

## Clarifying Stereotyping

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### I. INTRODUCTION

In the summer of 2009, *New York Times* columnist Maureen Dowd wrote a scathing, sardonic, insightful account of Sarah Palin's announcement of her decision to step down as Alaska's Governor.<sup>1</sup> The depiction of the Governor by Ms. Dowd dripped with the columnist's trademark descriptive, but acerbic, narrative, with lines like: "On the shore of Lake Lucille, with wild fowl honking and the First Dude smiling, . . . the woman who took the Republican Party by storm only 10 months ago gave an incoherent, breathless and prickly stream of consciousness to a small group in her Wasilla yard."<sup>2</sup> Ms. Dowd's rendition of the actual announcement, however, was even more pungent, capturing her view of Governor Palin's persona, character, and capabilities in rich, descriptive terms: "After girlish burbling about how 'progressing our state,' and serving Alaska 'is the greatest honor that I could imagine,' and raving about how much she loves her job, she abruptly announced that she was making the ultimate sacrifice: dumping the state on her lieutenant."<sup>3</sup>

Ms. Dowd's vivid, if slanted, depiction of Governor Palin as engaging in "girlish" chatter likely is not offensive to her readership. In fact, it is likely that most of her readers, if asked, would say that they found the term clearly descriptive—evocative, in fact, of a very specific and precise shading of a characteristic. The word, used in any context, and whether used by a woman, about a woman, or, as here, both, has a relatively clear and understood meaning.

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1. Maureen Dowd, *Now, Sarah's Folly*, N.Y. TIMES, July 5, 2009, at L9.

2. *Id.*

3. *Id.*

Antidiscrimination law, however, indicates that sex stereotyping that leads to adverse employment actions is unlawful. Is it gender discrimination, and thus illegal, to fire someone whose employment is at-will for being too “girlish,” or is it a legitimate character preference protected by law?

People make comments all the time that include or invoke stereotypes. Sometimes those comments are indicative of their belief systems or values. Sometimes they are feeble—or genuine—attempts at humor or wit. Sometimes people speak rashly and in anger. Many times, people are misunderstood, and their true feelings are belied by a clumsy choice of words. Much of the law of employment discrimination necessarily implicates a searching probe into the often undisclosed—sometimes even to oneself—motivations, beliefs, and intentions that underlie and impel acts alleged to have been discriminatorily premised on someone’s race, gender, or other protected class status. Rarely in this day and age does one who suspects that discrimination has befallen him have a “smoking gun”<sup>4</sup> or an admission to that effect. Generally, the undisclosed mindset of a discriminatory decision-maker, far from a simple hidden secret, is actually a complex tapestry of unvoiced beliefs, assumptions, and associations. This tapestry, a victim of discrimination soon realizes, is typically too tightly woven to easily extricate the needed, discrete strand of thought that shows a predisposition to see or judge certain groups differently.

This Article addresses the largely undefined, misunderstood-yet-often-resorted-to concept of “stereotyping” as a basis for, or sufficient evidence of, liability for employment discrimination. Since the concept’s genesis in Supreme Court jurisprudence in 1989,<sup>5</sup> plaintiffs have proffered remarks alleged to be tinged with, or indicating the presence of, impermissible stereotypes as evidence of discrimination based on protected-class status—be that sex, race, color, religion, or national origin—in contravention of Title VII of the Civil Rights Act of 1964.<sup>6</sup>

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4. So-called “smoking gun” evidence has been defined as “the crucial piece of evidence.” *See* WILLIAM SAFIRE, *ON LANGUAGE* 263 (1980); WILLIAM SAFIRE, *SAFIRE’S POLITICAL DICTIONARY* 661 (1978) (defining “smoking gun” as “incontrovertible evidence; the proof of guilt that precipitates resignations” and also stating that “[s]uch a stance is generally considered suggestive of obvious . . . guilt”).

5. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

6. 42 U.S.C. § 2000e-2(a)(1) (2006).

Courts, however, guided only by the original Supreme Court case about stereotyping—*Price Waterhouse v. Hopkins*,<sup>7</sup> which is ubiquitously invoked, but unclear—have come up short in their adjudication of these cases. Courts have failed to engage with the threshold questions of what it means to “stereotype,” how stereotyping translates into impermissible action, and why stereotyping is considered nefarious and capable of fomenting discrimination. Taking it upon themselves to discern those instances in which an allegedly stereotyped comment fails *as a matter of law* to evince the decision-maker’s intent that a plaintiff must establish, courts have all too often erred on the side of foreclosing claims at the summary judgment stage because of their limited, subjective understanding of what the words meant.

A court interpreting the words that one chooses, as well as their context and intonation, and concluding—as a matter of law—that the speaker could not possibly harbor the alleged animus or prejudice, would seem to supply an answer to the ultimate question of fact. To the extent that a single comment is alleged to evince a mindset of prejudice, discrimination, or even that the speaker harbored subconscious or unconscious beliefs about a class, engendering discrimination, at what point may a court conclude that, as a matter of law, this is not the case? Phrased differently, at what point may a trier of law conclude that a decision-maker misspoke? Is what was said what the speaker really meant? Does the comment evince a discriminatory mindset? These are just a few of the questions that courts must ask when they attempt to interpret stereotyped comments as they decide whether to grant summary judgment on the claim.

This Article examines the language in *Hopkins* and its precise mandates and guidance for lower courts. It then explains the widespread extrapolation of *Hopkins* by lower courts and the framework in which the case now operates. This Article posits that *Hopkins* furnished guidance that is less than clear as to when so-called “stereotyping” is evidence that warrants evaluation by a trier of fact and when a comment is harmless or too attenuated from an adverse action to permit an allegation of discrimination to survive. The Article also identifies the various smaller, often unarticulated questions bound up in the larger issues of when impermissible stereotyping has occurred and how various courts’ failures to specify these questions and their answers may have led to the confused state of stereotyping jurisprudence.

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7. 490 U.S. 228.

Next, this Article submits that there are two primary reasons why stereotyped comments and beliefs may be pernicious in the workplace. By dismantling the pat notion that “stereotypes are bad” and breaking out the various ways in which stereotypes can evince discrimination, a clearer view of when stereotyped remarks should be said to create triable issues of fact begins to emerge.

Why are stereotypes harmful? First, where stereotyped comments evince a belief about a group and the speaker’s predisposition towards viewing the group through a certain lens, they evince a discriminatory intent or state of mind that typically ought to be evaluated by a trier of fact against the backdrop of the alleged discrimination at issue, and that should preclude summary judgment. Second, irrespective of whether animus is expressed toward a *group*, where the stereotype is expressed as an intragroup critique that an individual is too much like or not enough like the stereotype for her group, a predisposition to hold group members to different standards and thus to treat them differently because of their protected-class status, is belied. This includes, for example, statements that a woman is too girly or not feminine enough, or that an Asian American does not work as hard as expected. These statements, too, should operate to preclude summary judgment when they are exposed.

The problem with *Hopkins*, the ubiquitous case resorted to by virtually every court with so-called stereotyping claims, is that its unique facts showed that both intergroup animus—comments directed against the plaintiff because she was a woman—and intragroup preferences—comments seeming to disfavor the plaintiff for being the “wrong type” of woman—were at work. This fact, as will be shown, served to obscure the rationale for the Court’s vigilance when it came to stereotypes and the reasons why and instances in which future courts should take allegedly stereotyped comments and hold that they are evidence of intentional discrimination that should permit a plaintiff’s case to survive summary judgment.

This Article thus aims to dispel the myth, propagated in part by courts’ misreading of *Hopkins*, that there is such a discrete cause of action as “stereotyping.” At the same time, it reviews the myriad of cases that have tried to decide, as a matter of law, when a stereotyped comment sufficed to create an issue of fact as to intentional discrimination and breaks down this complex question. Courts appear to have no real uniform standard for evaluating when a statement alleged to have stereotyped a plaintiff is probative and when it can only reasonably be seen as a misspeak, a mistake, or otherwise too “stray” to suffice as evidence that impermissible discrimination took place.

II. *PRICE WATERHOUSE V. HOPKINS* & STEREOTYPING

Consider the following two cases, each of which involves a male plaintiff alleging that he has been the victim of impermissible sex stereotyping in contravention of Title VII. Both cases' opinions invoke the 1989 Supreme Court case of *Hopkins*, which held: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."<sup>8</sup> In *Hopkins*, a large accounting firm rejected a female candidate for partnership because, according to the decision-makers, her demeanor, appearance, and interactions with others did not comport with the ways in which they felt a woman should look, act, and appear.<sup>9</sup>

A. *Sassaman*

In a 2009 Second Circuit case, the plaintiff, who worked for the Dutchess County Board of Elections in New York, became embroiled in a sexual harassment investigation after a series of interactions with a female coworker resulted in a disputed charge levied against him.<sup>10</sup> After being told that he must either resign or he would be fired, the plaintiff was then told that the decision-maker did not feel that he had "any choice" because the plaintiff's accuser knew many attorneys and the decision-maker feared being sued.<sup>11</sup> The decision-maker, a male, then added, "'And besides you probably did what she said you did because you're male and nobody would believe you anyway.'"<sup>12</sup>

Fearing that he had no other option, the plaintiff resigned and sued his employer under Title VII, alleging gender discrimination.<sup>13</sup> The district court granted the defendants' motion for summary judgment, declining to "attach any real significance" to the statement made about the plaintiff being male, and dismissing it as "stray," "ambigu[ous]," and

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8. *Id.* at 250.

9. *Id.* at 235. Partners at the company described Hopkins as "macho," claiming that she "overcompensated for being a woman," and advised her on one occasion to take "a course in charm school." *Id.* Other partners took offense to some of the language that Hopkins used because it was spoken by a female. *Id.* Another suggested to Hopkins that for her to improve her chances of becoming partner, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

10. *Sassaman v. Gamache*, 566 F.3d 307, 310–11 (2d Cir. 2009).

11. *Id.* at 311.

12. *Id.*

13. *Id.*

“incapable of ‘demonstrat[ing] actionable gender stereotyping’” so as to establish that the plaintiff was acted against under circumstances engendering an inference of discriminatory intent, an element of his prima facie case.<sup>14</sup> The court held that “such a viewpoint, even if held, would [not] necessarily taint an employment decision to respond to a harassment complaint.”<sup>15</sup>

The Court of Appeals for the Second Circuit, however, found that a reasonable trier might “construe this statement as an invidious sex stereotype” and called the sex stereotyping in the statement “more overt” than that which occurred in *Hopkins*.<sup>16</sup> According to the court, because the decision-maker justified his termination decision “by pointing to the propensity of men, as a group, to sexually harass women”—thus impermissibly relying upon a gender-based stereotype—he created a reasonable inference that the decision to terminate the plaintiff was motivated by a discriminatory intent.<sup>17</sup> Despite the defendants’ attempt to characterize the remark as stray, an aside, or even as having been made after the fact and only in reference to “what others may think,” the court maintained that in the context of a motion for summary judgment, the remark served to create a triable issue as to discriminatory intent.<sup>18</sup>

#### B. Lautermilch

The plaintiff in a 2003 Sixth Circuit case, an at-will substitute teacher named Lautermilch, was told that he would no longer receive calls to work in his school after the principal and assistant principal voiced concerns that he had been “acting inappropriately with young people, tutoring a female student at his home, telling inappropriate jokes in the classroom, and commenting on the size of a female teacher’s breasts,” as well as allegations that he made a lewd comment to a student.<sup>19</sup> The plaintiff claimed that the principal called him “too macho” and “spit the word macho out as if it was distasteful.”<sup>20</sup>

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14. *Id.*

15. *Id.* at 312.

16. *Id.* at 312–13.

17. *Id.* at 313 (“[C]omments made about a woman’s inability to combine work and motherhood constitutes sex stereotyping that provides evidence of discriminatory intent.” (citing *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004))).

18. *Id.*

19. *Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 273 (6th Cir. 2003).

20. *Id.* at 274.

The majority stated that the plaintiff was making a futile attempt to “hang his entire prima facie case on one offhand comment.”<sup>21</sup> It concluded that the comment did not compel the conclusion that “unlawful discrimination was at least a motivating factor in the employer’s actions” and subsequently granted summary judgment in the case due to the plaintiff’s inability to state a prima facie claim.<sup>22</sup> The court concluded: “Specifically, when the comment is placed in the context of the termination hearing documenting specific allegations of misconduct, any reasonable trier of fact would conclude that the comment was critical of [the plaintiff’s] behavior, not his sex or gender.”<sup>23</sup>

The dissent, however, concluded that the “comment that Lautermilch was ‘too macho,’ made at the time she informed him of the decision to deny him future opportunities as a substitute teacher, constitutes direct evidence of sex discrimination sufficient to defeat the Schools’ motion for summary judgment.”<sup>24</sup> According to the dissent, the majority’s mistake was “ignor[ing] the key fact that the ‘too macho’ comment was made by the decision-maker at the termination hearing.”<sup>25</sup> The dissent went on to explain that “the commonplace usage of the word ‘macho’ refers exclusively to behaviors or qualities associated with the male gender.”<sup>26</sup> Thus, a reasonable trier of fact could easily find that “[b]oth the nature of the comment and the manner in which it was delivered suggest that summary judgment was improper because a reasonable juror could find by a preponderance of the evidence that Lautermilch’s gender was at least a motivating factor in the employer’s actions.”<sup>27</sup> The dissent went to the definition of *macho*, which means, among other things, exhibiting aggressive manliness and assertive virility.<sup>28</sup>

“Suppose,” the dissent asked, the principal “had said to an African-American substitute teacher that the Schools were unable to utilize his services because he was ‘too black,’ or that [the principal] had failed to employ a particular female teacher because she was ‘too feminine.’”<sup>29</sup> Pursuant to *Hopkins*, it contended, “[u]nder these circumstances it is

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21. *Id.* at 276.

