a framework that balances the degree of causation with the burden of proof and evidentiary requirements. This Note suggests that by explicitly recognizing the relationship between causa-

3. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

4. *See, e.g.*, Roy L. Brooks, *The Structure of Individual Disparate Treatment Litigation After* Hopkins, 6 LAB. LAW. 215, 215 (1990); Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 53 (1990); Gerald A. Madek & Christine Neylon O'Brien, *Women Denied Partnerships: From* Hishon *to* Price Waterhouse v. Hopkins, 7 HOFSTRA LAB. L.J. 257, 289 (1990); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 523 (1990); Jean Calhoun Brooks, Note, *The Supreme Court Liberates Title VII Mixed-Motive Cases from the Procrustean Bed of the* McDonnell Douglas/Burdine *Pretext Model*, 25 WAKE FOREST L. REV. 345, 370-71 (1990); Tracey Gibbons Hanley, Note, Price Waterhouse v. Hopkins: *Attempting to Resolve the Mixed-Motive Dilemma*, 64 ST. JOHN'S L. REV. 289, 310-11 (1990); Susan Struth, Note, *Permissible Sexual Stereotyping Versus Impermissible Sexual Stereotyping: A Theory of Causation*, 34 N.Y.L. SCH. L. REV. 679, 682 (1989).

tion and evidence, courts will treat employment discrimination claims of gender stereotyping under Title VII more consistently and equitably.

I. GENDER STEREOTYPING AND EMPLOYMENT DISCRIMINATION

A. GENDER STEREOTYPING IN EMPLOYMENT

Stereotypes result from generalizations of social group behavior applied to individual group members "in terms of preconceived characteristics whether or not the descriptions are accurate."[5] Gender[6] stereotyping[7] cases thus turn not on whether the stereotypes have some truthful foundation but whether the decisionmaker has indiscriminately applied to individual women the true or false attributes ascribed to women as a group.[8] Women seeking employment[9] encounter numerous

5. Robert B. Fitzpatrick, *Stereotyping in the Workplace: Evidence of Discrimination?*, TRIAL, Jan. 1990, at 76; *see also* Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, *in* 5 RES. ORGANIZATIONAL BEHAV. 269, 271 (L. L. Cummings & Barry M. Staw eds., 1983) (stereotypes represent "a set of attributes ascribed to a group and imputed to its individual members simply because they belong to that group"). Sociologists believe that stereotyping occurs in a two-step process: first, categorization of individuals in groups by oppositional terms like female and male, young and old, and black and white; and second, attribution of certain group traits to individuals so categorized. Thomas L. Ruble et al., *Sex Stereotypes: Occupational Barriers for Women*, 27 AM. BEHAVIORAL SCIENTIST 339, 340 (1984).

6. Commentators often employ the terms gender, sex or sexual, and sex role interchangeably when describing discrimination against women. This Note will use gender.

7. Gender stereotypes include three kinds of "unconscious gender bias": "prototypes," or the images strongly associated with individual members of a specific occupation (for example, aggressive men as litigators); "schema," or the personal and situational attributes used to explain behavior (for example, men's achievement defined in terms of ability and women's in terms of luck or effort); and "scripts," or definitions of appropriate behavior in a particular situation (for example, women not interrupting and talking less in groups of men and women). Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1188-89 (1988).

Gender stereotyping in the law has a long tradition, dating from Justice Bradley's now famous statement in *Bradwell v. Illinois*: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator." 83 U.S. (1 Wall.) 130, 141 (1872).

8. Radford, *supra* note 4, at 487 n.63; *see* Esther D. Rothblum & Violet Franks, *Introduction: Warning! Sex-Role Stereotypes May be Hazardous to Your Health*, *in* THE STEREOTYPING OF WOMEN 3, 4 (Violet Franks & Esther D. Rothblum eds., 1983) (gender stereotypes "do not describe how women and men *actually* differ, but how society *thinks* they do").

9. In 1990, adult women represented 45% of the total U.S. workforce. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2385,

stereotypes[10] that impede equal treatment[11] of women and men in the workplace. Gender stereotyping harms women by restricting workplace opportunities,[12] inhibiting opportunity for career advancement,[13] and limiting earning power.[14] The no-

---

WORKING WOMEN: A CHARTBOOK 1 (1991) [hereinafter WORKING WOMEN]. The number of employed women has more than doubled since 1960, rising from 21.9 million to 53.5 million in 1990; working women account for 60% of the total increase in employment in that period. *Id.* at 11. Today, most mothers work outside the home, including 75% of those with school-age children and 52% of mothers with children under two. *Id.* at 35.

10. Ruble et al., *supra* note 5, at 351; *see* Cava, *supra* note 4, at 34-35 & nn.30-37 (reviewing recent survey research on the large role gender stereotyping plays in society's treatment of women).

11. Stereotypes defeat equality because they "undermine the individual by promoting unreasonable or untrue generalizations." Cava, *supra* note 4, at 28. Cava cites the journalist Walter Lippman as first using the term stereotype in such a manner. Lippman believed that:

> A pattern of stereotypes is not neutral. It is not merely a way of substituting order for the great, blooming, buzzing confusion of reality. It is not merely a short cut. It is all these things and something more. It is the guarantee of our self-respect; it is the projection upon the world of our own sense of our own value, our own position and our own rights. The stereotypes are, therefore, highly charged with the feelings that are attached to them. They are the fortress of our tradition, and behind its defenses we can continue to feel ourselves safe in the position we occupy.

WALTER LIPPMAN, PUBLIC OPINION 96 (1922), *quoted in* Cava, *supra* note 4, at 29.

12. One commentator has noted the prevalence of gender-based segregation in the workplace: "Almost half of all employed women work in occupations that are at least eighty percent female, and over half of employed men work in occupations that are at least eighty percent male." Maxine N. Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1397 (1988). For example, women represented almost 80% of all administrative support and clerical workers but less than 9% of precision production, craft and repair workers in 1990. WORKING WOMEN, *supra* note 9, at 38.

13. A study of the 11 industries making up almost 20% of the U.S. workforce found that women accounted for 46% of nonsupervisory workers, 64% of workers in jobs with the least advancement possibilities and 5% of workers in jobs with the most advancement potential. Eichner, *supra* note 12, at 1398 n.4. More recently, a Department of Labor analysis of almost 100 Fortune 1000 companies found that while women comprise 37.2% of all employees, they account for only 16.9% of all managers and only 6.6% of executive-level managers. U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 6 (1991). The Department of Labor recognized the invisible, structural barriers inhibiting the advancement of women employees when it created the Glass Ceiling Initiative in 1989. *Id.* at 1-2. The Initiative focused on internal education within the Department; a pilot study of nine companies; a public awareness campaign; and recognition of those employers which voluntarily removed their own "glass ceilings." *Id.* at 3. The pilot study reported findings in 1991 that women have less opportunity for advancement than originally anticipated; that women generally occupy higher positions than minorities; and that

tion that women are the primary family caregivers represents perhaps the most common stereotype facing working women today.[15]

B. LOCATING GENDER STEREOTYPING IN TITLE VII

Plaintiffs alleging employment discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[16] must first exhaust all administrative remedies within the Equal Employment Opportunity Commission (EEOC).[17] If the EEOC finds reasonable cause after investigation, it first attempts conciliation and, failing that, brings a civil suit in federal district court.[18] Although the statutory apparatus for raising Title VII claims requires re-

---

no systems of employee development exists specifically for women and minorities. *Id.* at 13-15.

14. Women working full-time year round earn 65¢ for every dollar paid to men. Eichner, *supra* note 12, at 1398 n.5. In 1986, a woman graduating with a four-year college degree earned on average less than a man with a high school diploma - $22,412 and $24,701, respectively. *Id.* Approximately 35-40% of this difference results from workplace gender segregation, *see supra* note 12, because historically female jobs pay less than historically male jobs. The remaining 60-65% of the earning discrepancy results from men earning more than women at the same jobs. *Id.*

15. Radford, *supra* note 4, at 475 n.21.

16. 42 U.S.C. §§ 2000e to 2000e-17 (1988). Plaintiffs may also sue under 42 U.S.C. § 1983. Section 1983 does not create any substantive rights of its own, but rather provides a private cause of action against someone acting "under color of any statute, ordinance, regulation, custom or usage of any State," who deprives the claimant of a constitutional right. SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 2.02, at 9 (1990). Plaintiffs often raise § 1983 claims in conjunction with Title VII claims because they offer the additional advantages of not requiring claimants to exhaust state or local administrative remedies, offering a generally longer state statute of limitations, allowing jury trials and providing for punitive damages. *Id.* at 10. Resort to § 1983 may change in future litigation, given the 1991 Civil Rights Act's addition of jury trials and punitive damages to Title VII. *See infra* note 75.

