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NOTE

RETHINKING THE DIRECT EVIDENCE REQUIREMENT: A SUGGESTED APPROACH IN ANALYZING MIXED-MOTIVES DISCRIMINATION CLAIMS

Christopher Y. Chen†

In Price Waterhouse v. Hopkins, *the United States Supreme Court augmented the existing framework for establishing employer liability in disparate treatment discrimination claims. This decision recognized the shortcomings of pretext analysis as outlined in* McDonnell Douglas v. Green *and* Texas Department of Community Affairs v. Burdine, *and enunciated mixed-motives analysis which enables plaintiffs to hold employers liable whenever an illegitimate criterion, such as race, sex, or national origin, is a motivating factor in an adverse employment decision. Viewed as a complement to pretext analysis, mixed-motives analysis aimed to fill gaps in available disparate treatment theories, and it also potentially leveled the playing field by providing a mechanism that allowed plaintiffs to shift the burden of persuasion to defendants. However, without explicit instructions from the*

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Court as to what constitutes direct evidence of discriminatory animus, the circuit courts have applied different standards for analyzing mixed-motives discrimination claims. The courts continue to struggle with the direct evidence requirement today and have adopted stringent interpretations of this requirement, thus denying the benefit of mixed-motives analysis to plaintiffs with arguably meritorious claims.

This Note points to research in cognitive psychology which shows that discrimination in today's workplace is more subtle and complex than traditional intent-based models of employment discrimination recognize. The author argues that a framework of mixed-motives discrimination that focuses on the nature and extent of employer liability, rather than on the definition of discriminatory animus, better furthers the goals of Title VII. Taking guidance from the Supreme Court's most recent decisions in Title VII jurisprudence which focused on workplace harassment, the author proposes a framework for mixed-motives analysis that is injury-based and fact-intensive and also takes into consideration economically efficient and socially desirable allocations of the burden of persuasion in employment discrimination cases.

INTRODUCTION

More than ten years after the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[1] the federal courts continue to struggle with mixed-motives discrimination claims. The source of the confusion and the inconsistent adjudications lies in the "direct evidence" requirement,[2] the necessary threshold for triggering mixed-motives

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1 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a)-(b), § 703, 105 Stat. 1071, 1075-76 (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (1994)), modified the liability component of the *Price Waterhouse* decision so that when a plaintiff demonstrates that "race, color, religion, sex, or national origin was a motivating factor for any employment practice," 42 U.S.C. § 2000e-2(m) (1994), the court "may grant declaratory relief, injunctive relief . . . , and attorney's fees and costs," *id.* § 2000e-5(g)(2)(B)(i), even when the employer demonstrates "that [it] would have taken the same action in the absence of the impermissible motivating factor," *id.* § 2000e-5(g)(2)(B). For a discussion of the Civil Rights Act of 1991, see *infra* Part I.C.

2 Ambiguity in the *Price Waterhouse* opinion as to the proper application of the mixed-motives analysis has produced considerable confusion among the federal appellate courts. Some courts require a strict traditional definition of direct evidence, while others adopt other restrictive standards. *E.g.*, Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1243 (2000) (applying a restrictive but nontraditional standard of direct evidence); Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156-57 (8th Cir. 1999) (same); Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (applying the strict traditional definition of direct evidence, which requires evidence that proves discriminatory animus without inference or presumption); Manzer v. Diamond Shamrock Chems. Co., 1994 FED App. 0255P (6th Cir.), 29 F.3d 1078, 1081 (same); Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990) (same); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990) (same); *see also, e.g.*, Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999) (articulating a new standard for the direct evidence requirement after concluding that the "indiscriminate use of the term 'direct evidence'" resulted in "substantial confusion in the district courts in [the Eleventh Circuit]"). Although the Eleventh Circuit attempted to clarify the definition of direct evi-

analysis set by Justice O'Connor in her *Price Waterhouse* concurrence.[3] Several commentators, recognizing the lack of uniformity among lower courts and the absence of guidance from the Supreme Court, have suggested their own views regarding direct evidence of discriminatory animus.[4] Nonetheless, the approaches suggested thus far do not adequately address the complex and subtle forms of discrimination that infect today's workplace, as revealed by recent research in the field of social psychology and work by other legal scholars.[5] Recent Supreme Court jurisprudence in employer sexual harassment cases,[6] however, provides suggestions for a workable approach to intentional discrimination under Title VII.

Over the past three decades, the Supreme Court has articulated two primary theories of employment discrimination to analyze "disparate treatment" claims.[7] The first is the pretext analysis outlined in

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dence in a thorough opinion by Judge Tjoflat, "the end result is that the issue is now confused even more." Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 51 MERCER L. REV. 1123, 1126 (2000).

3 *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in judgment).

4 *E.g.*, Steven M. Tindall, Note, *Do as She Does, Not as She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 337 (1996) (proposing that the probative value of the evidence rather than the type should trigger analysis and suggesting that courts require only enough evidence to reasonably allow a jury to conclude that unlawful discrimination motivated the adverse employment decision); Joseph J. Ward, Note, *A Call for* Price Waterhouse II*: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 629 (1997) (arguing that courts should apply the direct evidence requirement strictly, "much like Justice O'Connor's application in her *Price Waterhouse* concurrence"); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 980-84 (1994) (arguing that mixed-motives analysis should not hinge on evidentiary requirements or distinctions, but rather on "prudential, precedential, and policy concerns").

5 *See, e.g.*, Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 86 (1995) (arguing against a model of discrimination based on individual intent because "most discrimination today is the result of group effort"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161-66 (1995) (applying the insights of cognitive psychology to disparate treatment theory and arguing that current theory is inadequate because it assumes that discrimination is motivational, rather than cognitive, in origin); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-28 (1987) (using cognitive psychology, among other theories, to undermine an intent-based model of racial discrimination); Michael Selmi, *Response to Professor Wax, Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1233-35 (1999) (criticizing the notion that society should ignore unconscious or "subtle" discrimination); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130-34 (1999) (examining "unconscious disparate treatment" and arguing against extension of the existing framework of antidiscrimination law to cover unconscious discrimination).

6 Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

7 Disparate treatment doctrine applies when employers intentionally discriminated against employees or job applicants because of their membership in a protected class. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973).

McDonnell Douglas Corp. v. Green[8] and later elaborated upon in *Texas Department of Community Affairs v. Burdine*,[9] which implements a three-step, burden-shifting approach for establishing disparate treatment liability.[10] Second, in 1989, the *Price Waterhouse v. Hopkins* decision established the analytical framework for "mixed-motives" discrimination cases.[11] This groundbreaking decision recognized the shortcomings of the *McDonnell Douglas-Burdine* pretext analysis by providing a framework for analyzing situations in which adverse employment actions were motivated by both legitimate and illegitimate reasons. Federal courts, however, have had difficulty determining what properly constitutes direct evidence of discriminatory animus, the necessary threshold for shifting the burden of persuasion from the plaintiff to the employer in mixed-motives claims. Circuit courts have generally split in their approach to the direct evidence requirement along three different lines.[12]

The importance of the development of mixed-motives analysis to plaintiffs in proving intentional discrimination cannot be overstated. First, the mixed-motives analysis fills gaps in the available theories of employment discrimination.[13] Second, it potentially levels the decidedly pro-defendant field of litigation by providing a mechanism that allows plaintiffs to shift the burden of persuasion to defendants.[14]

Prior to *Price Waterhouse*, disparate treatment doctrine assumed that a single reason motivated the employer in an alleged discriminatory action.[15] The plaintiff's task involved convincing the trier of fact that the employer's proffered reason was pretextual—not the true reason for the adverse employment action.[16] Even if the plaintiff accomplished this task, the plaintiff had the additional burden of proving that "discrimination was the real reason"[17] underlying the employer's decision, essentially requiring the plaintiff to prove unstated reasons

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8 411 U.S. 792 (1973).