22. *Id.*

23. *Id.*

24. *Id.* (Moore, J., dissenting).

25. *Id.*

26. *Id.* at 277.

27. *Id.*

28. *Id.*

29. *Id.*

relatively clear that the majority would have reached a different result.”<sup>30</sup> Moreover, “[t]he Principal’s word choice, telling [the plaintiff] that he would not be rehired as a substitute teacher because he was ‘too macho,’ as opposed to telling him he was ‘too male,’ should not be the basis for a different finding.”<sup>31</sup>

The dissent pointed out that both the plaintiff and Ann Hopkins were characterized as acting too much like men, rendering the situation “directly analogous” to one in which a man and a woman are accused of behaving too effeminately.<sup>32</sup> The distinction, according to the dissent, was that Ann Hopkins was accused of not acting enough like a member of her sex, and the plaintiff was accused of acting too much like a member of his.<sup>33</sup> The dissent concluded: “Because . . . it is inconsistent to protect a woman from discrimination on the basis that she is not acting ‘like a woman’ or conversely acts ‘too much like a woman,’ while failing to protect a man accused of acting ‘too manly,’” summary judgment was improvidently granted, and “[u]nder either scenario the plaintiff is suffering sex discrimination by the application of harmful gender stereotypes.”<sup>34</sup>

Aside from their invocations of *Hopkins*, these two cases, *Sassaman* and *Lautermilch*, have several things in common. Both involve male plaintiffs alleging impermissible sex stereotyping in violation of Title VII. In each case, at least one opinion supporting each side’s stance on summary judgment was published. In each case, the argument could be made that the employer took the plaintiff’s gender into account in the course of an adverse employment decision. Similarly, in each case, the argument could be made that but for the inartful wording of an off-handed comment, gender was not a factor in the adverse action at all.

These cases differ in several key respects as well. The most notable difference between them is that the plaintiff in *Sassaman* ultimately succeeded in defeating the defendant’s motion for summary judgment, while the plaintiff in *Lautermilch* did not. They also differ in that the plaintiff in *Sassaman* was stereotyped in such a way as to indict his entire gender; as a man embroiled in a sexual harassment investigation, he was doomed to be viewed negatively, precisely because of his sex, and for no other reason, according to the comment. The plaintiff in *Lautermilch*, however, was not stereotyped by virtue of the fact that he

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30. *Id.* at 278.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*



was a man but rather for being the *wrong kind* of man—too “manly” in his behavior. Do these differences matter? Should they?

An examination of these cases reveals the murkiness of the *Hopkins* opinion and the reach of its guidance. Indeed, *Hopkins* has been cited in a one-size-fits-all manner in virtually every case brought under Title VII in which stereotyping of any kind or in any context has been alleged.<sup>35</sup> The actual diversity of “stereotyping” claims, as well as their pathologies and anatomies, has not been fully explored or correlated with their proper relationship to *Hopkins* or outcomes. A close analysis of the various opinions in these two cases, however, reveals several things.

In the first place, it reveals the many questions actually bound up in the singular question of *Hopkins*’s applicability and, ultimately, in whether it may be said, as a matter of law, that a plaintiff cannot make out a case of sex discrimination in whole or in part through sex stereotyping. In the second place, the Supreme Court gave poor guidance as to how to analyze stereotypes as evidence, leading to a legacy of inconsistency in lower courts’ determinations as to when an allegation of discrimination supported by a claim of stereotyping should reach a trier of fact. Looking first at *Sassaman*, what did the district court mean when it dismissed the comment at issue as “stray” and ambiguous? Did the court believe that the speaker misspoke? Perhaps it believed that the speaker actually felt that, as the man in a he-said-she-said situation, the plaintiff would not be believed. Maybe, however, the court thought the plaintiff’s lack of credibility alone provided an ample basis upon which to act without veering into a Title VII problem. Did the court think that the speaker actually believed that the plaintiff was guilty of sexual harassment and that this belief, irrespective of the basis of the belief, was a sufficient basis upon which to terminate the plaintiff without running afoul of Title VII? Or maybe the term *stray* referred to the court’s belief that the whole comment was an afterthought, stupidly voiced after a legitimate decision that did not contemplate gender had been reached. While the district court denied that the comment could, as a matter of law, ever amount to actionable gender stereotyping, the court of appeals found that *Hopkins* not only applied but that its facts were less “overt” than the comment at issue. Many questions surround this

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35. Although *Hopkins* has been used where stereotyping claims are raised against the backdrops of the Americans with Disabilities Act, 42 U.S.C. § 12201 (2006), and the Age Discrimination in Employment Act, 29 U.S.C. § 623 (2006), this Article will only discuss *Hopkins*’s application in Title VII cases. See, e.g., *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009) (holding that the plaintiff’s burden of persuasion in his ADEA claim should not be the standard that was set forth in *Hopkins*).

disparity in viewpoints and the case in general as *Hopkins* applies to it and ought to predicate its outcome.

If the defendants were genuinely worried about a sexual harassment lawsuit, or more simply, if they did not believe the plaintiff's version of events, did they not have a right to fire the plaintiff?<sup>36</sup> Would not such a firing, just or not, still be permissible so long as it was not, in fact, because of the plaintiff's sex?<sup>37</sup> To the extent that the remark was made in jest, frustration, or otherwise absent any intent other than to avoid a lawsuit, should it be read in context, as the district court read it, or was *Hopkins* properly implicated? The court of appeals noted that although the defendants could not be seen as having condoned or overlooked an instance of harassment, the "fear of a lawsuit does not justify an employer's reliance on sex stereotypes to resolve allegations of sexual harassment, discriminating against the accused employee in the process."<sup>38</sup>

Turning to *Lautermilch*, one could similarly ask whether what may be termed a simple misspeak, or poor word choice, was poised to buttress a claim of sex-based discrimination when such discrimination simply was not present.<sup>39</sup> Again, two sets of judges disputed the issue of whether the case could be disposed of as a matter of law without resort to a trier of fact.<sup>40</sup> As in *Sassaman*, was there an ample basis for the employment action without reverting to the unfortunate characterization of the plaintiff, and if so, should that operate to dispose of the matter? Once again, how ought *Hopkins* and its mandate have been applied to the case? The majority found that the "offhand[ed]," "macho" comment was, indeed, virtually irrelevant to the decision to fire the plaintiff, in light of the facts surrounding his termination.<sup>41</sup> On the other hand, the dissent found *Hopkins* directly on point, dictating a denial of summary judgment.<sup>42</sup>

Insofar as protected class stereotypes operate to influence the way in which a decision-maker views, treats, and ultimately disadvantages a plaintiff, evidence of such an occurrence should suffice as proof of

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36. See Patrick S. Shin, *Vive la Différence? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491, 491-92 (2007).

37. See *id.*

38. *Sassaman v. Gamache*, 566 F.3d 307, 313 (2d Cir. 2009).

39. See *Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 276 (6th Cir. 2003).

40. *Id.* at 276-78.

41. *Id.* at 276.

42. *Id.* at 277-78.

invidious intent.<sup>43</sup> Similarly, when a trier of fact finds the utterance of an allegedly stereotyped remark to be wholly nonindicative of discriminatory intent, it must be disregarded.<sup>44</sup>

However, scholars in law and other disciplines have pointed to the existence of subconscious and unconscious biases, belied, perhaps, by seemingly “stray” comments.<sup>45</sup> Moreover, the “mixed motive” theory of a case, ironically unveiled in *Hopkins*, dictates that a court must also look beyond the existence of a legal reason for a decision-maker’s action to see if invidious, class-based discrimination on any level underlies the decision.<sup>46</sup> The case law, however, cites to *Hopkins* virtually each time a plaintiff alleges any kind of “stereotype” in a Title VII case. When examined, the resulting opinions are as divergent as those in *Sassaman* and *Lautermilch*.<sup>47</sup> Should courts have different tools, or at least a different gloss, based upon certain factors, including the type of stereotyping being alleged (inter or intragroup), how tacit or explicit the alleged stereotype is, or what legitimate reasons may exist for the adverse action at issue? Should it matter if the allegation is of harassment, rather than a tangible employment action? At the end of the day, was what happened in *Sassaman* all that different from what happened in *Lautermilch*? Was the scenario in that case all that different from *Hopkins*?

After twenty years of indiscriminate citation in virtually every Title VII “stereotyping” case brought, *Hopkins* is proving inadequate to grapple with the complex determinations necessitated by the nuanced and complex modern world of workplace discrimination. This world is replete with inartful word choices, biases that exist on multiple levels of consciousness, and intragroup discrimination that might permit one with class-based biases and prejudices to select those within a group that are least objectionable to him and still stay within the purview of the law. The one-size-fits-all approach to *Hopkins*’s application can no longer be sustained by a body of law overrun with divergent opinions and inconsistent, often-unarticulated rationales as to why certain behavior

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43. See Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1293 (2008).

44. See *Lautermilch*, 314 F.3d at 276.

45. See Albiston et al., *supra* note 43, at 1293–96.

46. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–42 (1989).

47. See, e.g., *Lanahan v. S. Nev. Health Dist.*, No. 2:06CV-01176-LRH-LRL, 2009 WL 395794, at \*1–2, 7 (D. Nev. Feb. 17, 2009) (holding that defendant’s comments that “[w]omen are good for only one thing and that is sex” and that old employees were “too old to do their jobs well anymore” were sufficient for the plaintiff’s claims to survive summary judgment on the basis of gender and age discrimination).

will allow some, but not others, to elude liability. A reexamination of *Hopkins* is necessary.

C. *What exactly did Hopkins say?*

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice for an employer . . . to discriminate against any individual . . . because of . . . sex.”<sup>48</sup> In *Price Waterhouse v. Hopkins*, the Supreme Court addressed itself to the issue of an employer having multiple motives, some legal and some illegal, for taking an employment action against an employee.<sup>49</sup> *Hopkins* also addressed the issue of stereotyping as a means through which a decision-maker may exhibit or manifest his disparate treatment of an employee “because of . . . sex.”<sup>50</sup>

A court can decide Title VII claims under the *McDonnell Douglas* burden-shifting framework.<sup>51</sup> Under this framework, the plaintiff sets forth a prima facie case of discrimination, the burden then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its action, and then the burden ultimately returns to the plaintiff to persuade the trier of fact that the defendant’s reason was pretextual and that discrimination motivated the employer.<sup>52</sup> In *Hopkins*, however, the Supreme Court announced that an employee may show that an employment decision was made for both legitimate and illegitimate reasons, and Congress largely codified this mixed-motives theory in the Civil Rights Act of 1991.<sup>53</sup>

A reexamination of the facts and language of *Hopkins* seems useful. Ann Hopkins was a candidate for partnership at Price Waterhouse in 1982.<sup>54</sup> Her success in this pursuit was dependent on the results of written comments submitted by partners in the firm.<sup>55</sup> Of the eighty-eight individuals proposed for partner, forty-seven were made partners, twenty-one were rejected, and twenty were placed on “hold” for reconsideration to be made the following year.<sup>56</sup> Hopkins was among

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48. 42 U.S.C. § 2000e-2(a)(1) (2006).

49. *Hopkins*, 490 U.S. at 239–42.

50. *Id.* at 250–52.

51. *Id.* at 261 (O’Connor, J., concurring).

52. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

53. See 42 U.S.C. § 2000e-2(m) (2006) (“Except as otherwise provided in this subchapter, 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.”).

54. *Hopkins*, 490 U.S. at 231.

55. *Id.* at 232.

56. *Id.* at 233.

those “held.”<sup>57</sup> In Hopkins’s particular case, thirteen of the thirty-two partners who made written comments on her candidacy wrote in support of it, eight recommended that she be rejected, another eight wrote that they did not have an informed opinion on the matter, and three recommended that she be placed on hold.<sup>58</sup> Before any reconsideration of her candidacy, two partners withdrew their support of her candidacy, and the partnership informed her the reconsideration would not occur.<sup>59</sup> She subsequently resigned.<sup>60</sup>

At first blush, the reason for Hopkins’s failed candidacy was clear.<sup>61</sup> By all accounts, her interpersonal skills were found wanting by the partnership.<sup>62</sup> As the Supreme Court stated:

On too many occasions . . . Hopkins’ aggressiveness . . . spilled over into abrasiveness. Staff members seem to have borne the brunt of [her] brusqueness. Long before her bid for partnership, partners evaluating her work had counseled her to improve her relations with staff members. Although later evaluations indicate an improvement, [her] perceived shortcomings in this important area eventually doomed her bid for partnership. Virtually all of the partners’ negative remarks about Hopkins—even those of partners supporting her—had to do with her “interpersonal skills.” Both “[s]upporters and opponents of her candidacy . . . indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.”<sup>63</sup>

There was, however, more to this case than met the eye, and it appears as though the compelling factual circumstances surrounding Hopkins’s candidacy and evaluation impelled the Supreme Court to discern that Price Waterhouse had run afoul of Title VII.<sup>64</sup> In the first place, at the time of Hopkins’s candidacy, Price Waterhouse had 662 partners nationwide, seven of whom were women.<sup>65</sup> Moreover, although eighty-eight individuals were proposed for partnership that year, Hopkins was the only female among them.<sup>66</sup>

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57. *Id.*

58. *Id.*

59. *Id.* at 233 n.1.