17. The EEOC is the federal administrative agency that enforces and interprets Title VII, the Equal Pay Act, and the Age Discrimination in Employment Act. OMILIAN & KAMP, *supra* note 16, § 4.01, at 1. Claims, either by an individual or a discriminated class, are made by or on behalf of a party (by the EEOC) against an employer, labor organization or employment agency within 180 days of the unlawful practice. 42 U.S.C. § 2000e-5(b), (e) (1988). The filing period is extended to 300 days if the charging party initiates a state or local agency proceeding. 42 U.S.C. § 2000e-5(e) (1988).

18. 42 U.S.C. § 2000e-5(b), -5(f) (1988). If the EEOC does not find reasonable cause, it dismisses the charge and notifies the charging party, who may then initiate a private action within 90 days. *Id.* Furthermore, although § 2000e-5(f)(3) states that Title VII actions may be brought in federal district court, the Court of Appeals for the Seventh Circuit held that a party may also

sort to the EEOC before filing a private cause of action, it does not mandate total reliance on the bureaucratic mechanism.[19] Complainants must only show a timely resort to the EEOC and subsequent court filing.[20] If the EEOC should choose to sue, however, the agency limits the charging party's rights to intervention in that suit.[21]

1. Title VII's language and legislative history

Title VII requires that employers, employment agencies, and labor unions[22] not discriminate against any person because of race, color, religion, sex,[23] or national origin.[24] The broad

---

bring suit in state court. Donnelly v. Yellow Freight Sys., Inc., 874 F.2d 402, 405-09 (7th Cir.), *aff'd*, 493 U.S. 953 (1989).

19. If the EEOC does not sue within 180 days of filing, the charging party may request the commission to issue a Notice of the Right to Sue, after which the charging party has 90 days to file suit in federal court. OMILIAN & KAMP, *supra* note 16, § 4.01, at 2. The EEOC may also initiate a "pattern and practice" lawsuit. *Id.* Due to the EEOC's usual backlog of charges, however, a charging party typically either waits several years until the administrative process has run its course, or files a private suit after the expiration date of the commission's mandatory jurisdiction. 1 CHARLES A. SULLIVAN ET AL., EMPLOYMENT DISCRIMINATION § 11.2, at 427 (2d ed. 1988). For example, although the EEOC in 1990 filed a record 523 suits and investigators resolved 67,415 charges, the pending inventory for the third year in a row was 46,071 charges. John J. Ross, *Trends in the Law, in* 20TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, at 23-24 (PLI Litig. & Admin. Practice Course Handbook Series No. 416, 1991).

20. The Supreme Court declared that:

> [A]bsence of a Commission finding of reasonable cause cannot bar suit under an appropriate section of Title VII. . . . Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue. . . . The Act does not restrict a complainant's right to sue to those charges as to which the Commission has made findings of reasonable cause, and we will not engraft on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798-99 (1973).

21. 42 U.S.C. § 2000e-5(f)(1) (1988).

22. Title VII applies to both private and public sector employers, including the federal government. LEE M. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 1:1 (2d ed. 1988). Exempted employers under Title VII include religious institutions, Indian tribes and reservation businesses, and bona fide private membership clubs. *Id.* § 1:3, at 11.

23. Notably, sex did not appear in the original draft of the act, but rather was added during the debate in an effort to defeat the bill. Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-12 (1968).

> "The sex amendment can best be described as an orphan, since neither the proponents nor the opponents of Title VII seem to have

sweep of Title VII's language has left it open to conflicting interpretations of its intent. For example, critics of the Act have argued that the lack of definitions for "discriminate" and "because of" obfuscate the legislators' intent.[25] Given the lack of detail in the Act's language, courts initially questioned whether

---

felt any responsibility for its presence in the Bill." The startling truth is that the presence of the word "sex" is the result of what could be termed an historical accident. H.R. 7152, later to become known as the Civil Rights Act of 1964, was introduced in the House by Representative Emanuel Celler on June 20, 1963, without any mention of the word "sex." While the bill was before the House Judiciary Committee, the sex amendment was introduced by Committee Chairman Howard Smith. Representative Smith was an opponent of the bill, and indications are that he proposed the amendment in the hope that its addition would lead to defeat of the entire bill. There was no testimony on the amendment before the Judiciary Committee, nor did any organization petition Congress to add the word "sex" to the bill.

Anthony R. Mansfield, Note, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484, 491-92 (1968) (citation omitted); *see also* Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62, 64-68 (1965) (summarizing the legislative process that shaped Title VII); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) (describing in detail the legislative process).

Courts have repeatedly commented on the paucity of legislative history for interpreting Title VII. *See, e.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125, 143-45 (1976) (considering whether Congress intended Title VII to include discrimination based on pregnancy); Peters v. City of Shreveport, 818 F.2d 1148, 1158 (5th Cir. 1987) (finding the Act's legislative history of "little guidance" when determining the requisite causal relationship between gender and wage differential); International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1101-05 (3d Cir. 1980) (questioning whether Congress intended Title VII to relate to the Equal Pay Act regarding sex-based wage discrimination), *cert. denied*, 452 U.S. 967 (1981).

24. Title VII provides that:

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

42 U.S.C. § 2000e-2(a) (1988).

25. Senator Clark and Senator Clifford, two of the bill's floor managers, replied that:

> It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national

Congress intended to include gender stereotyping as a form of impermissible employment discrimination.

Although the legislative history of Title VII often provides scant or conflicting specifics on gender discrimination,[26] it does provide a clear picture of Congress's intent to balance employee and employer rights. On the one hand, the legislators sought to rid the country of discrimination directed at minority groups, especially African-Americans.[27] On the other, they did not want to usurp management's role in hiring and firing, reasoning that "[i]nternal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination practices."[28] The tension between these two objectives develops where both discriminatory and legitimate reasons enter the employment decision, a boundary stereotyping often broaches.

2. Judicial Interpretation of Title VII

The Supreme Court has firmly established that Title VII addresses gender stereotyping.[29] The Court observed that given Title VII's emphasis on the individual, "even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[30] Lower courts agree that Title VII affords relief for employment discrimination based on stereotyping and recognize that even subtle attitudes and behavior may evince dis-

---

origin. Any other criterion or qualification for employment is not affected by this title.

110 CONG. REC. 7213 (1964). Moreover, commentators have observed that while numerous statutes proscribe discrimination, none define the term. *See, e.g.*, Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 86 (1986).

26. Judge Goldberg of the Fifth Circuit wrote that "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970).

27. *See* 110 CONG. REC. 7212-14 (1964).

28. H.R. REP. NO. 914, 88th Cong., 2d Sess., pt. 2, at 29, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2516.

29. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978). In *Manhart*, the Court observed that:

> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males and females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.

Id.

30. *Id.* at 708.

criminatory motives.[31] The judiciary thus solidified the originally attenuated place of gender discrimination—and stereotyping as a form of it—in Title VII.

C. THE ROLE OF CAUSATION IN FINDING DISCRIMINATION

Although courts agree that Title VII affords relief for employment discrimination based on gender stereotyping, they differ greatly on how stereotypical behavior ripens into actionable discrimination. The controversy turns on the issues of causation and the proper allocation of the burdens of proof.[32] Determining legislative intent regarding the relationship between cause and effect in employment discrimination has proven elusive, spawning a wide array of judicial interpretation.[33] While courts agree that Congress did not intend to eradicate only that discrimination constituting the "sole" factor in the employment decision,[34] comments made during the legislative battle[35] do not

---

31. *See* Lynn v. Regents of the Univ. of Calif., 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (stating that subtle and "benign" attitudes may be characterized as discriminatory); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."), *cert. denied*, 404 U.S. 991 (1971).

32. Parties to a suit carry two separate burdens of proof—the burden of production and the burden of persuasion. The burden of production, also known as the "burden of evidence," requires offering evidence on a specific fact at issue to a judge's satisfaction; if insufficiently met, a judge may decide the case without jury consideration. EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE 947 (3d ed. 1984). The burden of persuasion comes into play only after the parties have sustained their burdens of production. This burden becomes critical when the jury or trial judge has some doubt about the issue at hand. Where parties holding the burden of persuasion fail to convince the factfinders of their positions, the judge will resolve, or instruct the jury to resolve, these issues against the burdened party. *Id.* One commentator observed that "[e]ssentially, two issues have been left to the lower courts: how much evidence is necessary to show that an allegedly nondiscriminatory reason was, in fact, a pretext for discrimination; and what standard of causation should be applied." Steel & Clark, *supra* note 2, at 862.