9 450 U.S. 248 (1981).

10 *Id.* at 252-56; *McDonnell Douglas*, 411 U.S. at 800-02.

11 Price Waterhouse v. Hopkins, 490 U.S. 228, 239-58 (1989) (plurality opinion). This theory of liability allows a plaintiff to prove that discrimination motivated the adverse employment decision even if the employer also had a legitimate motive. *See id.* at 247 (plurality opinion).

12 Tindall, *supra* note 4, at 354-56 (noting that courts can be divided into the following categories: those that apply the traditional definition of direct evidence, those that apply a restrictive standard, and those that apply a broad probative standard); Zubrensky, *supra* note 4, at 970-78 (discussing three different interpretations adopted by the courts in applying the direct evidence requirement); *see also infra* Part II.A (discussing different approaches to the direct evidence requirement among the federal circuit courts).

13 *See Price Waterhouse*, 490 U.S. at 247 (plurality opinion).

14 *See id.* at 258 (plurality opinion).

15 *See, e.g., Burdine*, 450 U.S. at 254-56; *McDonnell Douglas*, 411 U.S. at 804.

16 *Burdine*, 450 U.S. at 256.

17 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

for the employment action. The mixed-motives analysis, however, recognizes that employers often base their decisions on both legitimate and illegitimate reasons.[18] Thus, it allows the plaintiff's claim to proceed when the plaintiff can show that an impermissible bias played a role in the employment decision.[19] Furthermore, once the plaintiff establishes a causal connection between the illegitimate bias and the employment decision, the burden of persuasion shifts to the employer to prove that it would have reached the same decision notwithstanding the impermissible factor.[20]

The full potential of mixed-motives analysis to advance the goals of Title VII remains unrealized, however, because courts[21] continue to use a model of intentional discrimination that no longer adequately addresses the complex and subtle forms of discrimination in today's workplace.[22]

Part I of this Note reviews the importance of mixed-motives analysis within the framework of employment discrimination jurisprudence. Part II examines the recent wave of federal case law struggling with the direct evidence requirement. It also reviews the direct evidence requirement in light of cognitive psychology research and other scholarship that calls into question the overemphasis on intent in employment discrimination jurisprudence. In Part III, this Note discusses the concerns involved in setting a threshold that adequately separates legitimate discrimination claims from meritless and frivolous claims. Part IV proposes a workable approach to the direct evidence requirement that focuses not on the definition of what constitutes discriminatory animus but rather on outlining the nature and extent of employer liability in furthering the goals of Title VII, as the Supreme Court has done in recent workplace harassment decisions.

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18 *See Price Waterhouse*, 490 U.S. at 247, 250 (plurality opinion).

19 *Id.* at 258 (plurality opinion).

20 *Id.* (plurality opinion).

21 *See, e.g., Hicks*, 509 U.S. at 516-17 (indicating that the plaintiff has "'the ultimate burden of persuading the court that she has been the victim of *intentional* discrimination'" (emphasis added) (quoting *Burdine*, 450 U.S. at 256)); Warren v. Halstead Indus., 802 F.2d 746, 752-53 (4th Cir. 1986) (placing burden on the plaintiff to show that "the defendant's proffered reason is not worthy of belief or that discriminatory reasons more likely motivated the defendant"); Smith v. Honeywell, Inc., 735 F.2d 1067, 1068-69 (8th Cir. 1984) (noting that plaintiffs alleging disparate treatment have the burden of showing not only a difference in treatment but also that they are victims of intentional discrimination).

22 Krieger, *supra* note 5, at 1164-65; *see also id.* at 1199-1217 (applying cognitive psychology to undermine the notion of intent-based employment discrimination); Lawrence, *supra* note 5, at 322 ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation."); *cf.* John A. Bargh, *Conditional Automaticity: Varieties of Automatic Influence in Social Perception and Cognition*, in UNINTENDED THOUGHT 3, 3 (James S. Uleman & John A. Bargh eds., 1989) ("An automatic thought process [is] one that is capable of occurring without the need for any intention that it occur, without any awareness of the initiation . . . .").

I

BACKGROUND ON MIXED-MOTIVES ANALYSIS IN EMPLOYMENT DISCRIMINATION JURISPRUDENCE

A. Pretext Analysis

Prior to the development of the mixed-motives analysis outlined in *Price Waterhouse,* plaintiffs alleging disparate treatment in the workplace proceeded under the three-step, burden-shifting approach for proving intentional discrimination first enunciated by the Supreme Court in *McDonnell Douglas Corp. v. Green*[23] and later elaborated upon in *Texas Department of Community Affairs v. Burdine.*[24] The first step requires the plaintiff to establish a prima facie case of discrimination by showing that: (1) the plaintiff belonged to a protected class; (2) the plaintiff applied for a job for which he or she was qualified; (3) the plaintiff was rejected; and (4) the position remained open and the employer continued to seek applicants with similar qualifications.[25] A properly established prima facie case creates a rebuttable presumption of discrimination.[26]

The burden then "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the [plaintiff's] rejection," in the second step of the analysis.[27] If the employer simply articulates a legitimate, nondiscriminatory reason for its action, then the employer satisfies the burden of production[28] necessary to rebut the presumption of discrimination raised in the first step.[29] In the third step of the analysis the burden then shifts back to the plaintiff to demonstrate that the employer's proffered reason is pretextual and "not the true reason" for the employment action.[30] The plaintiff meets this burden of persuasion by proving that the "presumptively valid reasons for [the adverse employment action] were in fact a coverup" for discrimination.[31]

The first two steps of the *McDonnell Douglas-Burdine* analysis essentially serve as little more than mere formalities. The first step, the plaintiff's demonstration of a prima facie case, requires only minimal

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23 411 U.S. 792 (1973).

24 450 U.S. 248 (1981).

25 *McDonnell Douglas,* 411 U.S. at 802.

26 *Burdine,* 450 U.S. at 254.

27 *McDonnell Douglas,* 411 U.S. at 802.

28 *Burdine* made clear that the employer's burden here is merely one of production, requiring the employer to articulate a nondiscriminatory reason for an adverse employment action. 450 U.S. at 254-55. The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* at 254.

29 *Id.* at 255.

30 *Id.* at 256.

31 *McDonnell Douglas,* 411 U.S. at 805.

proof of discrimination.[32] To satisfy the second step, the employer "'need only *articulate*—not prove—'" a nondiscriminatory reason for its actions.[33] The employer does not need to persuade the trier of fact that its proffered reason actually motivated the employment decision.[34] Thus, under the *McDonnell Douglas-Burdine* approach, the ultimate burden of persuasion remains with the plaintiff, and the critical step lies in the pretext analysis. The plaintiff, in order to prevail under the *McDonnell Douglas-Burdine* framework, must demonstrate that the employer's articulated nondiscriminatory reason was in fact false.[35]

In *St. Mary's Honor Center v. Hicks*,[36] the Supreme Court further increased the plaintiff's burden of persuasion by holding that proof of pretext alone does not compel a finding in favor of the plaintiff.[37] In addition to demonstrating pretext, *Hicks* requires the plaintiff to prove that discrimination was the real reason for the employment action.[38] This additional burden essentially requires the plaintiff to prove unstated reasons for the employment action, which is "a formidable and impractical burden upon plaintiffs bringing disparate treatment lawsuits."[39]

B. Mixed-Motives Analysis

In *Price Waterhouse*, the Supreme Court recognized the inadequacy of the pretext analysis as a framework for disparate treatment claims.[40] The inadequacy is readily apparent in claims in which both permissible and impermissible motives prompted the employment action. The facts of *Price Waterhouse* perfectly demonstrate the need for a mixed-motives analysis in addition to the pretext analysis of disparate treatment discrimination.[41]

In that case, Price Waterhouse, an accounting firm, denied Ann Hopkins partnership despite her "key role in Price Waterhouse's suc-

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32 *See* Fisher v. Vassar Coll., 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc) (stating that "virtually any [employment] decision . . . will support a slew of prima facie cases of discrimination [under *McDonnell Douglas*]"), *abrogated on other grounds by* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000); *cf.* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (explaining that "[t]he prima facie case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic'" (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978))).