60. *Id.*

61. *Id.* at 234–35.

62. *Id.*

63. *Id.*

64. *See id.* at 258.

65. *Id.* at 233.

66. *Id.*

In the second place, by most accounts and objective measurements of success, Hopkins appeared to be the ideal partner.<sup>67</sup> In fact, the Supreme Court recited that partners from her office, “[i]n a jointly prepared statement supporting her candidacy, . . . showcased her successful 2-year effort to secure a \$25 million contract with the Department of State, labeling it ‘an outstanding performance’ and one that Hopkins carried out ‘virtually at the partner level.’”<sup>68</sup> This joint statement described Hopkins as “‘an outstanding professional’” with a “deft touch, strong character, independence and integrity.”<sup>69</sup> Indeed, as the Court pointed out, even the district judge assigned to Hopkins’s case found that she had “‘played a key role in Price Waterhouse’s successful effort to win a multi-million dollar contract with the Department of State’” and that “[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership.”<sup>70</sup> The judge also found that Hopkins “‘had no difficulty dealing with clients and her clients appear to have been very pleased with her work’ and that she ‘was generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked.’”<sup>71</sup> The Supreme Court also cited the testimony of a State Department official who had been a client of Hopkins, stating that she was “‘extremely competent, intelligent, strong and forthright, very productive, energetic and creative.’”<sup>72</sup> “Another high-ranking official praised Hopkins’s decisiveness, broadmindedness, and ‘intellectual clarity.’”<sup>73</sup>

Finally, and perhaps most fatal to Price Waterhouse, the Supreme Court found that “[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins’ personality because she was a woman.”<sup>74</sup> For example,

[o]ne partner described her as “‘macho’”; another suggested that she “‘overcompensated for being a woman’”; a third advised her to take “‘a course at charm school.’” Several partners criticized her use of profanity; in response, one partner suggested that those partners

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67. *Id.* at 233–34.

68. *Id.* at 233.

69. *Id.* at 234 (internal quotation marks omitted).

70. *Id.*

71. *Id.*

72. *Id.* (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 235.

objected to her swearing only “because it’s a lady using foul language.” . . . Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate.” . . . But it was the man who . . . bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, [he] advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>75</sup>

Moreover, the district court found past female partner candidates had “been evaluated in sex-based terms.”<sup>76</sup> The confluence of the above factors was simply too much for the Supreme Court to ignore. However, it almost painted itself into a proverbial corner when it conceded that “Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions”<sup>77</sup> and that, indeed, “Hopkins’ conduct justified complaints about her behavior as a senior manager.”<sup>78</sup>

Expert testimony provided the court a way out of the proverbial corner. The testimony of a renowned social psychologist “that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping buttressed the plaintiff’s theory.”<sup>79</sup> According to the expert, the confluence of factors discussed above led to the inexorable conclusion that sex stereotyping had infiltrated the decision-making process: “Hopkins’ uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping . . . .”<sup>80</sup>

It is important to review the precise derivation and wording of the Court’s theory promulgated about sex stereotyping and Title VII liability. Specifically, the Court explained that, “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman

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75. *Id.*

76. *Id.* at 236.

77. *Id.*

78. *Id.* at 258.

79. *Id.* at 235 (noting the defendant’s objections to the expert and her testimony—namely that her testimony amounted to “‘gossamer evidence’ based only on ‘intuitive hunches’” and that “her detection of sex stereotyping [w]as ‘intuitively divined’”—came too late and declining to discount her testimony or take issue with her expertise); cf. Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 40–41 (2009) (explaining expert testimony and its role in employment discrimination litigation, focusing on expert testimony in class-action suits).

80. *Hopkins*, 490 U.S. at 236.

cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>81</sup> The Court also explicitly rejected both the suggestion that sex stereotyping did not occur in Hopkins’s case—because the partners’ comments evinced it—and the suggestion that sex stereotyping “lacks legal relevance.”<sup>82</sup> Noting that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” the Court emphasized that Congress’s intent in enacting Title VII was to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>83</sup> Thus, the Court observed: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”<sup>84</sup>

The Court, however, noted workplace comments predicated on sex stereotyping “do not inevitably prove that gender played a part in a particular employment decision.”<sup>85</sup> Rather, the Court found the plaintiff bore the burden of demonstrating that her employer “actually relied on her gender in making its decision.”<sup>86</sup> While stereotyped remarks could evince that gender played a role in the decision, the Court believed the case involved more than stray remarks. Rather,

Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board’s decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations.<sup>87</sup>

The Court thus expressly countered Price Waterhouse’s assertion that all Hopkins could demonstrate, at best, was “discrimination in the air.”<sup>88</sup> Instead, the Court deemed it “discrimination brought to ground and visited upon an employee.”<sup>89</sup>

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81. *Id.* at 250.

82. *Id.*

83. *Id.* at 251.

84. *Id.*

85. *Id.*

86. *Id.*; *see also* *Barbano v. Madison Cnty.*, 922 F.2d 139, 142 (2d Cir. 1990) (declaring that plaintiff bears the burden of showing that gender played a role in an employment decision).

87. *Hopkins*, 490 U.S. at 251.

88. *Id.*

89. *Id.*



The Court, however, was not as clear as might be imagined as to the legal doctrine of stereotyping and its contours generally. On one hand, it said that the fact that the case before it was strong did not induce it to place limits on the “possible ways of proving that stereotyping played a motivating role in an employment decision” and expressly declined to “decid[e] here which specific facts, ‘standing alone,’ would or would not establish a plaintiff’s case.”<sup>90</sup> Moreover, the Court was careful to note: “We have not in the past required women whose gender has proved relevant to an employment decision to establish the negative proposition that they would not have been subject to that decision had they been men, and we do not do so today.”<sup>91</sup>

The Court gave even less clear guidance as to how courts should go about discerning illicit stereotyping that could make employers run afoul of the law. Noting that in the case before it, the expert testimony on stereotyping was “merely icing on Hopkins’ cake,”<sup>92</sup> the Court took a we’ll-know-it-when-we-see-it approach to sex stereotyping:

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course at charm school.” Nor, turning to Thomas Beyer’s memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.<sup>93</sup>

As to Price Waterhouse’s contention that Hopkins could not demonstrate that “sex stereotyping played a role in the decision to place her candidacy on hold,” the Court reiterated that Hopkins had demonstrated what she needed to demonstrate:

[The] partnership solicited evaluations from all of the firm’s partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners’ comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins’ case or in the past.<sup>94</sup>

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90. *Id.* at 251–52.

91. *Id.* at 248.

92. *Id.* at 256.

93. *Id.*

94. *Id.*

Thus, the Court deduced that the decision-making board took the comments “motivated by stereotypical notions about women’s proper deportment” into account as it arrived at its decision.<sup>95</sup>

Generally, then, the Court concluded:

[E]ven if we knew that Hopkins had “personality problems,” this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man. . . . We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.<sup>96</sup>

This was the extent of the *Hopkins* Court’s guidance on the issue of stereotyping. The Court left the lower courts the task of infusing its words with additional meaning.<sup>97</sup>

#### D. *Strictures Put on the Stereotyping Doctrine in the Wake of Hopkins*

Two years after *Hopkins*, in *McCarthy v. Kemper Life Insurance Cos.*, the plaintiff sued his employer for racial discrimination in violation of Title VII.<sup>98</sup> As evidence, he proffered what the Seventh Circuit called “stereotyped anti-black remarks” made by his coworkers.<sup>99</sup> The Seventh Circuit, however, found that because the plaintiff could not show that the comments at issue bore any relation to the adverse employment action at issue—the plaintiff’s discharge—they could not serve as evidence of discriminatory discharge.<sup>100</sup> “While racial slurs are always deplorable,” the court observed, these comments were not made by decision-makers and thus could not be used as evidence.<sup>101</sup>

Courts initially distinguished between cases in which plaintiffs proffered “direct evidence” of discriminatory intent and ones in which they did not. In cases in which the plaintiffs adduced direct evidence, courts held that the *McDonnell Douglas* burden-shifting analysis would not be necessary.<sup>102</sup> In such cases, courts have held that the mixed-motive test, derived from *Hopkins*, whereby the plaintiff need only

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95. *Id.*

96. *Id.* at 258.

97. Charles Stephen Ralston, *Employment Discrimination*, 6 *TOURO L. REV.* 55, 93 (1989).

98. 924 F.2d 683, 686–87 (7th Cir. 1991).

99. *Id.* at 686.

100. *Id.*

101. *Id.* at 687.

102. See *Roberts v. Oklahoma*, No. 95-6235, 1997 WL 163524, at \*3 (10th Cir. Apr. 8, 1997).

demonstrate that a protected characteristic played a motivating part in the employment decision, and the employer may try to show that the same action would have been taken even in the absence of the illegitimate motive, would apply.<sup>103</sup> In cases in which the plaintiffs did not have direct evidence, the courts forced them to use the *McDonnell Douglas* analysis.<sup>104</sup> It quickly became apparent that courts were poised to find that although a decision-maker had uttered a stereotyped, often revealing discriminatory remark, little or no weight might be attached to that remark.<sup>105</sup>

In one early case, the plaintiff successfully adduced evidence that her division director “was known to believe that certain jobs were more suitable for women than others” and that he “was widely known to have ideas about women’s place in the workforce.”<sup>106</sup> The plaintiff attempted to bypass the *McDonnell Douglas* analysis by arguing that because she had “direct evidence,” the need for the analysis was obviated.<sup>107</sup> The court, however, clarified that she needed to show “direct evidence of discrimination” in order to take issue with the application of the burden-shifting framework and not merely “direct evidence of personal bias.”<sup>108</sup> Instead, all that the plaintiff had, the court held, was “circumstantial or indirect evidence, and not direct evidence of discrimination” because she referenced only “statements” that were “on their face expressions of

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103. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989), the Supreme Court held that in a mixed-motives case an employer could avoid liability by prevailing on the same-decision defense. However, in 1991, Congress amended the statute to state that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (2006). The employer may still raise the same-decision defense to limit the plaintiff’s remedies. *See id.* § 2000e-5(g)(2)(B); *see also* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284 (4th Cir. 2004) (“The effect of the amendment was to eliminate the employer’s ability to escape liability in Title VII mixed-motive cases by proving that it would have made the same decision in the absence of the discriminatory motivation. Rather, through such proof, the employer can now only limit the remedies available to the employee for the violation.”).

104. *See* White v. Baxter Healthcare Corp., 533 F.3d 381, 391–92 (6th Cir. 2008) (“Absent direct evidence of discrimination, claims brought pursuant to Title VII’s antidiscrimination provision . . . are subject to the tripartite burden-shifting framework first announced by the Supreme Court in *McDonnell Douglas* . . .” (internal citations omitted)).

105. *See* Knox v. First Nat’l Bank of Chi., 909 F. Supp. 569, 572–73 (N.D. Ill. 1995) (“Evidence of a decision maker’s occasional or sporadic use of stereotyped remarks or derogatory comments about an employee’s age or race is generally insufficient, without more, to establish a violation of Title VII . . .”).

106. Ramsey v. City of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990).

107. *See id.*

108. *Id.* (“Abhorrent as Brown’s private opinions might be, they do not constitute direct evidence of discriminatory conduct.”).

Brown's personal opinion, and not an existing policy which itself constitutes discrimination."<sup>109</sup>

Subsequent courts dealing with stereotyped comments alleged to be indicative of class-based disparate treatment persisted in bifurcating the paths to a plaintiff's proof into roads of direct evidence and indirect evidence. Courts struggled, however, with the lack of clear guidance as to what constituted direct evidence, some noting with some amusement that "[t]he Supreme Court has defined direct evidence in the negative by stating that it excludes 'stray remarks in the workplace,' 'statements by nondecisionmakers,' and 'statements by decisionmakers unrelated to the decisional process itself.'"<sup>110</sup>

Courts often found that unless a plaintiff could demonstrate that a defendant "actually relied on racial stereotypes in making its decision, [a] plaintiff's reference to derogatory comments or racial slurs . . . [would be] insufficient to support a claim of discrimination under Title VII."<sup>111</sup> Even as these courts "recognize[d] that summary judgment is often inappropriate in cases involving issues of discriminatory intent and motive, which are often difficult to establish," they stressed that "a plaintiff bringing a Title VII action bears the burden of persuasion at all times" and that more than simply unfair treatment needs to be established; all of the relevant dots need to be connected.<sup>112</sup>

In 2003, the Supreme Court held in *Desert Palace, Inc. v. Costa* that to establish a jury question as to a section 703(m) mixed-motive violation, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"<sup>113</sup> In holding that direct evidence was not required for a plaintiff to bring a so-called mixed-motive claim, the Court essentially did away with the distinction between circumstantial and direct evidence in the context of determining the proper analytical framework to apply.<sup>114</sup> In the wake of this case, however, lower courts

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109. *Id.*

110. *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989)); see also Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1913 (2004) (noting that "lower courts could not begin to agree on what constituted 'direct' evidence").

111. See *Williams v. United Parcel Serv., Inc.*, No. 90 C 1823, 1994 WL 517244, at \*6 (N.D. Ill. Sept. 20, 1994).

112. See *id.*

113. 539 U.S. 90, 101 (2003).