33. One observer queried upon Title VII's passage that:

> For an unfair employment practice to exist, what must the causal nexus or relationship between improper motive and the overt act? Must the improper motive be the dominant factor, a substantial contributing factor or merely a factor leading to the overt act? The answers to these questions await the clarification of the law by . . . judicial decision.

Vaas, *supra* note 23, at 456-57.

34. Senator McClellan's amendment defining a Title VII violation "as occurring only when the prohibited discriminatory factor was the sole ground for the adverse action" was soundly defeated. *See* 110 CONG. REC. 13,837-38

clarify the boundary at the other end of the causation "continuum."[36] Consequently, courts have filled in the causation gap with a variety of standards derived from their individual construction of legislative intent.

1. Single Motive or "Pretext" Cases

Courts initially decided Title VII disparate treatment cases[37] under the theory that a single reason motivated the defendant's actions toward the plaintiff.[38] Courts required no separate showing of causation because single motive analysis presumed that only one factor caused the discriminatory behavior. Moreover, the Supreme Court introduced in *McDonnell Douglas v. Green*[39] a method for proving intentional discrimination using circumstantial evidence, given plaintiffs' difficulty in producing direct evidence.[40]

(1964). During debate, one of the leading critics of the amendment argued that it "would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of." *Id.* at 13,837.

35. For example, Senator Humphrey, the bill's sponsor, remarked that "[w]hat the bill does . . . is simply to make it an illegal practice to use [sex] as a factor in denying employment." 110 CONG. REC. 13,088 (1964).

36. Professor Stonefield coined this phrase to describe the array of causation standards used by the courts in deciding Title VII cases. Stonefield, *supra* note 25, at 114.

37. Two types of employment discrimination claims arise under Title VII—disparate treatment and disparate impact. "Title VII proscribes not only the discriminatorily motivated disparate treatment of statutorily protected individuals but also facially neutral practices which have a disparate impact upon protected individuals." MODJESKA, *supra* note 22, § 1:1 (footnote omitted). Disparate treatment involves treating someone less favorably because of one's race, color, religion, sex or national origin and requires proof of discriminatory intent or motivation. *Id.* § 1:6. The Supreme Court declared that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). In contrast, disparate impact involves facially neutral practices unjustified by business necessity which affect protected groups more severely than unprotected groups. A disparate impact claim focuses on the discriminatory practice's relation to the job rather than on the employer's motivation or intent. MODJESKA, *supra* note 22, § 1:6. The Court has recognized that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). This Note addresses disparate treatment issues only.

38. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 807 (1973).

39. 411 U.S. 792 (1973).

40. The Second Circuit has recognized the evidentiary difficulties that confront plaintiffs in this class of cases:

[E]mployment discrimination is often accomplished by discreet manip-

The *McDonnell Douglas* burden-shifting framework follows three steps. Initially the plaintiff must establish a prima facie case of discriminatory action, carrying at this point both the burdens of production and persuasion.[41] Next the responsibility shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action.[42] The defendant need not, however, prove the absence of a discriminatory motive.[43] Finally, if the defendant asserts a nondiscriminatory reason for its employment decision, the plaintiff carries the burden of per-

---

> ulations and hidden under a veil of self-declared innocence. An employer who discriminates is unlikely to leave a "smoking gun," such as a notation in an employee's personnel file, attesting to a discriminatory intent. A victim of discrimination is therefore seldom able to prove his or her claim by direct evidence and is usually constrained to rely on the cumulative weight of circumstantial evidence.

Rosen v. Thornburgh, 928 F.2d 528, 533 (2d Cir. 1991) (citations omitted); *see also* Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979) (stating that two evidentiary problems exist in most employment discrimination cases: direct evidence is usually unavailable or is under the control of the employer); MODJESKA, *supra* note 22, § 1:7, at 17 ("Direct evidence of subjective discriminatory intent is rarely available, particularly to the discriminatee."); Rhode, *supra* note 7, at 1194-95 (noting that direct proof of discrimination is even more rare in situations where the discrimination is rooted in stereotyping because often decisionmakers are either unlikely to express their biases openly or are unaware of them).

41. To meet this burden, *McDonnell Douglas* requires that the complainant show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

42. *Id.* While some commentators have viewed the plaintiff's prima facie standard as minimal, others have seen the employer's responsive burden as "comparatively slight." MODJESKA, *supra* note 22, § 1:7, at 24. Nonetheless the prima facie case raises an inference of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

43. Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978). In *Burdine*, the Court specifically stated that the defendant bore only the burden of production, not a burden of persuasion:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.

Burdine, 450 U.S. at 253-55.

suading the court that the reason constitutes a mere "pretext"[44] and does not represent the true reason for the employer's action.[45] The Seventh Circuit described this method of proof as "permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation."[46]

Although the Court noted in *McDonnell Douglas* that the burden shifting method would not apply to all fact situations,[47] lower courts widely applied it regardless of whether the cases presented direct or indirect evidence.[48] Courts began to employ

---

44. *McDonnell Douglas*, 411 U.S. at 804. "Because of the employee's easy burden of establishing a prima facie case and the employer's normal ability to articulate some legitimate nondiscriminatory reasons for its actions, most disparate treatment cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination." Miles v. M.N.C. Corp., 750 F.2d 867, 870 (11th Cir. 1985) (citation omitted).

45. *Burdine*, 450 U.S. at 256. The plaintiff need not introduce new evidence to prove the employer's use of pretext. "[I]nitial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Id.* at 255 n.10.

46. La Montagne v. American Convenience Prods., Inc., 750 F.2d 1405, 1410 (7th Cir. 1989).

47. 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."). The Court repeated this observation in other cases. *See, e.g.*, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. The shifting burdens of proof . . . are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' ") (alteration in original) (citations omitted); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983) ("[P]laintiff may prove his case by direct or circumstantial evidence."); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination."); *see also* Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1556 (11th Cir. 1983) ("It should be clear that the *McDonnell/Burdine* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking."), *cert. denied*, 476 U.S. 1204 (1984).

48. Direct evidence has been defined as proof which, if accepted as true, resolves the question at issue. CLEARY ET AL., *supra* note 32, at 543. Indirect or circumstantial evidence requires additional reasoning or inferences to reach the ultimate conclusion of fact. *Id.* Courts have characterized evidence as direct or indirect in a very fact-specific manner, for "the various circuits have about as many definitions for 'direct evidence' as they do employment discrimination cases." Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 113 S. Ct. 82 (1992). For examples of direct evidence classifications, see *infra* notes 67 and 90.

direct evidence in two ways—either to avoid the burden shifting model altogether,[49] or to prove during the third prong that the defendant's proffered reason amounted to merely a pretext.[50]

2. Mixed Motive Cases

Along with the growing confusion over evidence, courts began to realize the limitations of the single motive, "either-or" approach. Increasingly sophisticated courts, litigants, and attorneys recognized that this causation framework failed to "reflect realistically the variety of factors at play in the decisionmaking process."[51] Throughout the 1980s, courts became more aware that most challenged employment decisions resulted from not one, but rather a mix of motivations, both legal and illegal.[52] Hence the courts moved toward a mixed motives framework that required plaintiffs to show a direct connection between the discriminatory factor and the employment decision—how the illegitimate factor had caused the resulting outcome.

The definition of "causation" thus became critical in the determination of liability under Title VII, although prior to *Price Waterhouse*, the Supreme Court had barely addressed the standard of causation applicable in Title VII disparate treatment cases.[53] Adapting to the mixed motive framework, some lower courts employed a "discernible factor" standard,[54] consid-

49. *See* Blalock v. Metal Trades, Inc., 775 F.2d 703, 707-08 (6th Cir. 1985); Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1529-30 (11th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867, 875-76 (11th Cir. 1985); Bell v. Birmingham Linen Serv., 715 F.2d 1551, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984).

50. *See* Tye v. Board of Educ., 811 F.2d 315, 319-20 (6th Cir.), *cert. denied*, 484 U.S. 924 (1987).