33 450 U.S. at 258 (quoting Turner v. Tex. Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1971)).

34 *Id.* at 254.

35 *Id.* at 256.

36 509 U.S. 502 (1993).

37 *Id.* at 508-12.

38 *Id.* at 508.

39 Zubrensky, *supra* note 4, at 964.

40 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241-47 (1989) (plurality opinion).

41 *See id.* at 233-38 (plurality opinion).

cessful effort to win a multi-million dollar contract with the Department of State."[42] Although Price Waterhouse's decision to deny Hopkins partnership status was informed by legitimate concerns about Hopkins's impatience and abrasiveness with staff,[43] some of those who decided not to promote her also considered illegitimate gender stereotypes in their decision.[44] For example, one evaluator advised Hopkins that if she wanted to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[45] Even Hopkins's supporters evaluated her stereotypically, one commenting that she "'ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.'"[46]

Thus, in this mixed-motives situation, Hopkins could not prevail under the *McDonnell Douglas-Burdine* approach because she could not show that her employer's concern about her interpersonal skills was pretextual.[47] In other words, Hopkins could not disprove all of Price Waterhouse's justifications for its decision because in denying her the partnership Price Waterhouse considered both legitimate and illegitimate reasons. To fill this gap in disparate treatment doctrine, the Court for the first time applied mixed-motives analysis to an employment discrimination claim.

Under the Court's analysis, the plaintiff must initially prove that discriminatory animus played a motivating role in the adverse employment action.[48] If the plaintiff is successful, the employer can avoid liability only by proving that it would have made the same decision in the absence of the illegitimate criterion.[49] Applying this analysis to Hopkins's claim of discrimination, the Court found that the evidence established that gender stereotypes did play a motivating role in Price Waterhouse's decision to deny her partnership.[50] Although Price Waterhouse advanced some legitimate reasons for its decision, the Court remanded the case to "determine whether Price Waterhouse had proved by *a preponderance of the evidence* that it would have placed

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42 Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985), *aff'd in relevant part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

43 There were numerous complaints about her inability to work with and get along with others, and both her supporters and opponents described Hopkins as "overly aggressive, unduly harsh, difficult to work with and impatient with staff." *Id.* at 1113.

44 *See Price Waterhouse*, 490 U.S. at 235 (plurality opinion).

45 *Price Waterhouse*, 618 F. Supp. at 1117.

46 *Price Waterhouse*, 490 U.S. at 235 (plurality opinion) (first alteration in original) (quoting one of Price Waterhouse's exhibits).

47 *See id.* at 246-47 (plurality opinion).

48 *Id.* at 258 (plurality opinion).

49 *Id.* (plurality opinion).

50 *Id.* at 255-58 (plurality opinion).

Hopkins'[s] candidacy on hold even if it had not permitted sex-linked evaluations to play a part in the decision-making process."[51]

Price Waterhouse is significant not only because it provides a framework that recognizes forms of employment discrimination, such as mixed-motives claims, that are not viable under the traditional *McDonnell Douglas-Burdine* analysis, but also because it potentially affords plaintiffs more favorable standards of liability.[52] As discussed below, a framework that allows plaintiffs favorable standards of liability is important in addressing employment discrimination in today's workplace because of the difficulty in proving intent.[53] However, the *Price Waterhouse* analysis never realizes its potential for effectively addressing the complex and subtle forms of modern employment discrimination because of its misplaced focus on finding manifest discriminatory animus.[54]

C. Civil Rights Act of 1991

Under *Price Waterhouse*, employers could avoid liability by proving that they would have made the same decision absent the illegitimate motivating factor in the employment decision.[55] The Civil Rights Act of 1991 codified the "motivating factor" test of *Price Waterhouse*[56] and changed its liability component.[57] Under the Act, so long as the plaintiff demonstrates that an impermissible criterion such as race or gender was a motivating factor in the adverse employment decision, liability attaches to the employer regardless of whether the employer can satisfy the same-decision test.[58] That the employer can show that it would have made the same decision without considering the impermissible motivating factor only limits its liability;[59] it does not relieve the employer of liability altogether.[60] The plaintiff may still be entitled to "declaratory relief, injunctive relief . . . , and attorney's fees."[61] In sum, the employer becomes liable once the plaintiff establishes that an illegitimate criterion entered into the decision-making process.

By codifying *Price Waterhouse*'s motivating-factor test, the Civil Rights Act of 1991 "clarifies that the burden shifts to the defendant

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51 *Id.* at 254-55 (plurality opinion). On remand, the district court found that Price Waterhouse failed to carry this burden and held for Hopkins. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1207 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

52 *See* Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995).

53 *See infra* Part II.B.

54 *See infra* notes 116-25 and accompanying text.

55 *Price Waterhouse*, 490 U.S. at 246 n.11 (plurality opinion).

56 42 U.S.C. § 2000e-2(m) (1994).

57 *Id.* § 2000e-5(g)(2)(B).

58 *Id.* §§ 2000e-2(m), 2000e-5(g)(2)(B).

59 *Id.* § 2000e-5(g)(2)(B).

60 *Id.* § 2000e-5(g)(2)(B)(i).

61 *Id.*

once the plaintiff has established that sex [or another illegitimate criterion] was a 'motivating' factor for any employment practice."[62] More importantly, the Civil Rights Act of 1991 modifies the *Price Waterhouse* holding that an employer could avoid liability completely in mixed-motives cases by demonstrating that the same employment action would have been taken absent the discriminatory motive.[63] The fine point here is that Congress's enactment of the Civil Rights Act of 1991 illustrates its recognition that Title VII's goal of eliminating discrimination in the workplace is better served not by determining whether discriminatory animus was the but-for cause of an adverse employment decision but rather by eliminating impermissible criteria from the decision-making process.[64]

II
DIRECT EVIDENCE REQUIREMENT AS APPLIED TO DISCRIMINATION IN TODAY'S WORKPLACE

A. Direct Evidence Requirement and Its Application

Federal courts have struggled with the application of the mixed-motives analysis ever since *Price Waterhouse* formulated it more than ten years ago.[65] In particular, the primary source of the confusion among federal district and circuit courts has been the direct evidence requirement, which Justice O'Connor set out in her *Price Waterhouse* concurrence as a necessary threshold for triggering mixed-motives analysis.[66] Justice O'Connor's failure to define clearly what constitutes direct evidence has resulted in inconsistent and unjust adjudications of mixed-motives employment discrimination claims in the lower courts.

For example, in *Taylor v. Virginia Union University*,[67] the Fourth Circuit affirmed summary judgment against plaintiff Lynne Taylor on

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62 Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motives Cases*, 1993 WIS. L. REV. 231, 240; *see also id.* at 240-41 (discussing the *Price Waterhouse* analysis as clarified and changed by the Civil Rights Act of 1991).

63 *Id.* at 241.

64 *See* Kelley E. Dowd, Note, *The Correct Application of the Evidentiary Standard in Title VII Mixed-Motive Cases:* Stacks v. Southwestern Bell Yellow Pages, Inc., 28 CREIGHTON L. REV. 1095, 1124 (1995) (explaining that *Price Waterhouse*'s same-decision test diluted the effectiveness of Title VII as a deterrent to employment discrimination because it "'permit[ted] prohibited employment discrimination to escape sanction under Title VII'" (alterations in the original) (quoting H.R. REP. 102-40(1), at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584)).