114. See *id.* at 98-99; see also Michael J. Zimmer, *A Chain of Inferences Proving*

remained confused about what type and strength of evidence could buttress a Title VII claim.<sup>115</sup>

By way of illustration, the Sixth Circuit panel in *Lautermilch*, the case discussed earlier in which the terminated male teacher was called “too macho,” decided several months after *Desert Palace*, divided bitterly over more than just the case’s similarity or lack thereof to *Hopkins*.<sup>116</sup> Whereas the majority employed the *McDonnell Douglas* framework in its disposition of the plaintiff’s claim, the dissent observed:

The majority appears to hold that the “too macho” comment by the decision-maker at the termination hearing does not constitute direct evidence, and even if it were direct evidence the majority concludes that Lautermilch has failed to show pretext. The Supreme Court, however, has made it abundantly clear that the *McDonnell Douglas* test does not apply where the plaintiff presents direct evidence of discrimination.<sup>117</sup>

The proper synthesis of *McDonnell Douglas*, *Hopkins*, and *Desert Palace* has been hotly debated and is outside the scope of this Article,<sup>118</sup> but it should be noted that widespread confusion has persisted in the courts.<sup>119</sup> Most courts, however, agree that after *Desert Palace*, a plaintiff trying to establish intentional discrimination may proceed “either (1) directly by persuading the court that a discriminatory reason more likely motivated the employer or (2) indirectly by showing that the employer’s proffered explanation is unworthy of credence.”<sup>120</sup> With respect to the so-called direct method, the plaintiff “may present either direct or circumstantial evidence of discrimination, so long as it is sufficient to satisfy his ultimate burden.”<sup>121</sup> That said, courts have accused one another of confusing the direct and indirect methods of proof with a distinction between direct and indirect or circumstantial

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*Discrimination*, 79 U. COLO. L. REV. 1243, 1252–53 (2008) (noting that “the Court set the stage for the eventual destruction of the view that there are only two categories of individual disparate treatment cases”).

115. See *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1115 (9th Cir. 2006) (“It is not entirely clear exactly what this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination.”).

116. *Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 276 (6th Cir. 2003).

117. *Id.* at 277.

118. For more discussion see Zimmer, *supra* note 114, at 1249–52.

119. See Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 210 n.81 (2009).

120. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1137 (9th Cir. 2004) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)) (internal quotations and brackets omitted).

121. *Id.* (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

evidence.<sup>122</sup> Some courts persist in identifying evidence as direct or indirect,<sup>123</sup> allowing this identification to predicate an appropriate analytical framework for adjudicating a summary judgment motion, while others do not.<sup>124</sup> Some courts have recognized that to require a smoking gun comment in order to sustain a discrimination case would run counter to *Desert Palace*'s proclamation that even in the context of a mixed-motive case, circumstantial evidence is no less compelling than so-called direct evidence.<sup>125</sup>

Still, with so much up in the air about how these cases should proceed, what may be said about each analysis is that, essentially, each court "need only inquire whether [the plaintiff] presents 'enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias.'"<sup>126</sup> With this in mind,

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122. See, e.g., *Kogucki v. Metro. Water Reclamation Dist.*, 698 F. Supp. 2d 1026, 1028 (N.D. Ill. 2010) ("The Seventh Circuit has said on more [th]an one occasion that its formulae for resolving Title VII summary judgment motions is confusing. . . . Indeed, several of its own cases 'arguably conflate the direct method with direct evidence.' And while circumstantial evidence is not *direct*, the court has said it 'must point *directly* to a discriminatory reason for the employer's action.'" (quoting *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 720 (7th Cir. 2008)); cf. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 398 (6th Cir. 2008) ("Since *Desert Palace*, the federal courts of appeals have, without much, if any, consideration of the issue, developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases.").

123. See, e.g., *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007) ("*Desert Palace* is entirely consistent with our precedent under which a plaintiff survives summary judgment either by providing direct evidence of discrimination or by creating an inference of discrimination through the *McDonnell Douglas* framework."); *Debose v. Fla. Dep't of Children & Families*, No. 1:05-cv-00167-MP-AK, 2008 WL 3926858, at \*4 (N.D. Fla. Aug. 20, 2008) ("[The plaintiff] may satisfy [her] burden in one of two ways. First, under the traditional framework, she may proffer direct evidence of discrimination. . . . If direct evidence is unavailable, [she] may establish a prima facie case of discrimination under the framework of *McDonnell Douglas*." (internal citation omitted)).

124. See, e.g., *Burton v. Town of Littleton*, 426 F.3d 9, 19–20 (1st Cir. 2005) ("This court, however, following the Supreme Court's command in *Desert Palace*, . . . has rejected the requirement that there be direct evidence in mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive."); *McGinest*, 360 F.3d at 1122 (allowing a mixed-motive plaintiff to "proceed . . . using the *McDonnell Douglas* framework, or alternatively, . . . simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employment decision); cf. *White*, 533 F.3d at 398–99 (discussing the various ways in which federal courts have approached the summary judgment analysis for mixed-motive Title VII cases since *Desert Palace*).

125. See *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 46 (1st Cir. 2009) ("We reject the district court's requirement that Miller's words explicitly indicate that Chadwick's sex was the basis for Miller's assumption about Chadwick's inability to balance work and home. To require such an explicit reference (presumably use of the phrase 'because you are a woman,' or something similar) to survive summary judgment would undermine the concept of proof by circumstantial evidence, and would make it exceedingly difficult to prove most sex discrimination cases today.").

126. *Casella v. MBNA Mktg. Sys. Inc.*, No. 8-176-B-W, 2009 WL 1621411, at \*22 (D. Me. June

the question of evidence's sufficiency, and not its classification, will be the focus of the rest of this Article.

Jurists' lack of consensus as to when the *McDonnell Douglas* framework applies to stereotyping cases and as to when a "stray remark" should operate to preclude summary judgment highlights their underlying lack of understanding of precisely why, when, and how stereotypes are pernicious in the context of Title VII cases. While some scholars are bothered by some courts' quick resort to dubbing a comment "stray" in order to dispose of questions of intent to discriminate and thus the entire case,<sup>127</sup> other judges and scholars fear a scenario in which a comment, from its context probative of nothing, serves to prop up and sustain an otherwise meritless allegation of discrimination. But what exactly is a stereotype—this word so frequently used by courts and litigants with no further clarification? And when does the use of a stereotype in the formulation of a comment or a standard by an employer's agent evince the requisite intent to discriminate?

### III. WHAT IS STEREOTYPING?

#### A. *The Psychology of Stereotyping*

Psychologist John Bargh says that "'stereotypes are categories that have gone too far.'"<sup>128</sup> They are "schemas—preexisting theories and frameworks that help us understand our raw experiences."<sup>129</sup> A stereotype may also be conceptualized as "a cognitive structure that contains sweeping concepts of the behaviors, traits and attitudes associated with the members of a social category."<sup>130</sup> Most people intuitively recognize stereotypes, and most grasp the threat that

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9, 2009); *accord White*, 533 F.3d at 402 ("The ultimate question for the court in making a summary judgment determination in such a case is not whether the plaintiff has produced sufficient evidence to survive the *McDonnell Douglas/Burdine* shifting burdens, but rather whether there are any genuine issues of material fact concerning the defendant's motivation for its adverse employment decision, and, if none are present, whether the law—42 U.S.C. § 2000e-2(m)—supports a judgment in favor of the moving party on the basis of the undisputed facts.").

127. See, e.g., Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 539 (2005) ("Even though a complaint may include a statement clearly indicative of gender bias, the court, by labeling the statement as a 'stray remark,' categorically excludes it from evidence.").

128. Annie Murphy Paul, *Where Bias Begins: The Truth About Stereotypes*, PSYCHOL. TODAY, May–June 1998, at 53.

129. DAVID J. SCHNEIDER, *THE PSYCHOLOGY OF STEREOTYPING* 170 (2004).

130. Antony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 187 (2005).

stereotyped beliefs—like “Latinos have bad tempers” or “Jewish people are cheap”—pose to the goals of civil rights and antidiscrimination law. Such stereotypes’ geneses typically lie in invidious bias or ignorance and have been perpetuated in both private life—such as in the home<sup>131</sup>—and public life—such as in the workplace<sup>132</sup>—and by the media and other outlets of cultural consciousness.<sup>133</sup> Individuals subscribe to stereotypical beliefs on conscious and subconscious or unconscious levels.<sup>134</sup>

People tend to depend more on group-based impressions when forming judgments or opinions than they do on individuating attributes, leading them to socially categorize others as group members rather than individuals and to take note of whether others are members of their own groups or not.<sup>135</sup> This resultant classification of others into so-called ingroup and outgroup members leads people to form evaluative biases, whereby they become inclined to regard members of their own groups more positively than those who are not members of these groups.<sup>136</sup> As a result, attributes of outgroup members become magnified as stereotypes take form because they furnish “stable explanations for the group’s behavior, which enhance feelings of predictability,” but often engender contempt.<sup>137</sup> Thus, inasmuch as substantive stereotypes shape evaluations of individual group members and contour societal standards and models of behavior and appearance, stereotypes compel individual and societal responses to and often avoidance of group members.<sup>138</sup>

It is the tendency of human beings to process and evaluate individuals who belong to their same group more positively and in a more trenchant manner and to accord ingroup members more trust. Correspondingly, “[m]embers of other groups are viewed with suspicion

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131. See Mary C. Gentile, *How We Learn Who We Are*, in *GENDER NONCONFORMITY, RACE, AND SEXUALITY: CHARTING THE CONNECTIONS* 180, 181–83 (Toni Lester ed., 2002).

132. See JACQUELINE DELAAT, *GENDER IN THE WORKPLACE: A CASE STUDY APPROACH* 4–7 (1999).

133. See, e.g., LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 11 (2006) (“Our individual biases dovetail with a set of social practices, patterns, and norms that produce and reproduce unintentional discrimination and have become so familiar that they define our sense of what is ‘normal,’ and, in turn, what is ‘real’ . . . .”); SCHNEIDER, *supra* note 129, at 351–53.

134. See Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, in *7 THE PSYCHOLOGY OF PREJUDICE* 55, 67–68 (Mark P. Zanna & James M. Olson eds., 1994).

135. John F. Dovidio & Michelle R. Hebl, *Discrimination at the Level of the Individual: Cognitive and Affective Factors*, in *DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES* 11, 14–15 (Robert L. Dipboye & Adrienne Colella eds., 2005).

136. *Id.*

137. *Id.* at 16.

138. *Id.* at 16–17; see also SCHNEIDER, *supra* note 129, at 226–27.



and competitively.”<sup>139</sup> So-called outgroup members are regarded with enhanced suspicion, negativity, and animosity.<sup>140</sup> People tend to accentuate intergroup differences and to minimize differences discernible within a group.<sup>141</sup> Therefore, scholars have posited that, with respect to race in particular, “[i]n the United States, people automatically activate mental representations of racial group memberships when they see a person of another race. They become spontaneously aware of the person’s racial group membership, which makes them also think more about their own group membership.”<sup>142</sup>

Stereotyping in the context of employment discrimination is a category-based cognitive response to another person that attempts to structure one’s experience with that person.<sup>143</sup> Social cognition demonstrates that much of stereotyping occurs at the sub or unconscious levels; repeated activation causes stereotypes to inhere in the minds and processes of those who might not even believe that they subscribe to or harbor stereotyped beliefs.<sup>144</sup> Stereotypes function as “social schemas,”

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139. John F. Dovidio, *Racial Bias, Unspoken But Heard*, 326 SCI. 1641, 1642 (2009); see also Dovidio & Hebl, *supra* note 135, at 15 (finding that people retain more detailed and more positive information about ingroup than outgroup members, reminding themselves why outgroup members are dissimilar to the self).

140. Maria-Paola Paladino & Luigi Castelli, *On the Immediate Consequences of Intergroup Categorization: Activation of Approach and Avoidance Motor Behavior Toward Ingroup and Outgroup Members*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 755, 755 (2008) (finding that automatic attitudes and perceptions toward outgroup members tend to be more negative than toward ingroup members).

141. See Dovidio, *supra* note 139, at 1642; Paladino & Castelli, *supra* note 140, at 755; Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321 (2000).

142. Dovidio, *supra* note 139, at 1642.

143. Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 623 (1993); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995) (“[P]erhaps most significant for present purposes, [stereotypes] bias a decisionmaker’s judgment long before the ‘moment of decision,’ as a decisionmaker attends to relevant data and interprets, encodes, stores, and retrieves it from memory.”); Elizabeth E. Tharan, *“Free to Be Arbitrary and . . . Capricious”: Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL’Y 113, 117 (2001) (“Stereotyping is generally understood as the cognitive component of these category-based reactions: the part arising from and relating to the thought process, by which we process information and assign meaning to experience.”).

144. Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005) (discussing how unconscious discrimination can lead to an employer’s decision); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1031 (2006) (“[A]ctors often do not realize that they have formed biased judgments of others.”); see also Ramona L. Paetzold, *Using Law and Psychology to Inform Our Knowledge of Discrimination*, in DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES, *supra* note 135, at 329, 336 (finding that studies suggest that discriminatory behavior may be automatic and a person

or categorical structures that engender implicit theories that predictably bias individuals' interpretation, encoding, retention, and memories when it comes to others to whom they have been exposed.<sup>145</sup> Stereotyping permits differentiation and organization of groups and group members via cognitive shortcuts.<sup>146</sup> It is distinct from prejudice, which goes to one's affect, and from discrimination, which goes to one's behavior, in that stereotyping underlies one's beliefs about another based upon the other's group membership.<sup>147</sup>

To the extent that stereotypes and stereotypical images seep into cultural consciousness, they have been particularly nefarious to members of historically disadvantaged minority groups. For example, one-dimensional, distorted, and offensive depictions of African American women as, among other things, lazy, oversexualized, or overbearing have become part of "America's cultural pattern" via their appearances in American literature, film, and popular culture.<sup>148</sup> These pernicious portrayals became entrenched and have led to discriminatory and often abhorrent societal and legal treatment of African American women. "[A]s long as . . . these stereotypes remain unchallenged, even if . . . dismissed by most scholars, they hinder progress."<sup>149</sup>

Two types of stereotypes have been recognized: descriptive stereotypes, which purport to narrate the way in which group members tend to behave or appear, and prescriptive stereotypes, which purport to describe how group members ought to behave.<sup>150</sup> Stereotypes thus create expectations that serve as baseline starting points for the construction of one's impression of a group member, while simultaneously constraining perceptions of group members, operating as a form of social limitation or control.<sup>151</sup> The information that buttresses and reinforces stereotypes is unconsciously absorbed, pursued, preferred, and remembered by people more readily and more rapidly than other information, becoming quickly

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may act absent awareness of the intention to engage in that behavior).

145. Krieger, *supra* note 143, at 1188.

146. See Reskin, *supra* note 141, at 321 ("These processes, sometimes characterized as cognitive 'shortcuts,' occur regardless of people's feelings toward other groups or their desires to protect or improve their own status.").

147. See Dovidio & Hebl, *supra* note 135, at 13 (defining "prejudice" as an "unfair negative attitude toward a social group or a person perceived to be a member of that group").

148. See Jacklyn Huey & Michael J. Lynch, *The Image of Black Women in Criminology: Historical Stereotypes as Theoretical Foundation*, in JUSTICE WITH PREJUDICE: RACE AND CRIMINAL JUSTICE IN AMERICA 72, 78–88 (Michael J. Lynch & E. Britt Patterson eds., 1996).

149. *Id.* at 86; see also Irene Browne & Ivy Kennelly, *Stereotypes and Realities: Images of Black Women in the Labor Market*, in RACE, WORK, AND FAMILY IN THE LIVES OF AFRICAN AMERICANS 185, 185–88 (Marlese Durr & Shirley A. Hill eds., 2006).

150. Fiske, *supra* note 143, at 623–24.

151. See *id.*

assimilated and integrated into individuals' world pictures.<sup>152</sup> Stereotypes are thus tenacious and infectious as they seep into and spread across cultural consciousness.<sup>153</sup>

A stereotype, however, need not be negative, nor untrue; it must merely create a nexus between a group of people and a characteristic.<sup>154</sup> What stereotyping does is simplify and routinize one's experience of the world, causing one to rely on the crudest, most "cartoonish" constructs of others.<sup>155</sup>

Stereotypes constructed by the preconceived or assumed traits, predilections, or characteristics that one assigns to a group have long been held up by those who study class-based discrimination as both indicators and generators of discrimination.<sup>156</sup> Indeed, "negative stereotypes evolve from negative aspects of the inter-group relations (inequality, competition, relative deprivation)" and may be "strongly reinforced by the attribution of harmful goals to outgroups."<sup>157</sup> Negative class-based stereotypes not only operate to cement and reinforce negative and baseless images of class members in the eyes of outsiders,<sup>158</sup> but they also operate to engender bad self images, and worse, bad self-fulfilling prophecies for the group members who themselves are indoctrinated with them.<sup>159</sup>

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152. Reskin, *supra* note 141, at 322; *see also* Paetzold, *supra* note 144, at 335 (discussing how stereotypes can be activated automatically by exposure to relevant features of a stereotyped individual and how stereotypes can also be activated by constructs that are part of the stereotype); Paladino & Castelli, *supra* note 140, at 755 ("Research has extensively studied the affective and cognitive processes that are automatically triggered when individuals are faced with ingroup and outgroup members. Spontaneous affective responses toward outgroup members tend to be more negative in comparison to ingroup members and automatic stereotyping arises." (citation omitted)).

153. *See* Reskin, *supra* note 141, at 322 ("The cognitive processes involved in stereotyping make stereotypes tenacious. People unconsciously pursue, prefer, and remember 'information' that supports their stereotypes (including remembering events that did not occur), and ignore, discount, and forget information that challenges them.").

154. Page, *supra* note 130, at 187–88.

155. *See id.* at 188.

156. *See* Louk Hagendoorn & Hub Linssen, *Group Goal Attributions and Stereotypes in Five Former Soviet States*, in *COMPARATIVE PERSPECTIVES ON RACISM* 171, 172–73 (Jessika ter Wal & Maykel Verkuyten eds., 2000).

157. *Id.* at 175.

158. *See* Charles Stangor & Mark Schaller, *Stereotypes as Individual and Collective Representations*, in *STEREOTYPES AND STEREOTYPING* 3, 13 (C. Neil Macrae et al. eds., 1996) ("Once group stereotypes exist in a culture, expected patterns of behavior for those group members follow, and these expectations determine both responses to group members and the behavior of the group members themselves.").

159. *See* Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotyping*, 53 *DEPAUL L. REV.* 1013, 1052 (2004). The author cites several studies, one of which was conducted by a team of social psychologists that documented a phenomenon they referred to as "stereotype threat." *Id.* The related experiment demonstrated how members of stereotyped groups were less

Thus, stereotypes in American law have assigned people a trait or property on the basis that a group to which they might belong—gender, race, religion—has a high statistical correlation with that attribute, even where the correlation does not hold up on an individual basis.<sup>160</sup> They also serve to engender and perpetuate false beliefs about a group, cause employment decision-makers to impose normative beliefs about what attributes a member of a group should possess, and cause those decision-makers to impose standards and requirements on individuals accordingly.<sup>161</sup> For this reason, recent scholarship in this area has observed that the very word *stereotype*, as it is used in antidiscrimination law, “is being asked to do too much work,” which generates needless confusion.<sup>162</sup>

*B. Examples of Stereotyping in the Workplace*

A recent article on the ABA Journal website demonstrated the use of stereotypes in the employment context. It reported that three quarters of female lawyers of color leave their respective law firms within five years of starting due to the challenges they encounter in the workplace, like “unwanted or unfair critical attention” and institutional discrimination.<sup>163</sup> Interestingly, this discrimination is typically expressed in the form of gender and racial stereotypes present in the beliefs and attitudes of decision-makers and other superiors at the firms.<sup>164</sup> According to the study,

Women of color have a greater sense of “outsider status” than other groups, according to the Sun-Times summary of the report. They

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able (intellectually) to perform well on standardized tests after they would be reminded that they were stereotyped against. *Id.* When the researchers did not invoke (remind) the stereotype against the members of the group, they performed just as well as the nonminority white males. *Id.*; see also WANG, *supra* note 133, at 64–66; Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 409 (2003) (“People and jobs both are gendered, which gives stereotypes a profound effect on everyday interactions in the workplace. In addition to shaping expectations, stereotypes also can influence behavior, given that ‘people tend to engage in behaviors they believe are approved by significant others.’”).

160. See K. Anthony Appiah, *Stereotype and the Shaping of Identity*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 55, 63 (Robert C. Post ed., 2001).

161. See *id.* at 64–65.

162. *Id.* at 63.

163. Debra Cassens Weiss, *Why More Than 75% of Minority Female Lawyers Leave Law Firms Within 5 Years*, A.B.A. J.—L. NEWS NOW (July 22, 2009, 9:41 AM), [http://www.abajournal.com/news/why\\_more\\_than\\_75\\_of\\_minority\\_female\\_lawyers\\_leave\\_law\\_firms\\_within\\_5\\_years/](http://www.abajournal.com/news/why_more_than_75_of_minority_female_lawyers_leave_law_firms_within_5_years/).

164. *Id.*

reported more racial and gender stereotyping, and more feelings of sexism than white women. They also said they missed out on high-profile assignments and important client engagements, and had limited growth opportunities.<sup>165</sup>

Moreover, these results resonated with a study done by the ABA's Commission on Women in the Profession and reported in an August 2006 article.<sup>166</sup> The ABA study revealed that female lawyers of color reported being addressed by the same name as other lawyers of the same ethnicity, having it assumed that if they were Latinas, they would know how to speak Spanish and enjoy spicy food, that if they were Asian-American, they were subjected to stereotypes about their being "subservient or willing to work nonstop," and that if they were African American, they confronted "stereotypes about affirmative action or having quick-to-flash personalities."<sup>167</sup>

As upsetting as these reports and findings are, the true nature of the problems confronted by these women in the workplace is seemingly revealed in the anonymous comments posted on the ABA's website after the article. Ranging from the wholly unsympathetic and detached—"Why did they become lawyers if they just pick up and leave[?]"<sup>168</sup>—to the skeptical—"In order to verify something as a 'stereotype' we're going to need stats"<sup>169</sup>—to the outright bitter and belligerent—"Dear female minority lawyers: Start your own firms then! Frankly, female minority lawyers have Biglaw employment opportunities that most law grads can only dream of"<sup>170</sup>—the comments reveal a depth of indifference, ignorance, and animus toward these women among at least some of the online readers of the ABA Journal.

They reveal something more than that, though. They reveal a lack of understanding about how and why stereotypes harbored and acted upon in the workplace are so nefarious. One poster on the site asked, "what percentage of Latina attorneys can, in fact, speak Spanish?," reasoning that "[i]f the number is greater than 50%, people are not stereotyping—they're basing their conclusions on statistics. Now if the percentage of Latina attorneys who speak Spanish is less than 10%, then perhaps their

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165. *Id.*

166. *Id.*

167. *Id.*

168. Alexander, Comment to Weiss, *supra* note 163 (July 22, 2009, 10:03 AM).

169. J.D., Comment to Weiss, *supra* note 163 (July 22, 2009, 10:18 AM).

170. ded@gmail.com, Comment to Weiss, *supra* note 163 (July 22, 2009, 10:19 AM).

coworkers are not basing their assumptions on reality.”<sup>171</sup> This raises more than one interesting point.

C. *Is Stereotyping “Bad”?*

In the first place, not all stereotyping is “bad.”<sup>172</sup> Indeed, many of the stereotypes reported by the ABA study participants—such as speaking Spanish, liking spicy foods, or being willing to work nonstop<sup>173</sup>—are either innocuous or positive characterizations in the abstract. But this is the key. The characterizations *are* neutral or positive in the abstract—when they are divorced from a forced presumption that stems directly from the individual’s protected class status, potentially obscuring other attributes and an objective, integrated view of the individual. They are innocuous or positive when they are actually true or at least truly discernible when the individual is not viewed through the lens of her protected class status.

In the second place, where statistics tend to bear out a fact, the law and rational human beings indeed often permit inferences of an underlying truth in conformity with those statistics. However, in the employment arena, one’s tendency to regard someone through the lens of their protected class status and not as an individual for whom individual facts and attributes can be discerned based upon experience often belies one’s vulnerability to prejudicial thinking. Unlike in the law of evidence, where the goal is to ascertain the truth with few means and sometimes little information at one’s disposal, the law of employment discrimination is crafted to compel the evaluation and treatment of employees in the workplace in a manner that is individualized and free of animus, prejudice, or bias.

In the third place, while taking issue with the notion that, for example, Latinas are often presumed to know Spanish, may be to some,

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171. J.D., Comment to Weiss, *supra* note 163 (July 22, 2009, 10:18 AM).

172. See Craig McGarty et al., *Social, Cultural and Cognitive Factors in Stereotype Formation*, in *STEREOTYPES AS EXPLANATIONS: THE FORMATION OF MEANINGFUL BELIEFS ABOUT SOCIAL GROUPS* 1, 2 (Craig McGarty et al. eds., 2002) (explaining that stereotypes assist in making sense of one’s environment through the following: “(a) stereotypes are aids to explanation, (b) stereotypes are energy-saving devices, and (c) stereotypes are shared group beliefs. The first of these implies that stereotypes should form so as to help the perceiver make sense of a situation, the second implies that stereotypes should form to reduce effort on the part of the perceiver, and the third implies that stereotypes should be formed in line with the accepted views or norms of social groups that the perceiver belongs to”).

173. See Weiss, *supra* note 163.

as another poster put it, “anecdotal and non-serious,”<sup>174</sup> it is important to recognize that subconscious and even unconscious discriminatory beliefs operate to render stereotypes much more nefarious when fully unpacked. So, for example, is there anything per se illegal about the fact that an employer views a Latina employee as likely able to speak Spanish? The answer to this is clearly no. However, what if she cannot speak Spanish and the employer is subsequently disappointed in a way in which he would not be if she were another ethnicity? What if, either on a conscious or subconscious level, he believes further that non-native English speakers, or even that those who are fluent in a language other than English, speak English that is in some way compromised? While clearly government cannot outlaw stereotypical beliefs, cognizance of those beliefs and recognizing how deep-rooted or far-reaching they may be is the only way in which to accurately ferret out certain instances of disparate treatment on the basis of protected class status. And that is the end game in employment discrimination jurisprudence.