51. Radford, *supra* note 4, at 514.

52. *Id.* at 508. As Stonefield observed, mixed motive analysis "reflects the contrast between the discrete nature of the regulatory prohibition [against discrimination] and the richness of human interactions. . . . [P]eople's motives are complex and multi-faceted. It can rarely be said that any single stimulus is totally responsible for a particular act; many factors normally contribute." Stonefield, *supra* note 25, at 113.

53. Noting the Court's dearth of guidance on causation issues, one commentator said that "the courts have been cast adrift by the Supreme Court's use of murky language and apparently inconsistent rationales; evidence of the chaos so created is easily seen in recent appellate decisions." Charles A. Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1, 32 (1986).

54. *See, e.g.*, Bibbs v. Block, 778 F.2d 1318, 1320-24 (8th Cir. 1985) (en banc) (finding that Title VII's language indicates a broad reading of liability but a more restricted standard of remedy). The taint standard developed in re-

ered the most liberal, while the majority applied a "but for" test,[55] viewed as the most conservative.[56] Many courts utilized standards that fell in between, including "significant factor,"[57] "substantial part,"[58] and "motivating factor."[59] The use of these differing causation standards produced a "disarray" of decisions.[60]

3. *Price Waterhouse*

The Court's decision in *Price Waterhouse* changed the landscape of employment discrimination cases involving gender stereotyping. For the first time, the Supreme Court explicitly discussed gender stereotyping, with the plurality[61] finding that stereotyping provides evidence of discrimination.[62] *Price*

---

sponse to the judiciary's understanding of the "broad congressional design" of Title VII. Brooks, *supra* note 4, at 225 n.58.

55. *See, e.g.*, McQuillen v. Wisconsin Educ. Ass'n, 830 F.2d 659, 664 (7th Cir. 1987), *cert. denied*, 485 U.S. 914 (1988); Peters v. City of Shreveport, 818 F.2d 1148, 1161 (5th Cir. 1987); Ross v. Communications Satellite Corp., 759 F.2d 355, 366 (4th Cir. 1985).

56. While the theoretical "sole factor" standard, requiring the plaintiff to prove that the impermissible criteria constituted the sole reason for the employment decision, is arguably more conservative than the "but for" test, the judiciary has not applied it given the lack of textual support in Title VII. *See supra* note 37 and accompanying text.

57. *See, e.g.*, Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1166 (9th Cir. 1984) (drawing standard from *Burdine* language that plaintiff must prove discriminatory reason more likely than not motivated employer); Bell v. Birmingham Linen Serv., 715 F.2d 1552, 1557 (11th Cir. 1983).

58. *See, e.g.*, Berl v. County of Westchester, 849 F.2d 712, 714 (2d Cir. 1988).

59. *See, e.g.*, Fields v. Clark Univ., 817 F.2d 931, 937 (1st Cir. 1987).

60. Price Waterhouse v. Hopkins, 490 U.S. 228, 238 n.2 (1989) ("This question [of causation] has, to say the least, left the Circuits in disarray.").

61. *Price Waterhouse* was decided by a four member plurality composed of Justices Brennan, Marshall, Blackmun and Stevens. Justices O'Connor and White filed concurring opinions. Justice Kennedy filed a dissenting opinion in which Justices Rehnquist and Scalia joined. *Id.* at 231.

62. Justice Brennan sharply rebuked the defendant's attempts to trivialize gender stereotypes:

> Although the parties do not overtly dispute this last proposition [the definition of a motivating factor], the placement by Price Waterhouse of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities. As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work. . . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for " '[i]n forbidding employers to discriminate against individuals because of their

Waterhouse also offered a framework for analyzing mixed motive[63] cases that broke with the *McDonnell/Burdine* approach to single motive analysis. The decision has been characterized as adding "clarity and complexity to the evidentiary scheme governing the burden of persuasion in disparate treatment cases but, unfortunately, leav[ing] murky the concept of causation."[64]

Ann Hopkins brought her employment discrimination suit against Price Waterhouse after the firm denied her admission to partnership.[65] Justice Brennan, writing the plurality opinion, found that Hopkins had clearly established discriminatory factors and their linkage to the decision-making process.[66] He

---

sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' "

Id. at 250-51 (quotations omitted).

63. *Price Waterhouse* also highlights the way the courts overlap both single and mixed motive frameworks. *See* Radford, *supra* note 4, at 514 n.197.

64. Brooks, *supra* note 4, at 215. Another commentator has noted that:

> [C]ourts had intertwined inextricably the standard of causation with the allocation of burdens of proof, and had vacillated between the causation standard as a necessary component in the liability determination, or only in arriving at a remedy. The Supreme Court's decision [in *Price Waterhouse*] purported to settle all three of these problems. In reality, after sifting through the semantics of the plurality opinion, the two concurrences, and the dissent, it remains unclear exactly what has been accomplished by *Hopkins*.

Radford, *supra* note 4, at 523.

65. *Price Waterhouse*, 490 U.S. at 231-32. Price Waterhouse based its decision on comments of partners solicited by the Admissions Committee, including suggestions that Hopkins was " 'macho,' " had matured from " 'a tough-talking somewhat masculine hard-nosed manager to an authoritative, formidable but much more appealing lady partner candidate,' " and should take " 'a course at charm school.' " *Id.* at 235. When the firm's Policy Board chose not to offer Hopkins partnership, her supervisor informed her of the decision by advising that she " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.' " *Id.*

66. Whether Justice Brennan found that the stereotypical comments amounted to direct evidence remains an open question. While he concluded that Price Waterhouse's comments were not simply "stray remarks" or " 'discrimination in the air,' " he declined to categorize the evidence or even "suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id.* at 251-52.

Justice O'Connor, in contrast, clearly stated in her opinion that a plaintiff in a mixed motive case "must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276 (O'Connor, J., concurring). She defined direct evidence by what it is not—stray remarks and statements by nondecisionmakers. *Id.* at 277. O'Connor further clarified the meaning of direct evidence by explaining how Hopkins had presented direct evidence:

> Ann Hopkins had taken her proof as far as it could go. She had proved discriminatory input into the decisional process, and had

noted that the process relied upon all partners' comments and that "[a] negative comment, even when made in the context of a generally favorable review, nevertheless may influence the decision maker to think less highly of the candidate."[67]

Turning to the causation standard, Justice Brennan found that the plaintiff establishes a prima facie Title VII violation where gender constituted a "motivating part" of the employment decision.[68] The plurality opinion then offered the defendant an opportunity to avoid liability by showing as an affirmative defense[69] that the employer "would have made the same decision even if it had not allowed gender to play such a

---

proved that participants in the process considered her failure to conform to the stereotypes credited by a number of the decisionmakers had been a substantial factor in the decision. It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.

Id. at 272-73.

67. *Id.* at 257. Brennan also declared that "[i]t takes no special training to discern sex stereotyping" in some of the partners' remarks. *Id.* at 256. The amicus curiae brief of the American Psychological Association (APA) defined the linking process in more concrete terms. It described three factors that encourage workplace stereotyping: "(1) [t]he rarity of the stereotyped individual within the evaluation setting; (2) the ambiguity of the criteria used to make an evaluation; and (3) the paucity of information available to evaluators." Brief for Amicus Curiae American Psychological Association in Support of Respondent at 20, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (No. 87-1167).

68. *Price Waterhouse*, 490 U.S. at 244. Brennan defined a motivating factor as "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Id.* at 250. In adopting this causation standard, Brennan did not apply the "but for" test favored by the majority of circuit courts prior to *Price Waterhouse*, reasoning that "[t]o construe the words 'because of' as colloquial shorthand for 'but-for causation,' as does Price Waterhouse, is to misunderstand them." *Id.* at 240. He grounded his rationale in Title VII's legislative history, noting:

> We need not leave our common-sense at the doorstep when we interpret the statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.

Id. at 241-42.

69. "[T]he plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Id.* at 246.

role."[70]

The plurality thus distinguished *Price Waterhouse*'s mixed motive framework from the *McDonnell/Burdine* single motive method,[71] acknowledging the distinct fact-finding goals of each kind of case.[72] Under mixed motive analysis, the defendant bears both the burdens of production and persuasion once the plaintiff proves discriminatory motives constituted a motivating factor.[73] In her concurring opinion, Justice O'Connor explained that the defendant, having shown illegitimate motives, no longer deserves "the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination."[74]

D. THE CIVIL RIGHTS ACT OF 1991

The Civil Rights Act of 1991[75] specifically responded to

---

70. *Id.* Justice Brennan explained that "[t]his balance of burdens is the direct result of Title VII's balance of rights." *Id.* at 245.