65 *See supra* notes 2, 12 and accompanying text.

66 Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring in judgment).

67 193 F.3d 219 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1243 (2000).

her discrimination claims[68] in the face of strong evidence[69] that gender stereotypes played a motivating role in the refusal to permit Taylor to attend the Police Academy.[70] Taylor presented evidence that Chief Wells, the decision maker, told Officer Terry that "he was never going to send a female to the Academy."[71] Consistent with his promise, Wells did not send Taylor to attend the academy, "nor did he select any woman to attend the Academy during his tenure as Chief of Police."[72] Additionally, a fellow male officer "testified that Chief Wells had once referred to Taylor as a 'stupid bitch,' and asked him if he was sleeping with [another female candidate]."[73]

Despite evidence that clearly evinced Wells's discriminatory attitude towards women in general and his attitude against sending them to the Police Academy, the majority denied Taylor the benefit of the mixed-motives standard of liability.[74] The majority applied a standard of direct evidence that requires "'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'"[75] According to the majority, Chief Wells's statement to Officer Terry that "he was never going to send a female to the Academy" was not "direct evidence" for purposes of Taylor's claim because it lacked a sufficient causal nexus with his decision not to send Taylor to the Academy.[76] Although the Fourth Circuit recognized that under the Civil Rights Act of 1991 an employer is liable so long as an impermissible criterion was a motivating factor in an employment decision, the court's approach to the direct evidence requirement precluded successful application of mixed-motives analysis in *Taylor*.[77] This restrictive standard contrasts sharply with Fourth Circuit precedent, wherein the court "stated that to shift the burden of persuasion to the employer, a plaintiff need only 'prove by a preponderance of the evidence that the em-

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68 *Id.* at 225.

69 *See id.* at 227.

70 *Id.* at 225. Virginia Union University (VUU) had the opportunity to send two officers each year to the Police Academy. *Id.* at 225 n.2. The criteria for selection were "(1) seniority; (2) employment with VUU for more than ninety days; (3) experience; (4) interest; (5) desire to attend the Police Academy; and (6) written evaluations." *Id.* Attending the Police Academy "had a positive impact on promotional opportunities" for VUU's officers. *Id.*

71 *Id.* at 227 (internal quotation marks omitted).

72 *Id.* at 244 (Murnaghan, J., dissenting). "Of the six male officers . . . selected for the Academy while Taylor was employed by the police department, only three . . . were hired before Taylor; three were selected for the Academy within twelve months of their date of hire; and one was selected within four months of his date of hire." *Id.* at 241 (Murnaghan, J., dissenting).

73 *Id.* at 227 (quoting the joint appendix).

74 *Id.* at 232-33.

75 *Id.* at 232 (quoting Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995)).

76 *Id.*

77 *See id.*

ployer's motive to discriminate was a substantial factor in the adverse personnel action against the plaintiff.'"[78]

Even narrower than the approach adopted by the Fourth Circuit and followed by the Second, Third, Seventh, and Eighth Circuits,[79] is the approach that adopts the traditional definition of direct evidence.[80] This high evidentiary standard views direct evidence as the antonym of "circumstantial evidence," defining direct evidence as "'evidence, which if believed, proves existence of fact in issue without inference or presumption.'"[81] Commentators have previously identified the First, Fifth, Sixth, and Tenth Circuits as applying this traditional interpretation of the direct evidence requirement.[82] Under this approach, any evidence that requires the trier of fact to draw an inference to prove a causal relationship between the illegitimate criterion and the employment decision would not qualify as direct evidence.[83] Thus, to use an example illustrated by the Second Circuit, 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."[84] The court noted that this type of a statement which speaks to a specific mental state is "usually impossible to obtain," especially in today's workplace in which employers are smart enough to know not to say such things even if they may think them.[85]

Recognizing the inadequacy and injustice of these two standards applied to mixed-motives discrimination claims, the Eleventh Circuit

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78 Tindall, *supra* note 4, at 362-63 (quoting White v. Fed. Express Corp., 939 F.2d 157, 160 (4th Cir. 1991)).

79 According to commentators, the Second, Third, Seventh, and Eighth Circuits have interpreted direct evidence to mean evidence that reflects discriminatory animus and bears directly on the employment decision at issue. *See id.* at 359; Zubrensky, *supra* note 4, at 976; *see also, e.g.*, Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156-57 (8th Cir. 1999) (applying a restrictive, but nontraditional, standard of direct evidence). Although both commentators recognize the Fourth Circuit as using a nonrestrictive standard, *see* Tindall, *supra* note 4, at 362-63; Zubrensky, *supra* note 4, at 971, the court's most recent position on direct evidence as clarified in *Taylor* placed the Fourth Circuit in the group applying a restrictive standard, *see Taylor*, 193 F.3d at 232-33.

80 Tindall, *supra* note 4, at 356; Zubrensky, *supra* note 4, at 973.

81 Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999) (quoting BLACK'S LAW DICTIONARY 460 (6th ed. 1990)).

82 *See* Tindall, *supra* note 4, at 356; Zubrensky, *supra* note 4, at 973-74; *see also, e.g.*, Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1217 (5th Cir. 1995) (applying the strict, traditional definition of direct evidence, which requires evidence that proves discriminatory animus without inference or presumption); Manzer v. Diamond Shamrock Chems. Co., 1994 FED App. 0255P (6th Cir.), 29 F.3d 1078, 1081 (same); Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990) (same); Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990) (same).

83 Zubrensky, *supra* note 4, at 973.

84 Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 181 (2d Cir. 1992) (quoting Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1185 (2d Cir. 1992)).

85 *Id.*

recently articulated a new standard in *Wright v. Southland Corp.*[86] Judge Tjoflat enunciated the "'preponderance' definition,"[87] which holds that, in the context of discrimination law, "direct evidence" means "evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic."[88] He recognized that the nature of discrimination suits presents difficult evidentiary burdens for plaintiffs because it "puts the plaintiff in the difficult position of having to prove the state of mind of the person making the employment decision."[89] Judge Tjoflat justified this preponderance definition by examining the structure and rationale of employment discrimination jurisprudence in general.[90] He explained:

> [A] plaintiff in an employment discrimination suit may proceed by one of two means: (1) *McDonnell Douglas*, or (2) direct evidence. . . . [T]he *McDonnell Douglas* presumption is merely an evidence-producing mechanism that can aid the plaintiff in his ultimate task of proving illegal discrimination by a preponderance of the evidence. Consequently, if "direct evidence" is the alternative to using *McDonnell Douglas*, the term would seem necessarily to mean evidence sufficient to prove, without the benefit of the *McDonnell Douglas* presumption, that the defendant's decision was more probably than not based on illegal discrimination.[91]

Additionally, after examining fourteen prior Eleventh Circuit cases addressing direct evidence, Judge Tjoflat concluded that "[r]egardless of the stated definitions of direct evidence in these cases, . . . a look at the actual holdings . . . reveals that they all rely on the preponderance definition."[92]

The facts in *Wright* illustrate the need for another approach to the direct evidence requirement. Plaintiff James Wright could not present his case under the *McDonnell Douglas-Burdine* approach because "he could not prove that he was replaced by someone who differed in regard to the relevant personal characteristic (age)."[93] Rather, Wright's employer established that Wright was "replaced by someone six months older than he [was]," thus rendering Wright incapable of establishing a prima facie case under the first step of *McDonnell Douglas-Burdine* framework.[94] However, Judge Tjoflat was not persuaded by this fact because "it is both logically and practically pos-