*Hopkins* recognized the unique role of stereotyping in class-based discrimination but failed to define the contours of when and how its rule should apply to subsequent cases that allege stereotyped comments as evidence of or a basis for a valid Title VII claim. There are many problems with courts’ ubiquitous resort to *Hopkins* and the wildly disparate results they reach without amply fleshing out the precise queries that they undertake.

#### D. Classes of Stereotyping

Although the case law invoking *Hopkins* does not distinguish among the various kinds of stereotypes used by decision-makers in the employment context, it may be observed that there are, essentially, two major classes of stereotypes. The first kind of stereotype, “intergroup bias,” castigates the entire protected class, prejudging a member on the basis of her membership. With intergroup bias, the discriminator harbors a wholesale bias toward one or more entire protected classes. So the stereotype “all women tend to be hysterical; you are a woman, and therefore, I believe that you’re probably hysterical, and I am more inclined to see you as hysterical” would fall within this category.

The second kind of stereotype evinces what may be called an “intraclass preference.” With the evolution of antidiscrimination jurisprudence has come an awareness on the part of those who harbor

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174. Monkey C, Comment to Weiss, *supra* note 163 (July 22, 2009, 10:56 AM).

class-based animus on any level that explicit discriminatory statements and practices—like categorically refusing to hire African Americans or even making statements that fit into the first stereotype category described above—will quickly cause them to run afoul of the law and be susceptible to public scrutiny. The manifestations of prejudice, then, have evolved, whereas the core prejudices harbored may not have. Thus, intraclass preferences may inhere, whereby a decision-maker may realize on some level that he needs to hire members of a protected class but nonetheless engages in discrimination within the class, preferring those who do not conform to the stereotype of the class to which he adheres. So, for example, a bigoted decision-maker may hire an African American whom he does not consider to be “too African American,” or he may promote a woman who he thinks possesses more masculine qualities. He may engage in an evaluation of candidates that searches for one who is considered “exceptional” for transcending the expected limitations of his class or embodying unusual traits and assets considering her class.

In this category of stereotyping, then, unlike the former, there is likely to be less accompanying evidence of class-based animus or attitudes of any sort. Where an employer subscribes to garden variety intergroup bias and makes stereotyped comments indicative of such a bias, his employment records and statistics should bear out this bias if he acts upon it. Even without the stereotyped comment, a statistically based case of the systemic disparate treatment of the group will likely emerge. To the extent that this does not happen, it is likely that where a decision-maker acts upon his bias with respect to even one employee or one open position, that employee likely will be able to make out a prima facie case of employment discrimination because the employer will typically replace the employee with someone outside her protected class.<sup>175</sup>

This is not the case with intraclass preferences evinced by stereotyping. First, because the discrimination and the preferences exist within a protected class, the plaintiff, absent ample additional evidence, will not even make out a prima facie case of discrimination.<sup>176</sup> Second, the evidence that stereotyping even occurred will likely be scant, if it exists at all, because employers are less likely to voice intragroup

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175. *See Connecticut v. Teal*, 457 U.S. 440, 446–47 (1982) (“To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that ‘any given requirement [has] a manifest relationship to the employment in question,’ in order to avoid a finding of discrimination.”).

176. *But see Buggs v. Elgin, Joliet & E. Ry.*, 824 F. Supp. 842, 846 (N.D. Ind. 1993) (finding that a plaintiff was not barred from establishing a prima facie racial discrimination case simply because he was replaced by a person of his race).



preferences aloud than interclass bias, and the employer is more likely to code the preference—“Candidate A is more professional than Candidate B” instead of “Candidate A acts less female, Asian, or so forth, than Candidate B.” The reason for this is obvious: decisions manifesting intragroup preferences are less likely to come under scrutiny and require an explanation or justification because the employer’s statistics regarding the protected class do not skew. Additionally, if the fired, demoted, or non-selected employee’s replacement is a member of the same class, the employee is much less likely to make out so much as a *prima facie* case of discrimination. Thus, an explanation or comment, even a coded one, for a decision motivated by an intraclass preference is less likely to be forthcoming. To the extent that a plaintiff in an intraclass preference scenario somehow captures a stereotyped comment or attitude, it is truly fortuitous and somewhat of a rare smoking gun not often attainable.

Courts are often too quick to dismiss stereotyped comments of all varieties as “stray”—an overly generic term insufficiently connected to the employment decision at issue. The fact that these comments are so hard to come by, however, indicates that where they are articulated, they likely do bear upon and reflect a mindset of discrimination or at least a mindset of “disparate perception.”

So where does this leave us? Can it ever be the case that an Asian American is perceived as hardworking because she actually is? Or can it be that a female employee is deemed too “girlish” because her maturity and poise are not adequately developed or honed such that a male associate with her demeanor would also be criticized or counseled? Title VII was not designed to be a civility code;<sup>177</sup> Congress certainly did not design it to prevent employers from levying certain legitimate criticisms at certain individuals. But when a word that overtly references protected class status, like “girlish,” or when a tautology, like “you’re a man; you probably did it anyway,” is used, need it necessarily come under such scrutiny that it creates a material issue of fact as to bias as a matter of law, so as to stave off a grant of summary judgment? This issue is complicated, but it becomes less so when the issue of stereotyping is broken down and the precise reasons why and when stereotyping in the workplace evinces illegal discrimination are explained.

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177. See *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

*E. Why Are Stereotypes Suspect?*

As stated, not all stereotypes are pernicious, nor are they all harbingers of discriminatory beliefs. Moreover, even stereotypes of people are not always per se wrong in an employment context. For example, upon hearing that someone went to a certain excellent law school and served as a local bar association president, a prospective employer might conjure up a stereotype of how intelligent or professional the person is before meeting him or her.

When and why, then, should people and the law be wary of stereotypes? There are two important reasons that stereotypes should be viewed as suspect in employment discrimination law. In the first place, they operate to impose different, often higher standards or expectations on members of a protected class. So, for example, when Ann Hopkins's evaluators found her to be the "wrong type of woman," or, in essence, too manly of a woman to comport with their expectations of what a "lady partner" should be like, they were imposing a standard upon her that would not have been imposed had she been a man.

In a different but equally important vein, however, stereotypes are typically substantively insidious, conjuring up monolithic, often cartoonishly simplistic or offensive images of people based on their protected class status.<sup>178</sup> If a decision-maker operates with a predefined spectrum in his head as to how he expects an African American person, for example, to speak, perform, or act, he evinces a mindset that shows his predisposition to view African Americans through the filter of a lens of negativity and limitation. He demonstrates that he encounters members of a group with certain preconceived notions of how they will likely act or appear and that he, himself, is likely predisposed to project qualities or weaknesses onto group members or to shape his conception or expectations of them in a disparate manner from that with which he approaches nonclass members. From a dignitarian perspective, thinking that incorporates stereotypes into the assimilation of one's world picture is insidious because it erodes the integrity of how people are perceived and often treated before they are even encountered. This erosion of the integrity of the individual's image and perception contributes to discrimination in the workplace by fueling prejudices and predispositions

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178. See Charles Stangor, *The Study of Stereotyping, Prejudice, and Discrimination Within Social Psychology: A Quick History of Theory and Research*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 1, 2 (Todd Nelson ed., 2009).

to create different expectations for some because of their protected class status.

#### IV. WHY STEREOTYPING CAN PROVE DISCRIMINATION

Under section 703 of Title VII, an employer is prohibited from failing or refusing to hire, discharging, or otherwise discriminating against any individual because of his or her race, color, religion, sex, or national origin.<sup>179</sup> It is thus the case that, in the words of Professor Ann McGinley, “[i]ntent lies at the heart of employment discrimination law. For the vast majority of cases brought under Title VII of the Civil Rights Acts of 1964 and 1991, intent alone determines whether a violation has occurred.”<sup>180</sup> Indeed, a disparate treatment cause of action will turn upon the plaintiff’s ability to demonstrate that she was treated differently with respect to the terms and conditions of her employment “because of . . . sex.”<sup>181</sup> What, exactly, this means, however, is less than clear.<sup>182</sup>

The problem is that as the law has rendered overt and explicit bias taboo and socially unacceptable,<sup>183</sup> invidious discrimination has had two things happen to it. First, it has become expressed in increasingly subtle, nuanced ways, with those harboring bigoted attitudes deploying coded speech, tacit understandings, and unspoken, but acted-on preferences.<sup>184</sup>

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179. 42 U.S.C. § 2000e-2(a) (2006).

180. Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 416 (2000).

181. 42 U.S.C. § 2000e-2(a).

182. See Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 87 (2008) (“This language does not clearly require proof of purposeful or intentional discrimination.”); Hart, *supra* note 144, at 753 (discussing how the plaintiff has to show that the decision was made “because of” his or her protected class); Ernest F. Lidge III, *The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove that the Employer’s Action Was Materially Adverse or Ultimate*, 47 U. KAN. L. REV. 333, 338–41 (1999) (showing the various interpretations that courts have made in regard to the statutory language); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503 (2001) (“Discrimination is ‘because of’ race, sex, age, etc. when the protected characteristic caused, in whole or in part, the decision to occur.”).

183. See Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 637 (2000) (stating that expressing certain racist or sexist views is now considered unacceptable, and, as a result, it is unlikely that an employer will make a blatant comment regarding race or sex).

184. *Id.* at 605–06 (examining studies and showing that discrimination is often subtle and difficult to identify); see also Krieger, *supra* note 143, at 1244 (arguing that ingroup preferences are often acted upon by employers); McGinley, *supra* note 180, at 445 (“Thus, to the degree that intentionality must be demonstrated to prove discrimination legally, subtle and unintentional forms of contemporary bias, such as aversive racism, may continue to exist and persist in disadvantaging

Second, bias has become so deeply entrenched and repressed in some who know that it is unacceptable, but nonetheless harbor, it that it has morphed into subconscious, or even unconscious, bias in some individuals.<sup>185</sup> This subconscious or unconscious bias, however, while not in the forefront of one's consciousness, may prove to be more invidious and pernicious than conscious or expressed bias because of its ability to elude detection, bypass scrutiny, and defy proof.<sup>186</sup> As recently as 2009, the Supreme Court appeared to take judicial notice of this, observing that "[e]mployers responded to [Title VII in the wake of its enactment] by eliminating rules and practices that explicitly barred racial minorities from 'white jobs.' But removing overtly race-based job classifications did not usher in genuinely equal opportunity. More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions."<sup>187</sup>

Courts have attempted to grapple with the notion that bias may be less than conscious,<sup>188</sup> and the law has evolved somewhat. This evolution, however, has been punctuated by inconsistency, inadequately justified and elucidated, and stymied by courts' inability to agree upon or to articulate precisely what they are trying to do. Thus, scholars have criticized the disparate treatment cause of action's intent requirement as actually subverting the goals of Title VII, rather than comporting with them, when more complex forms of discrimination, like stereotyping, are present.<sup>189</sup> Professor Ruth Okediji, for example, stated:

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Blacks relative to Whites in significant ways."); Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 619 (1996).

185. See McGinley, *supra* note 180, at 425 ("The truth of the matter is that events and operations that completely evade conscious apprehension frequently trigger our evaluations, impressions and behavioral responses.").

186. See Hart, *supra* note 144, at 744 ("[P]roblems of proof will always present barriers to the ability of some individual plaintiffs to successfully demonstrate discriminatory motivation, whether conscious or unconscious."); see also White & Krieger, *supra* note 182, at 506–11.

187. Ricci v. DeStefano, 129 S. Ct. 2658, 2696 (2009).

188. See, e.g., Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (finding that discrimination can occur "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias"); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1236 (9th Cir. 1984) (holding that disparate-treatment discrimination occurs where a decision-maker applies subjective employment criteria, even without a conscious intent to discriminate); Sweeny v. Bd. of Trs. of Keene State Coll., 604 F.2d 106, 113 n.12 (1st Cir. 1979) (affirming judgment for plaintiff because the district court could have found the decision not to promote plaintiff was based on "a subtle, if unexpressed, bias against women"); Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004) ("Such subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor.").

189. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752 (2001); Barbara J. Flagg, *Fashioning a Title VII*

A stereotype serves as a proxy for truth and reduces the cost of information gathering. When an employer makes a decision based upon a stereotype, this decision, while clearly discriminatory, is not necessarily the product of a conscious awareness or desire for a particular outcome. Instead, a stereotype may be an honest conviction about a characterization. Stereotyping is one obvious example of a state of mind that may not satisfy the intent test required but, nonetheless, has been held to constitute a violation of Title VII. Unintended discrimination can be the product of stereotyping. If an individual employer chooses not to expend the resources and efforts to gather information about an employee but, instead, relies on a stereotype, a plaintiff should be able to prevail in a Title VII action without having to prove that the defendant had the intent or conscious purpose to discriminate.<sup>190</sup>

The D.C. Circuit in *Hopkins* noted that Title VII is “remedial rather than punitive in nature” and “designed to remove ‘artificial, arbitrary and unnecessary barriers to employment’” that work to effectuate protected-class-based discrimination.<sup>191</sup> Thus, it reasoned, “discriminatory motive in disparate treatment cases does not function as a ‘state of mind’ element, but as a method of ensuring that only those arbitrary or artificial employment barriers . . . related to [protected class status] are eliminated.”<sup>192</sup> Thus, according to the court, the fact that Ann Hopkins may have fallen prey to unwitting or subconscious bias would not preclude a finding of discriminatory motive.