71. The plurality did so without diminishing the importance of the *McDonnell/Burdine* test. "To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed." *Id.* at 247.

72. "[T]he situation before us is not one of 'shifting burdens' that we addressed in *Burdine*." *Id.* at 246. "Where a decision was the product of a mixture of legitimate and illegitimate motives, however, it simply makes no sense to ask whether the legitimate reason was '*the* true reason' for the decision—which is the question asked by *Burdine*." *Id.* at 247 (citations omitted).

73. Under the single motive test, the defendant bears only the burden of production. *See supra* notes 43-44 and accompanying text.

74. *Price Waterhouse*, 490 U.S. at 266 (O'Connor, J., concurring). Justice O'Connor underscored the shift of the burden of persuasion to the defendant: "the employer may be required to convince the factfinder that, despite the smoke, there is no fire." *Id.*

75. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.). The 1991 Act resembles the 1990 Act vetoed by President Bush. *See* LEX K. LARSON, *The Civil Rights Act of 1991*, *in* EMPLOYMENT DISCRIMINATION 8-9 (Supp. 1992). The Senate passed the 1991 bill by a vote of 93 to 5; the House passed an unmodified Senate version by a vote of 381 to 38. *Id.* at 9. President Bush signed the bill into law on November 21, 1991. *Id.*

The Act has been described as a "patchwork of provisions" amending many federal civil rights statutes in response to five recent Supreme Court decisions narrowing plaintiff rights in employment discrimination suits. *Id.* at 7-8. Specifically, it amended Title VII of the Civil Rights Act of 1964, § 1981 of the reconstruction statutes, the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act (ADEA). *Id.* at 7. In addition to reversing the Supreme Court decisions, the Act provided for compensatory and punitive damages and jury trials, and established a Glass Ceiling Commission. *Id.* at 10, 48-49. One commenta-

Price Waterhouse by changing the standard of causation in future[76] mixed motive cases. Now discriminatory motivation, if a "motivating factor" in the decision-making process, constitutes an illegal employment practice even though other factors may have influenced the decision.[77] The employer's showing that it would have made the same decision even had it not considered the discriminatory factor fails to rebut the existence of a Title VII violation, but rather limits the plaintiff's available remedies.[78] This approach provides a broad definition of liability

---

tor described it as amounting "to a pointed message to the conservative-dominated court that its overall judicial attitude on the subject of Civil Rights is not what the Congress has in mind." *Civil Rights Act of 1991-Analysis*, 9 Employee Rel. Wkly. (BNA) No. 44, at S-1 (Nov. 11, 1991).

The 1991 Act, however, failed to resolve several major questions. After two years of debate between Congress, the Bush administration and business and civil rights leaders, the Act "appears deliberately to leave open substantial questions, omits statutory definitions of terms such as 'business necessity' that had been the subject of extended debate, and seems to express statutory purposes that may be difficult to reconcile in specific application." David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, ALI-ABA COURSE OF STUDY § 1.01 (1992). Moreover, the legislative history of the 1991 Act contains no committee hearings or reports, and only brief floor debate on the Act's final provisions. *Id.* § 1.02.

76. The 1991 Civil Rights Act does not speak clearly on when the Act should become applicable law, apparently as a result of legislative compromise. Section 402(a) states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," without referring to what specifically (cases pending or prior conduct) it shall affect. *See* 42 U.S.C.A. § 1981 (West Supp. 1992) (Historical and Statutory Notes). Both the vetoed 1990 Civil Rights bill and the House's original version of the 1991 Act delineated that it should apply to cases pending either on the effective date of the Act or retroactively to the date of the pertinent nullified Supreme Court decision. *See* Cathcart & Snyderman, *supra* note 75, § 1.12. Several federal courts of appeals have ruled on the issue, holding that the Act does not apply retroactively, relying on the judicial presumption that absent a clear statutory mandate, statutes are to be applied prospectively only. *Id.* The Supreme Court has recently granted certiorari to decide the issue of whether the 1991 Act applies retroactively to cases that were pending when the Act became law. *See* Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992) (holding that 1991 Act could not be applied retroactively to case which was pending when legislation was enacted), *cert. granted*, 61 U.S.L.W. 3558 (U.S. Feb. 22, 1993) (No. 92-938); Landgraf v. USI Film Prod., 968 F.2d 427 (5th Cir. 1992) (holding that damage and jury trial provisions of the 1991 Act did not apply retroactively), *cert. granted*, 61 U.S.L.W. 3558 (U.S. Feb. 22, 1993) (No. 92-757).

77. 42 U.S.C.A. § 2000e-2(m) (West Supp. 1992). Section 2000e-2(m) states that "Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." *Id.* (emphasis added).

78. LARSON, *supra* note 75, at 40. If the employer can prove other reasons

and a narrow definition of remedy.

II. GENDER STEREOTYPING UNDER TITLE VII AFTER *PRICE WATERHOUSE*

The lower courts have interpreted *Price Waterhouse* in a conflicting manner. While all have explicitly recognized the decision in their analysis, few have applied the same reasoning or achieved the same result. Moreover, the appellate courts have not yet decided any cases under the 1991 Act.[79] Thus, despite the *Price Waterhouse* decision, courts continue to use a wide variety of causation standards and allocations of proof.

A. THE SECOND CIRCUIT

Barbano v. Madison County[80] represents the first employment discrimination case based upon gender stereotyping decided in the federal courts after *Price Waterhouse*. Maureen Barbano brought suit against the county after applying and interviewing for, but not receiving, the director position at the Madison County Veterans Service Agency.[81] During Barbano's only interview for the job, one committee member told her that "he would not consider 'some woman' for the position."[82] The same interviewer then asked about her childbearing plans and whether her husband would approve of her transporting male veterans as part of her job duties.[83] Despite Barbano's repeated

---

for not hiring the plaintiff (in addition to the impermissible reason), the plaintiff may receive declaratory and injunctive relief as well as attorney's fees, but not damages or an order of hiring, promotion or reinstatement. *Id.* The Eighth Circuit has separated the liability and remedy phases of litigation since the mid-1980s. In *Bibbs v. Block*, the Eighth Circuit justified the separation with its interpretation of the statutory language in § 706(g), 42 U.S.C § 2000e-5(g) (1982):

> By the terms of the statute, injunctive relief may be awarded after a finding of intentional discrimination; and affirmative relief such as reinstatement and back pay may not be awarded if the employment decision was "for any reason other than discrimination." The "but-for" determination required for an award of affirmative relief is consistent with Title VII's intended purpose of making persons whole for injuries suffered on account of unlawful employment discrimination.

778 F.2d 1318, 1322 (8th Cir. 1985) (en banc).

79. *See supra* note 77 (discussing the Act's effective date).

80. 922 F.2d 139 (2d Cir. 1990).

81. *Id.* at 141-42.

82. *Id.* at 141. Before Barbano entered the interview room, she heard someone say " 'Here are copies of the next resume,' " followed by the comment, " 'Oh, another woman.' " *Id.*

83. *Id.* At one point in the interview, the exchange between interviewer and interviewee deteriorated into an argument. When he asked Barbano a

assertions that these questions were discriminatory and irrelevant, none of the other five interviewers agreed with her, disagreed with the member asking the questions, or even attempted to stop this line of questioning.[84]

The Second Circuit Court of Appeals affirmed the district court finding that Madison County had discriminated against Barbano under Title VII.[85] The court found that the interview questions and statements were clearly discriminatory[86] and that they directly affected the hiring decision of the committee, and ultimately, the county board.[87] The Second Circuit concluded that "it was not clearly erroneous for the district court to conclude that Barbano sustained her burden of proving discrimination by the Board," given that the discriminatory interview questions "tainted" the hiring committee's recommendation[88] and that the Board had been "put on notice . . . that the Committee's recommendation was biased by discrimination."[89]

---

second time whether her husband would object to her " 'running around the country with men' " and followed up with the comment that he would not want his wife to do such a thing, the plaintiff responded that she was not his wife. *Id.*

84. *Id.*

85. In its decision, the appellate court reviewed whether the record supported the lower court's findings and whether the court had applied the appropriate legal standards to its factual findings. *Barbano*, 922 F.2d at 142.

86. The court began its analysis of the discrimination issue by stating "[f]irst, there is little doubt that Greene's statements during the interview were discriminatory." *Id.* at 143.