86 187 F.3d 1287 (11th Cir. 1999).
87 *Id.* at 1294.
88 *Id.*
89 *Id.* at 1290.
90 *Id.* at 1293.
91 *Id.* (footnote omitted).
92 *Id.* at 1294.
93 *Id.* at 1303.
94 *Id.*

sible for an employer to discriminate against a person on the basis of a protected personal characteristic despite the fact that the person is replaced by someone with the same characteristic."[95] Such a discriminatory action would clearly violate Title VII, which makes unlawful any employment decision in which impermissible criteria are a "motivating factor."[96] If Wright could produce evidence that age was a motivating factor in his termination, he should have been allowed to proceed under the *Price Waterhouse* mixed-motives analysis, his only other path for pursuing a disparate treatment claim.[97]

However, when courts apply restrictive standards of direct evidence, plaintiffs often have no recourse—even in situations where the evidence suggests that an impermissible criterion played a role in the employment decision. For example, the evidence presented at Wright's trial clearly demonstrated that age was a factor in his termination.[98] Shortly prior to his termination, a relevant decision maker, Sharon Powell, had told Wright to consider quitting his job as a store manager because she was concerned that he was too old to understand the store's new computer programs.[99] In addition, the other decision maker responsible for Wright's termination, Phil Tatum, indicated to another employee that "Wright was too old, and that he was looking for younger store managers."[100] Nonetheless, the district court, applying a restrictive definition of direct evidence, held that Wright had failed to present direct evidence of age discrimination, and granted summary judgment to the employer.[101] Wright's evidence, according to the court, was not direct evidence because it required the fact-finder to draw an inference to establish causation.[102]

In order to effectively implement the mixed-motives analysis in accordance with congressional intent and other principles of employment discrimination law, Judge Tjoflat applied the newly enunciated preponderance standard of direct evidence in vacating the district court's judgment.[103] Judge Tjoflat found that, although this evidence did not establish conclusively the validity of the age discrimination claim, it warranted mixed-motives analysis because "a jury could rea-

95 *Id.* at 1300.

96 *See* 42 U.S.C. § 2000e-2(m) (1994).

97 *See Wright*, 187 F.3d at 1301; *see also* Ward, *supra* note 4, at 645 (explaining that, under the Civil Rights Act of 1991, "once the plaintiff shows that the illegitimate reason . . . was a motivating factor in the employment decision, an irrebuttable liability attaches to the defendant").

98 *See Wright*, 187 F.3d at 1303-04.

99 *Id.* at 1303.

100 *Id.* at 1304.

101 *Id.* at 1303.

102 *Cf. id.* (indicating that the district court, applying "the dictionary definition of direct evidence," held that plaintiff failed to present direct evidence).

103 *See id.* at 1305.

sonably conclude [from this evidence] that, more probably than not, age discrimination was the cause of Wright's termination."[104] According to Judge Tjoflat, a genuine issue of material fact existed as to the cause of Wright's termination, that could only be properly determined by a trial on the merits.[105]

Judge Tjoflat recognized that the question whether to proceed under a *Price Waterhouse* mixed-motives analysis or a *McDonnell Douglas-Burdine* pretext analysis should not depend on the type of evidence that a plaintiff presents.[106] However, the root of the problem does not lie in which definition of direct evidence the court decides to use. Rather, this Note suggests that the more fundamental question is: assuming that the burden of persuasion should shift to the employer in certain situations because it is difficult to prove intent in employment discrimination, when should this occur? An examination of the problems that underlie the current framework of mixed-motives analysis will aid in addressing this question.

B. Misplaced Focus on Intent

Current approaches to mixed-motives analysis shift the burden of persuasion to the employer when there is direct evidence that the employer intentionally used an impermissible criterion in an employment decision. The approaches vary only with respect to the definition of direct evidence, with some courts favoring a traditional definition of direct evidence requiring no inferences of causation to be drawn,[107] and others requiring the evidence to both reflect directly on the alleged discriminatory attitude and bear directly on the contested employment decision.[108] However, these approaches, while arguably sufficient in addressing the deliberate discrimination of an earlier time, are unable to correct the subtle, unconscious forms of bias prevalent in the modern workplace.[109]

Linda Hamilton Krieger argues that current disparate treatment jurisprudence, including mixed-motives analysis, is incapable of adequately remedying discrimination because of its emphasis on discrimination that presumes intent or motive.[110] Describing the view found in both the plurality opinion and Justice O'Connor's concurrence in *Price Waterhouse*, Krieger explains that "evidence that a decisionmaker holds stereotyped views of the plaintiff's group is deemed evidentially significant not in and of itself, but because it is assumed to betoken

104 *Id.* at 1304 (footnotes omitted).
105 *Id.* at 1305.
106 *See id.* at 1301.
107 *See supra* notes 80-85 and accompanying text.
108 *See supra* note 79.
109 Krieger, *supra* note 5, at 1164.
110 *Id.*

discriminatory animus."[111] In establishing a Title VII violation, "the plaintiff must prove the connection between stereotyping and discriminatory intent."[112] However, social psychology studies show that a significant proportion of modern employment discrimination stems from social cognitive processes and is not motivational in origin.[113] This misplaced focus on manifest intent creates the evidentiary hurdles discussed above[114] which temporarily foreclosed Taylor's sex discrimination claim and prompted Judge Tjoflat to articulate a new standard for direct evidence to salvage Wright's age discrimination claim.[115]

Social cognition theory, developed by researchers in cognitive psychology, provides an alternative explanation, one that does not assume that conscious discriminatory intent necessarily motivates all, or even most, employment decisions.[116] According to this theory, the use of stereotypes or schemas facilitates memory input, storage, and recall of information.[117] By "actively categorizing or coding . . . information according to well-learned conceptual schemas," people learn and remember information.[118] Subsequent events that confirm existing schemas are stored and encoded into the corresponding schema, or "'tagged' with a category label."[119] Categorizing information into schemas aids the retrieval of information from memory because the category label functions as a retrieval cue when recalling specific events.[120] Thus, memory recall favors events that confirm schematic expectancies over "expectancy-inconsistent information."[121] Moreover, the bias for expected events extends beyond memory to perceptive processes so that people generally attend more closely to schema-confirming as opposed to expectancy-inconsistent information.[122] Thus, this bias for expected events selectively filters the "facts" available to the decision maker, resulting in the distortion by "cognitive process-based errors in perception and judgment" of "the ostensibly objective data set upon which a decision is ultimately based."[123]

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111 *Id.* at 1172.

112 *Id.*

113 *Id.* at 1216-17.

114 *See supra* notes 67-85 and accompanying text.

115 *See supra* notes 86-91 and accompanying text.

116 *See* Krieger, *supra* note 5, at 1209.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* at 1211.

Discrimination then does not necessarily occur at the "moment of decision."[124] Rather, "stereotypes, person prototypes, and other implicit knowledge structures bias decisionmaking long before the 'moment of decision' upon which *Price Waterhouse*... focus[es] Title VII's adjudicative attention."[125] Disparate treatment, therefore, is not necessarily the result of deliberate discriminatory motive or intent.[126] Scholars also recognize the difficulty of addressing the phenomenon of unconscious discrimination.[127] For example, Krieger notes that "[e]ven among the well-intentioned, social schemas such as stereotypes, acting in concert with a variety of other judgment heuristics, can be expected to bias intergroup perception and judgment."[128] Stereotyping is simply a natural part of human cognitive functioning that utilizes a number of categorical structures and heuristics.[129]

In sum, intergroup discrimination can be cognitive as well as motivational in origin. Further, as an essential part of effective cognitive functioning, the cognitive processes which cause discrimination occur without ordinary conscious self-awareness.[130] The current framework of disparate treatment analysis, premised as it is on the assumption that discrimination necessarily manifests intent, is only capable of addressing conscious and deliberate discrimination.[131] However, as discussed previously, proving such intent is particularly difficult in employment-related disputes.[132] As Judge Posner once observed: "Proof of [intentional] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible."[133] The fundamental flaw in the current model lies in its equating causation with intentionality.