The Supreme Court in *Hopkins*, as discussed, set forth what Professor McGinley has referred to as the “stereotyping doctrine,” which envisions “overt stereotyping by a decisionmaker as virtually the equivalent of direct evidence of discrimination.”<sup>193</sup> It has been the case, then, Professor McGinley has argued, that *Hopkins* “unwittingly expands the definition of intent to include the use of unconsciously or consciously held stereotypes to make employment decisions.”<sup>194</sup> The decision-makers there were held to have rejected Hopkins’s candidacy because of her sex, even though some may not have even been aware that her failure

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*Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2014–15 (1995); Hart, *supra* note 144, at 743; Krieger, *supra* note 143, 1227–41 (arguing that Title VII jurisprudence is unable to address the unconscious bias that the law should address).

190. Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 80–81 (1998).

191. *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468 (D.C. Cir. 1987) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973) (internal quotations omitted)), *rev’d on other grounds*, 490 U.S. 228 (1989).

192. *Id.* at 469.

193. McGinley, *supra* note 180, at 472.

194. *Id.* at 475.

to conform to their expectations actually stemmed from their *own* preconceived notions about what kind of woman a female partner should be.<sup>195</sup> Title VII's intent requirement, then, *should* be met by showing that a bias, whether or not conscious, effectively operated to somehow impel the adverse decision at issue.<sup>196</sup>

A few courts have found that Title VII's "ultimate question is whether the employee has been treated disparately "because of race" and that "[t]his is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."<sup>197</sup> However, even the First Circuit opinion from which this assertion comes conceded that "[t]he language in certain other First Circuit cases might suggest that an express and conscious employer intent to discriminate is critical to . . . the *McDonnell Douglas* . . . inquiry," despite the fact that the Supreme Court "has not reconsidered *Price Waterhouse*'s conclusion that the phrase 'because of' . . . is not limited to expressly conscious intent."<sup>198</sup> Moreover, to the extent that a few courts have been explicit about using Title VII to guard against the dangers of subconscious or unconscious discrimination, this has traditionally been done largely within the confines of discussing the dangers of employers using interviews or other "subjective" gauges to ascertain merit.<sup>199</sup> Finally, even those few courts that have recognized

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195. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989) ("Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.").

196. See *McGinley*, *supra* note 180, at 475; see also *Hart*, *supra* note 144, at 746 (recognizing that "[b]y focusing the legal inquiry on the employer's intent at the moment an employment decision is made," the courts have not recognized the idea that the bias may be unconscious); *Krieger*, *supra* note 143, at 1242–43 (criticizing various courts' interpretations of Title VII as requiring proof of conscious intent to discriminate); *Krieger & Fiske*, *supra* note 144, at 1034 ("A decision maker can act because of or on the basis of a target person's race, sex, or other group status, while subjectively believing that he or she is acting on the basis of some legitimate, nondiscriminatory reason."); cf. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 926 (1999) (asserting that Title VII omits any recognition of unconscious bias and requires "proof of conscious, discriminatory intent"). But see Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1134 (1999) (arguing that employers should not be held liable for unconscious biases).

197. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 56, 58 (1st Cir. 1999).

198. *Id.* at 58 n.13, 60 n.14.

199. See, e.g., *Woods v. Boeing Co.*, 355 F. App'x 206, 210 (10th Cir. 2009) ("[The] use of subjective criteria, while not alone sufficient to show discrimination, is evidence that a jury may use to find pretext."); *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136 (9th Cir. 2003) ("Where termination decisions rely on subjective evaluations, careful analysis of possible impermissible motivations is warranted . . ."); *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002) ("Courts view with skepticism subjective evaluation methods such as the one here."); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1142 (9th Cir. 2001)

subconscious or unconscious discrimination as pernicious have nonetheless typically gone on to foreclose a plaintiff's case, holding that evidence of such discrimination was irrelevant or insufficient, even where the plaintiff could point to, for example, race-based comments.<sup>200</sup>

The fact of the matter is, however, that even post-*Hopkins*, many courts have continued to insist that plaintiffs in disparate treatment cases "prove not only that [they were] treated differently, but that such treatment was caused by purposeful or intentional discrimination."<sup>201</sup> In 1994, then-Third Circuit Judge Samuel Alito questioned the viability of a disparate treatment plaintiff's proffer of evidence of unconscious discrimination and referred to such a theory of a Title VII case as "unconventional."<sup>202</sup> Moreover, courts have found explicitly that

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("Against the background of the other evidence of pretext, the subjective nature of these criteria provides further circumstantial evidence that SRP denied Bergene the promotion as a form of retaliation, rather than because of DeGraff's superior qualifications."); *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 167 (1st Cir. 1998) ("Because of the availability of seemingly neutral rationales under which an employer can hide its discriminatory intent . . . there is reason to be concerned about the possibility that an employer could manipulate its decisions to purge employees it wanted to eliminate."); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) ("It is true that an employer's use of subjective criteria may leave it more vulnerable to a finding of discrimination, when a plaintiff can point to some objective evidence indicating that the subjective evaluation is a mask for discrimination."); *McCullough v. Real Foods, Inc.*, 140 F.3d 1123, 1129 (8th Cir. 1998) (reversing a grant of summary judgment and finding that "the extremely subjective nature of the employer's stated promotion criteria" was central to the analysis); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) ("[S]ubjective evaluations 'are more susceptible of abuse and more likely to mask pretext.'" (quoting *Fowle v. C & C Cola*, 868 F.2d 59, 64-65 (3d Cir. 1989))); *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 482 (5th Cir. 1989) ("[T]he criteria IPCO used to make promotion decisions was highly subjective, which, as this court has held in previous cases, makes it easier to discriminate.").

200. See, e.g., *Douglas v. J.C. Penney Co.*, 474 F.3d 10, 14-15 (1st Cir. 2007); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073, 1078 (7th Cir. 1994) ("Ultimately, the EEOC must show that Parker's rationale is pretextual and that the salary system is predicated on some stereotype, conscious or unconscious. Otherwise, summary judgment in favor of Parker is proper."); see also *White & Krieger*, *supra* note 182, at 507 ("Indeed, there exist surprisingly few published Title VII disparate treatment decisions in which, after acknowledging the existence of unconscious bias, a court has ruled in favor of the plaintiff or reversed a trial court ruling for the defendant on that basis.").

201. *Krieger*, *supra* note 143, at 1168; see also, e.g., *EEOC v. Flasher Co.*, 986 F.2d 1312, 1312-13 (10th Cir. 1992) (holding that to prevail, the plaintiff had to prove termination of employment was the result of intentional discrimination based on a plaintiff's national origin); *Warren v. Halstead Indus., Inc.*, 802 F.2d 746, 752-53 (4th Cir. 1986) (holding discriminatory intent means actual motive and cannot be presumed based upon a factual showing of less than actual motive); *Jackson v. Harvard Univ.*, 721 F. Supp. 1397, 1432 (D. Mass. 1989) ("Disparate treatment analysis is concerned with intentional discrimination, not subconscious attitudes."); *White & Krieger*, *supra* note 182, at 502 ("For intentional discrimination to exist, the employer must act because of the protected characteristic, not in spite of it."); *Zimmer*, *supra* note 110, at 1896 (stating that the plaintiff has the ultimate burden of showing "that she has been the victim of intentional discrimination").

202. *Glass v. Phila. Elec. Co.*, 34 F.3d 188, 200 (3d Cir. 1994) (Alito, J., dissenting).

discrimination in other contexts, such as in jury selection, must be shown to have been conscious and “purposeful.”<sup>203</sup>

Why then, post-*Hopkins*, does confusion as to intentional discrimination persist? One scholar has noted that while Ann Hopkins was clearly the victim of stereotyping that evinced discrimination, the Supreme Court chose instead to “focus[] on the employer’s conscious state of mind—intent rather than motive.”<sup>204</sup> If intent and motive are viewed, respectively, as this scholar defined them, as “the state of mind with which the act is done or omitted” and that which “prompts a person to act or fail to act, which could include stereotypes,” then their inadvertent conflation or confusion could certainly be seen as undercutting *Hopkins*’s most basic premise: when beliefs that lie beneath one’s consciousness impel an adverse action, that action may still have been taken because of protected-class status.<sup>205</sup>

There is widespread agreement among scholars that despite the persistence of this trend, this construction no longer keeps pace with the current form or status of discrimination in the workplace because the mechanics and manifestations of discrimination have evolved since the passage of Title VII.<sup>206</sup> The paradigm of discrimination contoured and prohibited by Title VII is simply not seen by those who study the realities of discrimination in the workplace and elsewhere as ample to engage with the increasingly nuanced and repressed, albeit present discrimination that manifests itself in contemporary society.<sup>207</sup>

As Professor Charles Lawrence has observed:

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize

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203. *United States v. Roebke*, 333 F.3d 911, 913 (8th Cir. 2003).

204. Pollard, *supra* note 196, at 931 n.94.

205. *Id.*; see also Okediji, *supra* note 190, at 80–81; Zimmer, *supra* note 184, at 618–20.

206. McGinley, *supra* note 180, at 416; Krieger, *supra* note 143, at 1211.

207. Krieger, *supra* note 143, at 1211 (“The assumptions underlying Title VII’s disparate treatment theory have been so substantially undermined by social cognition theory that they can no longer be considered valid.”); White & Krieger, *supra* note 182, at 524 (discussing the faulty assumptions made by Title VII jurisprudence with regard to “independent investigations” made by higher-level supervisors); cf. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–99 (2003) (arguing that what has been learned from cognitive social psychology should be applied to disparate-impact theory and employment discrimination litigation).



the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.<sup>208</sup>

Scholars have long lamented a fracture between the theory upon which antidiscrimination jurisprudence is predicated and the realities of the harm that the jurisprudence exists to police.<sup>209</sup> Professor Linda Krieger, for example, has argued that the premises upon which Title VII and its prevailing jurisprudence are modeled are outdated.<sup>210</sup> She has argued that “the assumptions undergirding disparate treatment theory generally reflect the thinking about intergroup bias and human inference accepted into the 1970s, these assumptions have been so undermined, both empirically and theoretically, that they can no longer be considered valid.”<sup>211</sup> Instead, Professor Krieger and others have urged that many of the alleged discriminatory adverse actions being litigated under Title VII traditionally conceived of as stemming from discriminatory intent are actually impelled by “a variety of categorization-related judgment errors characterizing normal human cognitive functioning.”<sup>212</sup> Such scholars have advocated a variety of approaches for capturing and regulating the actual bias that engenders the harm that Title VII aims to eradicate.<sup>213</sup>

During the first half of the twentieth century, the predominant view on bias and prejudice as understood by social psychologists was that it was the product of a mode of thinking that deviated from “normal” or acceptable thinking and functioning.<sup>214</sup> Thus, the notion of bias harbored by one less than fully cognizant of it was anathema to popular understanding of what occurred when one experienced prejudice. Thus,

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208. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

209. See, e.g., Chamallas, *supra* note 189, at 752–53; Flagg, *supra* note 189, at 2014–15; Hart, *supra* note 144, at 743; Krieger, *supra* note 143, at 1164; David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901 (1993).

210. See generally Krieger, *supra* note 143 (arguing that Title VII jurisprudence is insufficient to address subtle or unconscious forms of bias).

211. *Id.* at 1165.

212. *Id.*

213. See *id.* at 1166 (calling for “the nondiscrimination principle, currently interpreted as a proscriptive duty ‘not to discriminate,’” to “evolve to encompass a prescriptive duty of care to identify and control for category-based judgment errors and other forms of cognitive bias in intergroup settings”).

214. See McGinley, *supra* note 180, at 418 n.9 (noting that “pathological personality structures” were thought to cause prejudice); see also Hart, *supra* note 144, at 745 (“For the first half of the twentieth century, psychologists and social theorists viewed prejudice primarily as a psychopathology, ‘a dangerous aberration from normal thinking.’”).

lawmakers enacting legislation to arrest the effects of such attitudes and the judges seeking to interpret bias were predisposed to conceive of and engage with bias only in this rather one-dimensional form.

The application of the more modern social cognition theory and the social sciences' endeavor to map the anatomy and genesis of prejudice, bias, and the act of "stereotyping" to law has been laudably executed in the scholarship of many, including Professor Krieger. The work of social psychologists like Henri Tajfel, A.L. Wilkes, W.E. Vinacke, and Donald Campbell has brought to light the principle that "cognitive structures and processes involved in categorization and information processing can in and of themselves result in stereotyping and other forms of biased intergroup judgment."<sup>215</sup> Thus, social cognition theory should inform the law's understanding of stereotypes, reinforcing the notions that (1) all people engage in stereotyping "to simplify the task of perceiving, processing, and retaining information about people in memory"; (2) "once in place, stereotypes bias intergroup judgment and decisionmaking"; and (3) "[s]tereotypes, when they function as implicit prototypes or schemas, operate beyond the reach of decisionmaker self-awareness."<sup>216</sup> Seen through this lens, the law must grapple with stereotypes just as they are often formed, in a dispassionate, but routinized manner, so as to combat the harms that they might confer and to ensure that the broad remedial goals of Title VII are being met.<sup>217</sup>

According to social cognition theory, stereotypes foment discrimination by shading or tainting the ways in which individuals process information about and perceptions of others.<sup>218</sup> The various social schemas constructed and amassed by people as they extract and process information from the world around them, including information about others, mediate, structure, and order their subsequent encounters.<sup>219</sup>

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215. Krieger, *supra* note 143, at 1187. For an excellent and thorough discussion of the history of the study and understanding of bias and prejudice, which were initially conceived of as engendered by prejudice and other "motivational processes" inconsistent with "normal cognitive processes," see generally *id.*

216. *Id.* at 1188.