87. Although the defendant argued that the committee's actions should not bind the Board, the court emphatically disagreed, citing *Price Waterhouse*'s reasoning that a collective decision-making body can discriminate through discriminatory recommendations. *Id.* The court believed that Barbano's interview presented "an even stronger case of discrimination because the *only* recommendation the Board relied upon here was discriminatory, whereas in *Price Waterhouse*, not all of the evaluations used in the decision-making process were discriminatory." *Id.* at 144.

88. *Id.*

89. *Id.* The court stressed the importance of notice to the Board of the tainted committee interview because of the governing body's heavy reliance on delegatory process and its inaction when faced with information of the flawed process. As one interviewer testified, the Board regularly relies on a committee system to accomplish its work and "usually accept[s]" committee recommendations, especially unanimous ones. *Id.* at 145. Barbano, who attended the public meeting where the Board ratified the hiring decision, supplied the notice herself. Before the Board acted on the employment resolution, Barbano objected and asked board members if the committee had asked the same kinds of questions of male applicants. *Id.* at 144. The committee chair responded that he had not asked such questions; the other committee members remained silent. *Id.* The chairman of the board, who as an ex officio member of the interviewing committee observed Barbano's interview, did not reply nor did his fellow board members question him about the allegations. *Id.* This lack of

Treating the tainted interview as direct evidence[90] of sex discrimination, the Second Circuit then turned to the issue of causation. It affirmed the district court's decision to shift the burden to the defendants to prove "by a preponderance of the evidence that, absent the discrimination, they would not have hired Barbano for the position."[91] After reviewing Barbano's qualifications in light of the listed job requirements and comparing them to those of the candidate selected for the position, the court of appeals once again agreed with the district court that the employer had failed to prove that "they [sic] would not have hired Barbano even if they had not discriminated against her."[92] Hence, by treating stereotyping interview questions as

---

investigation on the part of the board members, coupled with their complete reliance on the committee's recommendation, led the court to conclude that "the Board was willing to rely on the Committee's recommendation even if Barbano had been discriminated against during her interview." *Id.*

90. The defendant treated Barbano's evidence as circumstantial and argued that the burden of proof should not shift to the employer. The court found that the appellants "misapprehend[ed] the nature of Barbano's proof and thus the governing legal standard." *Barbano*, 922 F.2d at 144-45. The Second Circuit recognized that the classification of evidence as direct or indirect provides the "key inquiry" for it determines when the burden of proof moves from the plaintiff to the defendant. *Id.* at 145. The court ruled that the burden shifts "[o]nce the plaintiff establishe[s] by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision." *Id.* (citation omitted). To apply this rule, the court invoked a two-step process that began with classifying the evidence as direct and then assessing the causal relationship. The Second Circuit classified proof as direct evidence where "it shows that the impermissible criterion played *some part* in the decision-making process." *Id.* (emphasis added). The court then defined causation as "whether the evidence shows that the impermissible criterion played a *motivating or substantial part* in the hiring decision." *Id.* (emphasis added).

91. *Id.* at 144. In considering the defendant's proof, the Second Circuit drew from Justice O'Connor's concurring opinion in *Price Waterhouse*: "the employer may be required to convince the fact finder that, despite the smoke, there is no fire." *Id.* at 145. The court clearly believed that the district court's role as trier of fact required it to "have an opinion" or "make a finding" on the reasons offered by the employer for not hiring Barbano (contrary to the defendant's assertion that to do so is to " 'impermissibly substitute its own opinion on the matter' "). *Id.*

92. *Id.* at 146. The court specifically focused on the applicants' objective education and employment qualifications as they related to the job description and distinguished the subjective issues. For example, the court viewed Barbano's three year work experience as a social welfare examiner for Madison County as an important qualification, as she was familiar with the array of social assistance programs and agencies available to veterans. *Id.* at 145-46. In contrast, the selected candidate's present employment as a school bus driver and part-time bartender at the American Legion indicated to the court his lack of relevant knowledge for the director position. *Id.* In addition to her work experience, Barbano was working toward a degree in human services at

direct evidence of discrimination, the Second Circuit found a Title VII violation.

B. THE SEVENTH CIRCUIT

In contrast to the Second Circuit, the Seventh Circuit ruled in *Bruno v. City of Crown Point*[93] that similar interview questions did not violate Title VII. Micolette M. Bruno sued the City of Crown Point after interviewing for and not receiving a job as a paramedic. During her only interview for the job, the interviewer asked Bruno about the number of children she had and would have,[94] her child care arrangements, and how her husband would feel about the job.[95] Although the interviewer testified that he held the same family concerns[96] for all applicants regardless of gender, he admitted that he did not ask male applicants the same questions posed to Bruno.[97]

The Seventh Circuit reversed the lower court's finding of sex discrimination under Title VII,[98] "[b]ecause substantial evi-

---

the time of the interview, while the selected candidate's education consisted only of a high school equivalency degree and some extension classes in management. *Id.* at 146. Moreover, given the county's explicit personnel policy, the committee should have considered Barbano's residency in the county as an advantage. *Id.* Finally, although Barbano had a short military career and she had not participated in the American Legion like the selected candidate, both Barbano and the selected candidate received honorable discharges. *Id.*

93. 950 F.2d 355 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2998 (1992).

94. Bruno contended that the interviewer asked her whether it was "time to have more children." *Id.* at 358. The interviewer "categorically denied ever suggesting that Bruno was about due for some more children," although he agreed with Bruno's accounting of the rest of the interview. *Id.*

95. *Id.*

96. The interviewer asserted that he should learn about a prospective employee's plans for child care because he wanted parent paramedics " 'to come to work knowing that their kids are taken care of,' " so they " 'can concentrate on doing their job and not have to worry about the safety and welfare of their children.' " *Id.* He contended that Bruno's case posed special problems because as her husband also worked as a paramedic, " 'the kids might not see mom or dad maybe four waking hours every couple of days.' " *Id.* at 359. Interestingly, the trial court allowed testimony regarding Bruno's resignation from a former supervisory position (ostensibly to reduce her work schedule from 60 to 40 hours per week) and the interviewer's blackboard demonstration of the extent of Bruno's potential work week when combining her present with her potential future job. *Id.* at 357-58.

97. *Id.* at 359. Although the interviewer testified that he asked all applicants about their family status, the interview notes of only one of the other three male candidates indicates a response. *Id.* Furthermore, the interviewer testified that "he did not recall asking any male applicant how his spouse felt about the 24-hour shifts or whether they expected to have children in the future." *Id.*

98. The court, finding the magistrate judge's denial of the employer's mo-

dence does not support the jury's conclusion that Bruno's sex was a determining factor" in the decision to hire a man instead of Bruno.[99] In its decision, the court analyzed the case from both the mixed and single motive perspectives. The court concluded that to uphold the lower court finding, the plaintiff must have shown that sex played a motivating part in the employment decision.[100] In considering whether the family-oriented interview questions asked only of Bruno[101] qualified as direct evidence, the court concluded that while they belied gender stereotyping,[102] "[m]erely showing the questions were asked . . . is not sufficient to prove intentional discrimination."[103] Rather, the court required that Bruno show "substantial evidence" that the interviewer relied on the gender stereotyping questions when making its decision not to hire her; it found that she had failed to meet this burden.[104]

---

tion for judgment notwithstanding the verdict "brief and providing little in the way of specifics," chose to review the decision de novo. *Id.* at 361.

99. *Id.* at 357. The Seventh Circuit stated: "we determine whether the evidence is sufficient to support the verdict," and that "the evidence supporting the verdict must be *substantial*; a mere scintilla of evidence will not suffice." *Id.* at 361.

100. *Id.* The court noted that plaintiffs may meet this burden with either direct or indirect evidence. *Id.*

101. The interviewer denied having asked Bruno particular family-oriented questions. *Id.* at 358. Moreover, he stated that he discussed family status with all of the applicants. *Id.* at 359. Despite the court's characterization of Bruno's impeachment of interview testimony with earlier deposition answers as "dubious at best," it concluded that "when we view all this evidence in the light most favorable to Bruno, we conclude that the jury could have found that Pyle did not ask the male applicants how their spouses felt about working a 24-hour shift on an ambulance or whether they planned to have more children." *Id.* at 361-62.

102. "The fact that Pyle asked only Bruno family-oriented questions reveals that those questions were based on sex stereotypes—namely, that females are the primary care providers for children and that the wife's career is secondary to the husband's." *Bruno*, 950 F.2d at 362.