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124 *Id.*

125 *Id.*

126 *See id.*

127 *E.g.*, Lawrence, *supra* note 5, at 322-26 (arguing against an intent-based model of racial discrimination); Wax, *supra* note 5, at 1130-31 (focusing on "unconscious disparate treatment" in the workplace).

128 Krieger, *supra* note 5, at 1211.

129 *Id.*

130 *See supra* notes 116-23 and accompanying text; *see also* Lawrence, *supra* note 5, at 323 (arguing that cognitive psychology posits that culture transmits beliefs and preferences to individual actors, and that because cultural messages "seem part of the individual's rational ordering of her perceptions of the world," individual actors are "unaware . . . that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent").

131 *See supra* notes 110-15 and accompanying text.

132 *See supra* notes 84-85 and accompanying text.

133 *See* Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

III
SEARCHING FOR A REASONABLE THRESHOLD FOR SHIFTING THE BURDEN

Concurring in *Price Waterhouse*, Justice O'Connor determined that a reasonable threshold for shifting the burden of persuasion to the employer is to require direct evidence of discriminatory animus.[134] She stated that "[w]hat is required is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[135] Scholars and courts that do not adopt the traditional definition of direct evidence[136] interpret Justice O'Connor's standard to require that employer statements "(1) reflect a bias against, or stereotypical attitudes about, the plaintiff's protected class; and (2) are closely connected to the adverse employment action at issue."[137] The logic for this high evidentiary threshold is that "when there is direct evidence of intentional discrimination, as in *Price Waterhouse*, it is logical to place a more demanding burden on the defendant, one beyond mere production."[138] By requiring both a temporal and causal connection between the discriminatory statement and the employment action at issue, the Court made intent the focus of the analysis.[139] Therefore, manifest discriminatory intent is at present the best indicator of a violation of Title VII.

However, as discussed above, a model of employment discrimination based on manifest intent is both underinclusive and hard to prove.[140] Thus, the focus on intent is misplaced.

A. Need for a New Focus

In her article, Professor Krieger suggests instead that the analysis should focus on causation, that is "whether the applicant or employee's group status 'made a difference.'"[141] However, although she believes that causation should not be equated with intentionality, Krieger's proposal simply returns to the statutory language of § 703(m) of Title VII,[142] enacted as part of the Civil Rights Act of 1991.[143] Rather than proposing an alternative analysis that would effectively identify

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134 Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring in judgment).

135 *Id.* at 277 (O'Connor, J., concurring in judgment).

136 *See supra* notes 79-81 and accompanying text.

137 Tindall, *supra* note 4, at 348.

138 Ward, *supra* note 4, at 645.

139 *See* Tindall, *supra* note 4, at 353.

140 *See supra* Part II.B.

141 Krieger, *supra* note 5, at 1242.

142 *See id.*

143 Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), § 703, 105 Stat. 1071, 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (1994)).

causation in employment actions, Krieger focuses her discussion mainly on causation itself (i.e., the cognitive processes that enter into decision making).[144] Simply focusing on causation alone runs into the same problems with intent that her article identifies—namely, that stereotyping is often so deeply integrated into cognitive processes that its effect on the decision-making process is unnoticed.[145] Krieger's article also suggests that a negligence approach to discrimination might better further the purposes of Title VII.[146] Nonetheless, she recognizes that "imposition of a duty of care without defining what specific actions an employer should undertake to fulfill that duty could prove counterproductive" because little information exists as to how to reduce or control the various biases that affect modern decision making.[147]

In *Wright*, Judge Tjoflat proposed that there should only be one inquiry: whether or not "a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic."[148] In essence, this simple approach collapses the two frameworks in disparate treatment jurisprudence, pretext and mixed-motives analyses.[149] Regardless of whether the plaintiff can establish a prima facie case under *McDonnell Douglas-Burdine* pretext analysis, she still has the ultimate burden of proving that the employment action was discriminatory.[150] This approach also allows the court to examine all the evidence in order to determine whether an impermissible criterion was a motivating factor, even when the plaintiff presents no evidence that fits the traditional definition of direct evidence.[151] However, the preponderance of the evidence threshold in mixed-motives cases essentially negates any favorable standard of liability that *Price Waterhouse* intended to provide for plaintiffs.[152]

An important rationale for shifting the burden of persuasion to the employer is to compensate for the difficulty of proving discrimination in employment decisions in mixed-motives situations.[153] This

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144 Krieger, *supra* note 5, at 1211-17.

145 *See id.* at 1188.

146 *Id.* at 1245. *See generally* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (advocating negligence approach to workplace discrimination).

147 Krieger, *supra* note 5, at 1247.

148 Wright v. Southland Corp., 187 F.3d 1287, 1294 (11th Cir. 1999).

149 *See id.* at 1293, 1302.

150 *Id.* at 1302.

151 *See id.*

152 *See id.* (explaining that "failure to establish the *McDonnell Douglas* presumption, under the preponderance definition of direct evidence, means only that the case will be treated like any other civil case").

153 *Cf. supra* notes 47-52 (discussing the Court's sensitivity to Ann Hopkins's difficult task under traditional pretext analysis); Part II.B (discussing subtle forms of cognitive-

plaintiff-friendly standard is important because employers are liable so long as an impermissible criterion was a factor in an employment decision, even if other legitimate reasons were present.[154] This brings the analysis back to the fundamental question posed by this Note: assuming that the burden of persuasion should shift to the employer in certain situations because it is difficult to prove intent in employment discrimination cases, when should this occur? This Note addresses two concerns in an attempt to answer that question.

B. Equilibrium and Economics

The first concern in setting a reasonable threshold for shifting the burden of persuasion is striking an effective equilibrium between screening out meritless and frivolous claims and allowing plaintiffs with legitimate claims the full recourse of the law.[155] In setting a high threshold for shifting the burden by requiring direct evidence, Justice O'Connor tipped the balance in favor of screening out meritless and frivolous claims. Her concurring opinion stated:

> I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof . . . and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision.[156]

In addition, Justice O'Connor also commented that "stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria."[157] Furthermore, Justice O'Connor would not allow "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" to shift the burden to the employer.[158] Thus, for Justice O'Connor, claims based primarily on statistical evidence, stray remarks, statements by nondecisionmakers, and statements unrelated to the decisional process itself are insufficient to warrant shifting the burden to the employer.[159]

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based discrimination and the evidentiary hurdles that they present for disparate treatment plaintiffs).

154 42 U.S.C. § 2000e-2(m) (1994).

155 *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 275-77 (1989) (O'Connor, J., concurring in judgment).

156 *Id.* at 275 (O'Connor, J., concurring in judgment).

157 *Id.* at 277 (O'Connor, J., concurring in judgment) (citation omitted).

158 *Id.* (O'Connor, J., concurring in judgment).

159 *See id.* at 275-77 (O'Connor, J., concurring in judgment).