103. *Id.*

104. *Id.* Specifically, the court of appeals looked at the interviewer's concern about the time conflicts between Bruno's and her husband's jobs, intimating that the committee asked only Bruno family-oriented questions because "[t]here is no evidence that any other applicant was faced with this unique and demanding situation." *Id.* The court found that Bruno's answers appeared to have reassured the interviewer, even though earlier in the opinion it acknowledged the unreliability of answers to such questions since "the interviewee has to assume that the employer wants to hear" a particular answer. *Id.* The court then drew its own inferences from the notes made during the interview (" 'No problem w/24/48 hr shifts' " and " 'No problem w/child care' "), surmising that they could indicate either the interviewer's or Bruno's conclusion that Bruno's family life would not affect her work. *Id.* The Seventh Circuit thus concluded that the record did not establish that the employer relied on sex

Having found Bruno's evidence insufficient to meet direct evidence standards, the court evaluated the proof as indirect evidence. It held that while she had established a prima facie case of sex discrimination,[105] the employer articulated "several legitimate, nondiscriminatory reasons for hiring" someone else,[106] and that Bruno, in turn, failed to prove the reasons merely pretextual.[107] Therefore, neither Bruno's direct nor her indirect evidence of the employer's gender stereotyped ques-

---

stereotypes, because "[n]either inference implies that Pyle concluded Bruno's sex rendered her ineligible for the job." *Id.*

Judge Easterbrook vigorously dissented from the majority's de novo scrutiny of the facts in this manner.

> My colleagues make some solid points in favor of Pyle and the City. A verdict in their favor could not be disturbed. When the inferences cut both ways, the trier of fact is entitled to decide. Both the jury evaluating the § 1983 claim and the judge assessing the Title VII claim accepted the inferences in Bruno's favor. We should affirm the judgement.

Bruno v. City of Crown Point, Ind., 950 F.2d 355, 365 (7th Cir. 1991) (Easterbrook, J., dissenting).

105. *Id.* at 363. The court used the *McDonnell/Burdine* burden shifting method. *See supra* notes 42-46 and accompanying text.

106. *Bruno*, 950 F.2d at 363. The interviewer testified that he hired the candidate "because he had the least experience . . . and therefore could be molded in the Crown Point way of doing things," he had made a good impression on the staff during a student training period with them, and because he had "clicked" with the interviewer. *Id.*

107. *Id.* The court found it "logical for Pyle to want employees that could be molded into the Crown Point way of doing things" because Pyle was the first and only director of a department of seven people. *Id.* On the basis of the interview notes stating that Wagner " 'could be molded' " and that the second-ranked candidate was " 'set in his ways,' " the court concluded that "Pyle obviously had a trained team in place and wanted the new person to fit in." *Id.* at 363-64. The court discarded Bruno's theory that the employer's articulation constituted a pretext as "too farfetched and simply implausible given the evidence in this case." *Id.* Using strongly biased language, the court reasoned that "Bruno's attorney *admitted* at oral argument that, in order to accept Bruno's argument of pretext, the jury had to conclude that Pyle's effort to discriminate against Bruno was so well-thought-out that he hired the least experienced male paramedic over six more experienced men, all so he could *concoct* the pretextual argument that he wanted to mold his new paramedic into the Crown Point way of doing things." *Id.* (emphasis added).

In contrast, Judge Easterbrook concluded that "[a] jury also could find this explanation fabricated, a pretext—age discrimination on top of sex discrimination. When asked just what the 'Crown Point way of doing things' is, Pyle had no answer. He conceded that the paramedics operate under the direction of a local hospital." *Id.* at 365 (Easterbrook, J., dissenting). Once again, arguing that the ultimate power should rest with the jury and trial judge, Easterbrook urged that "[i]f the employer is trying to hide its real reason, that effort—coupled with the evidence making up the employee's case—may convince the trier of fact that the real reason needed to be hidden because it was discriminatory." *Id.*

tions asked only of female candidates met the test of causing or, at least, playing a motivating role in, the hiring process.[108]

III. TOWARD A NEW UNDERSTANDING OF CAUSE AND EFFECT IN GENDER STEREOTYPED EMPLOYMENT DISCRIMINATION

Sharp contrasts in the analytical frameworks and ultimate decisions of these federal courts point to the need for a uniform system of deciding employment discrimination cases based upon stereotyping. *Barbano* and *Bruno*, along with *Price Waterhouse*, show that the causation standard, burden of proof allocation, and evidentiary requirements constitute the key elements for analyzing such mixed motive cases. Although Congress intended to resolve the causation standard conflict in the 1991 Civil Rights Act, questions of interpretation will undoubtedly arise as the judiciary decides what constitutes a "motivating factor," how to prove it, and who bears the burden. This Note proposes an analytical method that recognizes the close relationship between evidence and causation by combining the evidentiary requirements of the Second Circuit with the causation standard of the 1991 Civil Rights Act.

A. STANDARDS OF CAUSATION AND THEIR IMPLICATIONS

The federal judiciary clearly demonstrated in *Bruno* and *Barbano* its conflicting notions of how to link discriminatory intent with outcome. The Seventh Circuit, purportedly applying the more liberal "motivating factor" test,[109] found no Title VII violation, while the Second Circuit, using the same test, did find a violation.[110] Thus, the expressed causation standard as applied did not necessarily evince the level of proximate cause the courts actually required to explain why the two women did not get the jobs they sought.

This difference in application turns on the courts' comfort level with the nexus between the injurious act—gender stereotyping—and the resulting injury—employment discrimination.

---

108. *Id.* The majority reasoned that "[t]he plaintiff still must prove that the employer based his decision on the sex stereotypes implicit in such questions when directed only to women." *Id.* Easterbrook sharply differed with this conclusion: "[t]hese paternalistic questions, asked only of women, show that he thought about men and women differently and allowed the jury to infer that he believes a woman's place is in the home." *Id.* (Easterbrook, J., dissenting).

109. *Bruno*, 950 F.2d at 361.

110. Barbano v. Madison County, 922 F.2d 139, 144 (2d Cir. 1990).

The Seventh Circuit saddled Bruno with the double burden of proving that her sex amounted to "a motivating factor"[111] and "a determining factor,"[112] a much more difficult standard to prove. In doing so, the court accepted only a very close causal connection between the discriminatory interview and the hiring decision. In contrast, the Second Circuit characterized the "tainted" interview as the proximate cause of the decision not to hire Barbano.[113] These conflicting outcomes indicate not the need for a new standard but rather the need for judicial consensus on the meaning of the "motivating factor" test cited by the *Price Waterhouse* plurality[114] and codified in the 1991 Civil Rights Act.[115]

B. Evidentiary Standards and Their Relation to Causation

The role of direct and indirect evidence in showing that the discriminatory interviews constituted Title VII violations proved critical to the courts' applications of causation standards. In *Bruno*, the Seventh Circuit refused to construe the interview questions as direct evidence of discrimination because the plaintiffs did not produce "substantial evidence" that the interviewers relied upon the answers when making the ultimate hiring decisions.[116] Instead, the court resorted to the indirect evidentiary framework of *McDonnell/Burdine* and reasoned that while the plaintiff successfully shifted the burdens of production to the defendants, she failed to meet her burdens of persuasion in proving that the employers' alleged nondiscriminatory reasons amounted to "mere pretext."[117]

The Second Circuit, in stark contrast, construed the interview questions as direct evidence of sex discrimination and proceeded to apply the *Price Waterhouse* mixed motive analytical framework.[118] In *Barbano*, the court appeared to reason that such questions, when asked only of one gender, created a presumption of gender stereotyping both in thought and action.[119]

---

111. *Bruno*, 950 F.2d at 361.
112. *Id.* at 357.
113. *Barbano*, 922 F.2d at 144.
114. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989).
115. *See* 42 U.S.C.A. § 2000e-2(m) (West Supp. 1992).
116. *Bruno*, 950 F.2d at 362.
117. *Id.* at 363-64.
118. *Barbano*, 922 F.2d at 145.
119. *See id.* The court appeared to follow the reasoning of one commentator, who likened finding discrimination to solving an algebraic equation:

The court required no additional, explicit proof of reliance on the answers.