Unfortunately, as social psychologists demonstrate,[160] and as the above cases establish,[161] Justice O'Connor erred too much on the side of screening out meritless and frivolous claims because application of the direct evidence requirement denies legal recourse to many legitimate Title VII plaintiffs. One can sympathize with Justice O'Connor's concern, however, in not wanting disparate treatment jurisprudence to allow stray remarks in the workplace to be the basis for mixed-motives claims. While Title VII forbids discrimination based on an individual's "race, color, religion, sex, or national origin" with respect to the "terms, conditions, or privileges of employment," it clearly does not prohibit discriminatory attitudes or prejudicial thoughts themselves.[162] Only when those thoughts and attitudes constitute a "motivating factor for any employment practice" may an employer be liable under Title VII.[163]

This Note submits that because Title VII prohibits discriminatory acts, and not discriminatory thoughts, the proper framework for mixed-motives analysis should be injury-based and fact-intensive, and the threshold for burden-shifting should focus more on what happened and less on why or how it happened. Once courts properly allocate the burdens of production and persuasion under this mixed-motives framework, then the mechanics of the adversarial system can sort out the "hows" and the "whys."

Second, probabilities of outcome and economic concerns influence the threshold at which the burden of persuasion shifts to the defendant.[164] Burdens may be "allocated in accordance with the base rate prior probabilities assumed to be associated with various explanatory theories or classes of events."[165] Additionally, burdens may be assigned "as the result of a deliberate decision to allocate one rather than another group of potential litigants the risks associated with factual indeterminacy."[166] Specifically, burdens may be seen as mechanisms for assigning the risk of nonpersuasion to the group of potential litigants which, as a class, is best positioned to bear it cost-

160 *See supra* Part II.B.

161 *See supra* Part II.A.

162 42 U.S.C. § 2000e-2(a)(1) (1994).

163 *Id.* § 2000e-2(m).

164 *See generally* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1 (1997) (employing "economic analysis to provide a framework for allocating burdens of pleading and proof"); Linda Hamilton Krieger, *The Burdens of Equality: Burdens of Proof and Presumptions in Indian and American Civil Rights Law*, 47 AM. J. COMP. L. 89 (1999) (analyzing how burdens of proof are allocated in Indian and American civil rights law).

165 Krieger, *supra* note 164, at 120-21.

166 *Id.*

effectively in view of its comparative economic advantages.[167] Admittedly, these types of allocations could create a situation in which a particular adverse act against a particular plaintiff might not be strictly attributable to discrimination on a given occasion, but they may achieve cost efficiency and an overall result in which potential litigants "[are] wrongly denied judgments least often."[168] Either this economic theory of burden allocation or one based on probabilities of outcome (or a combination of the two) could justify the law's departure from a default rule that automatically assigns the burden of persuasion to the plaintiff.

IV
FORMULATING A WORKABLE APPROACH

The Supreme Court, in its most recent review of Title VII jurisprudence, enunciated a framework for analyzing sexual harassment claims that resolved inconsistency among lower courts and essentially collapsed the "quid pro quo"[169] and "hostile work environment"[170] theories of sexual harassment. In *Burlington Industries v. Ellerth*[171] and *Faragher v. City of Boca Raton*,[172] the Court specifically addressed employer liability for sexual harassment by supervisors of subordinate employees.[173] Courts have since applied these holdings in the context of employer liability for racial harassment,[174] and commentators have argued to extend them to other protected classifications under Title VII.[175] Some scholars have even argued that through these two decisions, the Supreme Court has finally "merg[ed] analysis of [sexual harassment law] with other claims of intentional discrimination."[176]

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167 *Id.* at 121; *see also* Lee, *supra* note 164, at 9 (advocating shifting the burden of pleading to the defendant on the issue of business justification in Title VII employment discrimination suits, in order to "economize[ ] on direct expenditures on investigation and more effectively narrow[ ] the scope of issues to which further direct costs must be devoted").

168 Krieger, *supra* note 164, at 120-21.

169 A quid pro quo claim for sexual harassment exists when a job benefit or detriment is conditioned on the granting or withholding of sexual favors. Burlington Indus. v. Ellerth, 524 U.S. 742, 751 (1998).

170 Sexual harassment exists under a claim of hostile work environment when unwelcome sexual conduct is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create a hostile or abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

171 524 U.S. 742 (1998).

172 524 U.S. 775 (1998).

173 *Faragher*, 524 U.S. at 780, 807-08; *Ellerth*, 524 U.S. at 746-47, 764-65.

174 *E.g.*, Booker v. Budget Rent-A-Car Sys., 17 F. Supp. 2d 735 (M.D. Tenn. 1998) (applying *Burlington* and *Faragher* to a Title VII race discrimination case).

175 *E.g.*, Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725, 743 (1999) (arguing that "liability principles developed in [*Ellerth* and *Faragher*] should apply to all discrimination claims").

176 *Id.* at 730.

Because sexual harassment "presupposes intentional conduct"[177] and this framework imputes that intent to the employer vicariously,[178] the framework provides important guidance in formulating a workable approach to mixed-motives analysis that circumvents the focus on motive or intent.

A. *Faragher* and *Ellerth*

Prior to *Faragher* and *Ellerth*, the lower courts applied different approaches to employer liability for quid pro quo and for sexual harassment claims based on hostile work environment.[179] Lower courts imposed vicarious liability on the employer in quid pro quo claims but not for hostile work environment claims.[180] Thus, it was important for courts to distinguish between the two forms of sexual harassment.[181] In *Faragher*, the plaintiff advanced her claim under a theory of hostile work environment[182] "because no tangible job benefits, nor threats to deny those benefits, were at issue."[183] However, that distinction was not always easy to achieve, as was the case in *Ellerth*. In that case, the question presented to the Supreme Court was whether an employer can be held vicariously liable for a supervisor's unfulfilled threats to deny tangible job benefits to an employee if she refused to submit to his sexual demands.[184] The Court instead deliberated on when an employer would be liable for a hostile work environment created by its supervisors.[185]

The Supreme Court, recoguizing that the issue was not really about attaching labels of sexual harassment, resolved both the *Ellerth* and *Faragher* cases by setting a standard for employer liability that "rejected the categories 'quid pro quo' and 'hostile work environment' as determinative."[186] Under the Court's holdings, "an employer *always* will be vicariously liable when supervisory discrimination results in a *tangible job action*."[187] The Court defines "tangible employment action" in *Ellerth* as one that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[188] When a supervisor takes no tangible

177 *Ellerth*, 524 U.S. at 756.
178 *Id.* at 765.
179 *See id.* at 752-53 (discussing the distinction and citing cases).
180 *See* White, *supra* note 175, at 740.
181 *See Ellerth*, 524 U.S. at 753.
182 *Faragher*, 524 U.S. at 780.
183 White, *supra* note 175, at 741.
184 *Ellerth*, 524 U.S. at 753-54.
185 *See Ellerth*, 524 U.S. at 754.
186 White, *supra* note 175, at 742.
187 *Id.*
188 *Ellerth*, 524 U.S. at 761.

employment action, "an employer [still] will be vicariously liable for supervisory discrimination that is sufficiently severe or pervasive so as to alter the terms and conditions of employment."[189] However, the employer may assert an affirmative defense when no tangible employment action has occurred.[190] Under this defense, the employer avoids liability if he can prove, by a preponderance of the evidence, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[191]

Through this elegant framework, the Court is able to accomplish two things. First, the Court provides a means of legal recourse to those plaintiffs with legitimate claims of sexual harassment but without proof of discriminatory intent. Second, the Court employs a system of burden and duty allocations to minimize unjust adjudications and to encourage conscientious Title VII compliance. For example, the Court allows the employer to assert an affirmative defense only "when no tangible employment action is taken," which may be the case in many claims previously labeled "hostile work environment," but allows no affirmative defense when a tangible employment action is taken, which may be the case in many claims previously labeled "quid pro quo."[192] The rationale is that a tangible employment action can only result from action done in a supervisory capacity, whereas supervisors or coworkers can create a hostile working environment.[193] Moreover, the nature of the affirmative defense encourages employers to take preventive and prompt corrective measures, to implement policies against harassment, and to foster employee communication and feedback to employers.[194]

B. Proposal for a Workable Approach

The following proposal outlines a workable approach to analyzing mixed-motives claims. This approach consists of two separate thresholds for shifting the burden of persuasion to the employer. The first threshold is Justice O'Connor's direct evidence requirement

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189 White, *supra* note 175, at 742.