The Seventh and Second Circuits took diametrically different approaches when considering the evidence, one formulaic and rigid, the other practical and inclusive. The Second Circuit deduced from the fact that the interviewer asked stereotyped questions only of the female candidate that the discriminatory bias permeated not only the interview process but the ultimate decisionmaking one as well. The Seventh Circuit, in contrast, compartmentalized the stereotyping behavior, separating the thinking that created the questions from that which formed the ultimate decision. Thus, the Seventh Circuit required a threshold of proof so "direct" that a plaintiff could rarely, if ever, meet her burden of production.[120]

Moreover, the courts' categorizations of the proof as direct or indirect affected how they actually applied the causation standard. The Seventh Circuit's high evidentiary threshold essentially precluded the plaintiff from showing that the discriminatory interview played a motivating role in the employment decision. Instead, the court's single motive analysis effectively forced her to show that the interview questions amounted to a determining factor. The Second Circuit's evidentiary threshold, in contrast, invoked the mixed motive framework which allowed the plaintiff's direct evidence to apply to a less exacting causal standard, thereby permitting her to shift the burden to the defendant to prove how it would have made the same decision regardless of the discriminatory interview. The courts' proximate cause concerns thus fueled the standards for evidence and causation.

C. TOWARD A UNIFORM STANDARD OF RELATING CAUSE AND EFFECT IN GENDER STEREOTYPED EMPLOYMENT DISCRIMINATION

As the *Bruno* and *Barbano* decisions illustrate, causation standards, evidentiary requirements, and proof allocations affect one another; changing one element has an impact on the

"[B]ut when one proceeds to cancel out the common characteristics of the two classes being compared (married men and married women) . . . the cancelled-out element proves to be that of married status, and sex remains the only operative factor in the equation." ARTHUR LARSON & LEX K. LARSON, 1 EMPLOYMENT DISCRIMINATION: SEX § 11.22, at 3-10 (1992).

120. This heavy burden of production ignores the practical difficulty that plaintiffs are rarely in the position to produce direct evidence of employment discrimination. *See supra* note 40 and accompanying text.

others. Standardizing one, as the 1991 Civil Rights Act intended with the motivating factor causation standard, will not necessarily result in different decisions on gender stereotyping. Rather, Congress's attempt to render *Price Waterhouse* more "plaintiff friendly" may instead ignite unintended changes in the remaining two elements. Thus, to harmonize the treatment of employment discrimination cases asserting gender stereotyping, this Note advocates a unified framework of all three elements.

1. Evidentiary Requirements

Courts should treat family status interview questions asked only of women applicants as direct evidence[121] of the employer's discriminatory motivation. In doing so, courts would immediately proceed to a mixed motive analysis, thereby avoiding the *McDonnell/Burdine* approach. By explicitly adopting the approach the Second Circuit implicitly utilized in *Barbano*,[122] the courts would achieve two distinct aims. First, they would eliminate barriers to litigating the subtle and persistent discrimination that continues to plague women in seeking employment opportunities.[123] In this manner the remedial function of Title VII's private cause of action would operate more effectively by maximizing enforcement opportunities without burdening the regulatory apparatus.[124]

---

121. In a subsequent case, the Second Circuit concluded that the term direct evidence "is an unfortunate choice of terminology for the sort of proof needed to establish a 'mixed-motives' case." Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir.) (a case of age discrimination under New York's Human Rights Law), *cert. denied*, 113 S. Ct. 82 (1992).

> "Direct" and "indirect" describe not the quality of the evidence presented, but the manner in which the plaintiff proves his case. Strictly speaking, the only "direct evidence" that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker such as "I fired him because he was too old." Even a highly-probative statement like "You're fired, old man" still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision.

Id. Instead the court referred to a "more focused proof of discrimination" than the *McDonnell Douglas* prima facie evidence. *Id.*

122. *See* 922 F.2d at 144-45.

123. Congress intended Title VII to "eradicat[e] discrimination throughout the economy and mak[e] persons whole for injuries suffered through past discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Furthermore, the Supreme Court has noted that "[i]n the implementation of [employment] decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

124. Some might argue that this standard would open the floodgates for

Second, a broader definition of direct evidence would infuse judicial thinking with a more realistic reflection of current methods of discrimination. Since the 1970s, when the courts began to interpret the 1964 Civil Rights Act, explicit edicts against hiring women have given way to more subtle forms of discrimination based on the stereotypes deeply rooted in our culture.[125] By concluding that employers who ask family status questions only of women invoke gender stereotypes and necessarily rely on them when making the ultimate employment decision, courts would tear down the artificial wall[126] between direct and indirect evidence built by years of judicial interpretation.

2. Causation Standard

Under a mixed motive analysis, courts should apply the motivating factor test used by the *Price Waterhouse* plurality and codified in the 1991 Act. By using this standard, the courts establish a causal link between discriminatory intent and outcome appropriate to Title VII's original mandate and the explicit affirmation contained in the 1991 Act. A motivating factor standard, applied to the plaintiff's burden of proof, places the proximate cause close enough to the injury to satisfy the need for causality, yet within the pragmatic evidentiary realm of today's plaintiffs. Clearly the "motivating factor" test places a heavier burden of proof on the employer than the existing "but for" and "substantial factor" tests, but appropriately

---

gender stereotyping claims under Title VII and render the private cause of action useless under the weight of excessive litigation. While treating evidence of gender-specific family status questions as direct evidence of employer gender stereotyping will undoubtedly increase the number of claims brought against employers, it will also assuredly increase employers' awareness (through litigation and settlement) of the need to treat male and female applicants equally. While employers will, in the short term, incur additional expense in defending themselves from suit, they will learn in the long run to insulate themselves from claims by either asking no family status questions or asking them equally of men and women applicants.

Furthermore, this approach coincides with the policy direction set by Congress in the 1991 Act. By increasing the potential use of jury trials and "easing" the standard for proving a Title VII violation (thereby improving the chances for an award of attorney's fees), Congress expressed its support for remedying gender-stereotyped discrimination through increased resort to private suit. *See* 42 U.S.C.A. §§ 2000e-2 (West Supp. 1992).

125. For examples of gender stereotyping and its effects on working women, see *supra* notes 9-14 and accompanying text.

126. Courts should be wary of "creating walls too steep for meritorious claimants to climb." Cuddy v. Carmen, 694 F.2d 853, 860 (D.C. Cir. 1982) (age discrimination).

so. Employers usually control the crucial factual information for determining the role the gender-stereotyped questions played in decisionmaking. Moreover, Congress stated clearly in the 1991 Act that the causal nexus suggested in the 1964 Act's "because of" term did not require direct precision but rather a proximate relationship.

3. Burden of Proof Allocation

Once the plaintiff has provided direct proof that a discriminatory factor motivated the employment decision, the burden should then shift to the employer, under mixed motive analysis, to articulate why the discriminatory interview did not motivate the employment decision. The employer would shoulder both the burdens of production and persuasion to show the court how other legitimate factors actually motivated the employment decision.[127] The burden of persuasion rests appropriately on the defendant for not only does it possess superior access to crucial evidence linking thought and action, but the plaintiff's showing of illegitimate motives denies the employer a "presumption of good faith" in its decisionmaking. In turn, the plaintiff would carry the burden of persuasion in rebutting the defendant's proffered motives.

Applying this framework to the facts of *Barbano*, the Second Circuit would have produced the same result but by a more explicit analytical process. Rather than implicitly concluding that family status questions asked only of women constitute direct evidence, thereby collapsing the issues of motivating thought and action, the Second Circuit would have shown explicitly how gender-stereotyped thoughts can translate into gender-discriminating action.[128]

In contrast, had the Seventh Circuit applied this suggested framework, it would have found for the plaintiff Bruno. By initially classifying the interview questions as direct evidence of an illicit motivating factor, the court would have avoided confusing the single and mixed-motive frameworks and their disparate underlying premises. Instead it would have immediately shifted the burden to the employer and applied the motivating factor test to the plaintiff's evidence. Finally, as Judge Easter-

127. Under the 1991 Act, the employer's success at proving other legitimate factors would free it from an assessment of damages, not a finding of a Title VII violation. *See supra* note 78 and accompanying text.

128. *Barbano*, 922 F.2d at 145-46.

brook suggested in his dissenting opinion,[129] under this approach the appeals court appropriately would have deferred to the lower court's factfinding and to Congress's intent to "eradicate employment discrimination"[130] by recognizing the relationship between gender-stereotyped thoughts and gender-biased actions, as well as that between evidence and causation.

CONCLUSION

By using the unified analytical framework suggested in this Note, courts will send a strong message to employers that stereotyping, while prevalent in society, has no place in employment decisions. The federal judiciary would also reconcile the inconsistencies presently evolving from their interpretation of *Price Waterhouse*'s "murky" approach to causation. Most importantly, utilization of this framework now would reflect the standards recognized in the 1991 Civil Rights Act and expediently bring them to bear on the important cases presently before the courts.

129. *Bruno*, 950 F.2d at 365.
130. Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975).