190 *Id.*

191 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

192 *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

193 *See Ellerth*, 524 U.S. at 762; White, *supra* note 175, at 748.

194 *See* Paul Buchanan & Courtney W. Wiswall, *The Evolving Understanding of Workplace Harassment and Employer Liability: Implications of Recent Supreme Court Decisions Under Title VII*, 34 WAKE FOREST L. REV. 55, 62-64 (1999) (discussing the precautions that the employers take to forestall sexual harassment claims).

from her concurrence in *Price Waterhouse*[195] as it is interpreted by a majority of the circuit courts: statements made by decision makers must "(1) reflect a bias against, or stereotypical attitudes about, the plaintiff's protected class; and (2) [be] closely connected [either temporally or logically] to the adverse employment decision at issue."[196] If a plaintiff presents such evidence bearing directly on the employment decision at issue, then the burden of persuasion shifts to the employer to prove that the impermissible criterion played no part in the decision. Second, the burden of persuasion also shifts to the employer if a plaintiff presents probative evidence of discriminatory action: that is, evidence that gives an indication of bias or stereotyping of the plaintiff's protected class such that a reasonable fact-finder could find it to have had an effect on an evaluation of the plaintiff's job performance or an employment decision. When the burden of persuasion shifts under this second threshold, the employer can avoid liability by either proving by a preponderance of the evidence that the plaintiff's protected status was not a factor in the employment decision or by asserting an affirmative defense. No affirmative defense is available if the direct evidence threshold is met.

The structure of the affirmative defense is similar to that outlined in *Faragher* and *Ellerth*: it is available if (1) the employer exercised reasonable care to prevent and correct promptly any discriminatory employment action, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities made available to him or her by the employer.[197] The first purpose of this affirmative defense is to force employers to consciously take note of employment discrimination and to actively prevent impermissible stereotyping from entering into decision-making processes. The second is to encourage employers to take remedial action once they identify discriminatory action.

These two different thresholds correspond to two sets of mixed-motives claims. Under the direct evidence threshold, because the evidence of discriminatory animus bears directly on the employment decision at issue, the probability that an impermissible criterion infected the decision is high, and thus, the claim is unlikely to be meritless or frivolous. For example, when Price Waterhouse refused to make Ann Hopkins a partner at the firm, there was sufficient evidence to pass the direct evidence threshold because Hopkins could demonstrate that the decision makers at Price Waterhouse considered gender stereotypes—including how she fit those stereotypes—when making

195 Price Waterhouse v. Hopkins, 490 U.S. 228, 276 (1989) (O'Connor, J., concurring in judgment).

196 Tindall, *supra* note 4, at 348.

197 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

their decision regarding her partnership bid.[198] The fact that evidence of discriminatory animus directly relates to the employment decision at issue presents strong proof that the impermissible criterion played a motivating role in the decision, thus warranting the shift of the burden of persuasion to the employer. This direct evidence threshold can be analogized to the "tangible employment action" requirement in the *Faragher-Ellerth* framework, because it too is indicative of a causal relationship between supervisory capacity and discriminatory harm. Applying this standard, evidence of discriminatory animus is overtly related to the employment decision, and no affirmative defense is available to the employer.

Under the probative evidence threshold, the causal relationship between the discriminatory animus and the employment action is further removed. For example, in *Taylor v. Virginia Union University*,[199] when Lynne Taylor alleged that her failure to be selected to attend the Police Academy from Virginia Union University (VUU) was discriminatory, the powerful evidence of discriminatory animus harbored by Chief Wells, the decision maker, would meet the probative evidence threshold and shift the burden of persuasion to VUU.[200] The employer then would have a choice of either proving by a preponderance of the evidence that any discriminatory animus held by Wells played no part in the decision regarding the Academy or asserting an affirmative defense of proper remedial measures. Because the evidence of discriminatory animus meets the probative evidence threshold, the general character of Wells's discriminatory statements (i.e., they were not specifically related to Taylor's inability to attend the Academy) would not prevent this claim from reaching the jury, as it did in the Fourth Circuit's decision.[201]

Furthermore, as discussed above, social cognition research demonstrates that stereotyping and bias affect and influence judgment and association of social groups rather unnoticeably.[202] Thus, the probative evidence standard more effectively encompasses cognitive-based employment discrimination because it does not require that the evidence establish a causal link between the discriminatory attitude and the employment action.[203] This standard can be analogized to the severe-and-pervasive requirement in the *Faragher-Ellerth* frame-

198 *Price Waterhouse*, 490 U.S. at 235-37 (plurality opinion).

199 193 F.3d 219 (4th Cir. 1999).

200 *See id.* at 227.

201 *See supra* notes 67-77 and accompanying text.

202 *See supra* Part II.B.

203 The capacity for plaintiffs to proceed in these circumstances is especially important given that employers today "will neither admit discriminatory animus nor leave a paper trail demonstrating it." Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

work[204] because determination of severity and pervasiveness does not necessarily depend on the supervisory capacity of the harasser.

One may worry, as Justice O'Connor did, that stray remarks in the workplace would allow plaintiffs to bring mixed-motives claims. However, research in social cognitive psychology suggests that when a *decision maker* in an *evaluative role* harbors bias or stereotyping against a plaintiff's protected class, there is a high probability that the classification may affect either the employment decision at issue or job performance evaluations that subsequently influence the employment decision. Moreover, the employer has an affirmative defense in these circumstances, thus mitigating any unfairness in allowing plaintiffs to proceed when there is a diminished causal link between discriminatory animus and adverse employment action. For example, in Lynne Taylor's situation, the employer, VUU, could have had antidiscrimination policies in place to make both decision makers and employees aware of their responsibilities. Taylor, if suspecting gender discrimination by Wells, could have used the appropriate reporting mechanism. In order to avoid liability in potential discrimination litigation, VUU (or at least its legal counsel) would have taken steps to ensure that VUU officers investigated Taylor's claim and took appropriate remedial measures. Thus, this dual standard framework with an affirmative defense would allow VUU a mechanism to avoid liability, and it would properly discourage discriminatory employment *actions* without prohibiting discriminatory thoughts or stray remarks. As seen in *Faragher* and *Ellerth*, this way of allocating burdens and duties to encourage prescriptive action by employers furthers the purpose of Title VII.

CONCLUSION

As outlined in *Price Waterhouse*, the importance of the development of the mixed-motives analysis to plaintiffs in proving intentional discrimination cannot be overstated. The mixed-motives analysis filled the gaps in the available theories of discrimination and provided a mechanism that allowed the plaintiff to shift the burden of persuasion to the defendant, a favorable result previously unavailable to plaintiffs who could not demonstrate that discriminatory animus was the but-for cause of an adverse employment action. However, the direct evidence requirement as a threshold for the burden shift has led to confusion and inconsistency in the federal courts and also to frustration of legitimate discrimination claims.

In light of social psychology research, this Note concludes that the focus of the mixed-motives analysis should shift from intent to in-

204 *See supra* note 189 and accompanying text.

jury. In the Supreme Court's most recent articulation of Title VII jurisprudence, the Court similarly focused on the resultant tangible employment action and allocated burdens and duties according to whether the injury itself was indicative of discrimination. This Note's proposal for a workable approach follows the Court's rationale and purpose in furthering the goals of Title VII and adapts mixed-motives analysis to the more subtle, and often unconscious, forms of discrimination that exist today.