217. This Article is only meant to give an overview of the research on subconscious and unconscious bias. For more extensive research, see, for example, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241 (2002); Bodensteiner, *supra* note 182, at 99–107; Hart, *supra* note 144, at 745–49; Krieger, *supra* note 143, at 1186–1211; McGinley, *supra* note 180, at 416.

218. See Krieger, *supra* note 143, at 1199; see also Reskin, *supra* note 141, at 320 ("In brief, social cognition theory holds that people automatically categorize others into ingroups and outgroups. The visibility and cultural importance of sex and race and their role as core bases of stratification make them almost automatic bases of categorization. . . . Importantly, categorization is accompanied by stereotyping, attribution bias, and evaluation bias.").

219. Krieger, *supra* note 143, at 1199–1200.

Thus, “[a]s a theoretical matter, the notion that racial, ethnic, or gender distinctions could be ignored in the priming of schematic expectancies is, at best, implausible. As an empirical matter, it is simply insupportable.”<sup>220</sup> Based upon the work of Fritz Heider, Galen Bodenhausen, and Robert Wyer, and their contributions to attribution theory,<sup>221</sup> Professor Krieger urges that the law ought to recognize the basic precept that “stereotypes operate as judgment heuristics in causal attribution,” and that “[o]nce a stereotype is activated, . . . [it] operates as a kind of cognitive shortcut, bringing the search for additional causal antecedents to a screeching halt.”<sup>222</sup>

Still other scholars, said to be “behavioral realists,” have buttressed their claims about subconscious or unconscious bias with evidence gleaned from the administration of Implicit Association Tests (IATs), which test subjects’ instinctive associations of various attributes with members of different races.<sup>223</sup> The results point strongly toward biases that are innate, pronounced, and less than consciously harbored.<sup>224</sup>

Thus, courts should view evidence of stereotyping and any stereotyped comments as probative, at least to some extent, of the speaker’s worldview and biases. Indeed, Professor Michael Zimmer has argued that stereotyped comments are actually powerful evidence that

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An incoming bit of information that “fits” an existing schema is said to “instantiate” that particular schema. When this instantiation process activates a schema, other elements of the schema are then imposed on the incoming experience. In other words, once a particular schema is activated, incoming information tends to be ordered in a manner that reflects the structure of the schema. In this way, a schema acts as an implicit expectancy: We implicitly expect incoming information instantiating a particular schema to be consistent with elements of that schema already present in its cognitive representation.

*Id.*; see also Susan T. Fiske, *Social Cognition and Social Perception*, 44 ANN. REV. PSYCHOL. 155, 168–69 (1993) (stating that categorization allows people to differentiate each other by group, allows the outgroup homogeneity effect, whereby outgroups are seen as less variable than the ingroup, allows greater familiarity with the ingroup and perception of greater variability across group members, and allows people to make inferences based on the categorization); Reskin, *supra* note 141, at 320 (finding that once a person has categorized others into groups, the person often tends automatically to feel toward particular members of the category in the same way in which he or she feels toward the social category in general).

220. Krieger, *supra* note 143, at 1201–02; accord Dovidio & Hebl, *supra* note 135, at 12–13 (discussing how the cognitive component of individuals’ attitudes involves specific thoughts or beliefs about the attitude object and often involves automatic categorization); Dovidio, *supra* note 139, at 1642 (finding that people automatically group people according to their race).

221. Krieger, *supra* note 143, at 1204–05 (citing FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* (1958); Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267, 268, 279 (1985)).

222. *Id.* at 1206.

223. See Bodensteiner, *supra* note 182, at 102–03.

224. *Id.*

ought to be seen as something akin to a statement against interest, rather than as something too severable from the context of a given adverse action to be relevant to a trier's considerations.<sup>225</sup> To the extent that social mores dictate restraint when it comes to the utterance of such comments, the fact of their vocalization ought to strengthen the presumption of their truthfully representing the beliefs of the speaker.<sup>226</sup>

#### V. WHEN SHOULD COURTS APPLY *HOPKINS*?

As stated, courts habitually resort to *Hopkins* when adjudicating claims alleging the illicit use of stereotypes in the workplace. However, the law has not yet carefully broken down precisely when and why stereotypes in the workplace are suspect or their exact role in how and when a plaintiff's Title VII claim survives summary judgment. *Hopkins* has been overcited, and it has come to be a one-size-fits-all solution to allegations of stereotyping. It, however, furnishes no specific guidance as to how to evaluate various stereotyping claims that arise in various contexts. In reality, there are two major questions—and multiple issues bound up within each question—that need to be addressed when a court decides whether *Hopkins* applies to a stereotyping claim so as to permit the claim to survive summary judgment. By examining cases in which discrimination “because of” protected class status was alleged using stereotyped comments or beliefs, the array of unarticulated queries and approaches undertaken by courts may be demonstrated.

Although the courts have been less than explicit about this fact, a court confronted with an allegation that a stereotyped comment or belief evinces discrimination “because of” sex must address two primary questions. The ultimate question, of course, is whether *Hopkins* applies to the case so as to compel the court to view the comment or belief as existing and serving as evidence of discrimination sufficient to at least create a triable issue of fact. The first question—a focus of this Article—is whether a stereotype is even in play. In other words, is there a stereotyped belief, voiced or somehow acted upon, that could serve as viable evidence of discrimination? The second question is when a sufficient nexus may be said to exist between the stereotype and the adverse action at issue.

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225. Zimmer, *supra* note 184, at 619–21; *see also* Bodensteiner, *supra* note 182, at 114–20 (discussing the importance of stereotyped comments and the weight that should be given to them).

226. *See* Lawrence, *supra* note 208, at 340 (“[An] inadvertent slip of the tongue [is] not random.”).

A. *Is a Stereotype in Play?*

Crucial to the analysis of discrimination alleged to be evinced or motivated by a stereotyped belief is the threshold question of whether a discernable stereotype is even in play. In cases in which a stereotyped remark's evidentiary sufficiency is at issue, courts are asked to determine whether the remark reflected a mindset, motive, or intention or whether it was merely collateral and offhand. The issue of whether an invidious stereotype is even in play, however, is a threshold issue.

The issue of whether stereotyping even occurred surfaced in *Weinstock v. Columbia University*.<sup>227</sup> In that case, the plaintiff alleged stereotyping in conjunction with her denial of tenure at a university.<sup>228</sup> Members of the plaintiff's evaluating committee referred to her as "gentle and caring, 'nice,' a 'pushover,' and nurturing."<sup>229</sup> The plaintiff proffered these comments in order to rebut the defendant's proffered legitimate, nondiscriminatory reason for the denial of tenure and to establish pretext. The majority, however, held that the use of those words failed to evince discrimination or pretext on the part of the defendant.<sup>230</sup> The majority specifically distinguished the case from *Hopkins*.<sup>231</sup> It reasoned that Ann Hopkins had been spoken of pejoratively in conjunction with her nonselection "because she did not fit the sexual stereotype of what a woman should be," whereas the plaintiff at bar "faced no such carping."<sup>232</sup> The majority observed that "'[n]ice' and 'nurturing' are simply not qualities that are stereotypically female. Any reasonable person of either sex would like to be considered 'nice.'"<sup>233</sup> The court found that it would be

indefensible to conclude that an employer's use of the word "nice" evinces gender discrimination. Were it so, every time an employer said, "[Bob or Sue], you are a nice person and a hard worker, but I am going to have to let you go," such a statement would become a basis for a Title VII discrimination claim.<sup>234</sup>

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227. 224 F.3d 33 (2d Cir. 2000).

228. *Id.* at 37–38.

229. *Id.* at 57.

230. *Id.* at 43–44.

231. *Id.* at 44.

232. *Id.*

233. *Id.*

234. *Id.*

The majority even went so far as to go to the dictionary definition of the word *nurture*, which is “to supply with food, nourishment, and protection” and “to train by or as if by instruction.”<sup>235</sup> These definitions, the majority found, “are in no way stereotypically female,”<sup>236</sup> and wholly “innocuous words” improperly deemed by the plaintiff to be “semaphores for discrimination.”<sup>237</sup> Fearful of chilling tenure committees’ prerogative to candidly discuss tenure applicants’ “positive personal attributes,” the majority declined to take issue with the characterizations.<sup>238</sup> After all, it reasoned, “[n]iceness and nurturing are not . . . bad qualities to have in a teacher’s mentoring capacity—particularly of undergraduates.”<sup>239</sup>

According to the dissent, however, the record in *Weinstock* “reflect[ed] gender discrimination incontrovertibly shown by gender stereotyping.”<sup>240</sup> In fact, the dissent argued, the majority’s distinction of the case at bar from *Hopkins* evinced a logic that “misapprehends why stereotyping is discriminatory.”<sup>241</sup> In fact, as the dissent recited, the very irony of Hopkins’s case stemmed from the fact that her so-called “masculine qualities” that took her out of contention for partnership would have been lauded had they been discerned in a male candidate.<sup>242</sup> Thus, Hopkins failed to comport with her gender stereotype, resulting in her illegal ouster. Weinstock’s case, according to the dissent, confronted the court with “the mirror image” of *Hopkins*, in that the plaintiff’s nonselection was allegedly premised on her perceived success at projecting a stereotypically ‘feminine’ image at work.”<sup>243</sup> The case thus cried out for an application of *Hopkins*, according to the dissent:

Unfortunately for Weinstock, a stereotypically “feminine” person is not viewed in a male dominated field as a driven, scientifically-minded, competitive academic researcher. The inappropriate focus on Weinstock’s “feminine” qualities in the tenure process led . . . others to discount her “masculine” success as a researcher and professor. While

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235. *Id.* (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY (1961)).

236. *Id.* The majority also noted that these terms were used to describe the plaintiff’s classroom performance, and not her research, which was cited by the university as the basis for her denial of tenure. *Id.*

237. *Id.* at 45.

238. *Id.* at 45.

239. *Id.*

240. *Id.* at 56 (Cardamone, J., dissenting).

241. *Id.* at 57.

242. *Id.*

243. *Id.* (emphasis omitted).

Hopkins was punished for failing to perform a “feminine” role, Weinstock was punished for performing it too well.

The problem both Weinstock and Hopkins faced is that their employers demanded that they perform both “masculine” and “feminine” roles, yet perceived those roles as fundamentally incompatible. Unlike “masculine” men at *Price Waterhouse*, Hopkins was punished because her “masculinity” appeared inconsistent with gendered stereotypes of how women should look and behave; Weinstock was punished because her “femininity” appeared inconsistent with “masculine” success as a researcher. Yet if Weinstock had chosen to project a more “masculine” image, she could very well have suffered the same fate as Hopkins.<sup>244</sup>

The issue of whether an actual stereotype is in play in a given situation is a threshold issue that ought to be answerable by resort to *Hopkins*—the case in which the Supreme Court discussed the impermissible use of stereotypes and stereotyping.<sup>245</sup> This issue, however, broken down, actually involves multiple questions that are evaluated by courts, albeit often implicitly. Additionally, there is, or at least there should be, some debate as to whether all of these questions are even relevant to the query at hand. Among the questions that courts appear to have considered when resolving the issue of whether or not a stereotype—expressly articulated or not—was in play include the following: Does the statement reference an identifiable class, or is it too vague or ambiguous; is the stereotype an entrenched stereotype, meaning, is it societally known; is the stereotype adequately voiced, or is too tacit or implied to be discerned as such; and is the comment or remark a stereotype that adverts to a characterization of a person based upon his class, or is it merely an inartful characterization of a trait or behavior that has no relation to either the plaintiff’s protected class or to the speaker’s perception of the class?

#### 1. Does the Stereotype Reference an Identifiable Class?

If a precise, protected class is not discernible as the subject of a stereotyped belief, it is difficult for the alleged belief viably to buttress a Title VII claim.<sup>246</sup> Sometimes a plaintiff will call upon a court to read into words or actions to discern that an employer has discriminated

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244. *Id.* at 57–58.

245. *See generally* *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

246. *See* 42 U.S.C. § 2000e-2(a)(1) (2006).

against the plaintiff “because of” protected class membership, despite the fact that such a link is far from explicit.

In a 2007 district court case, *Maturen v. Lowe’s Home Centers, Inc.*, the plaintiff’s supervisor told him that he “should learn to control [his] wife and keep her in her place” after the plaintiff’s wife criticized his employer’s store and personnel in an e-mail to the supervisor.<sup>247</sup> He sued after his termination, alleging that the defendant had violated Title VII by punishing him for his wife’s misdeed and his failure to prevent or “control” it.<sup>248</sup> The court, however, observed that “[t]he salient issue in a Title VII claim of discrimination is whether the plaintiff was singled out because of his membership in a protected class and treated less favorably than those outside the class, not whether the plaintiff was treated less favorably than ‘someone’s general standard of equitable treatment.’”<sup>249</sup> Thus, the court found the plaintiff failed to state a cognizable claim that he was treated differently because of his sex or, as the court said, show that any defendant “was motivated by a hostility toward or prejudice against a protected class.”<sup>250</sup>

It is interesting to note that the court did not specify *of whom* “someone’s general standard of equitable treatment” refers.<sup>251</sup> Is it, in fact, even the case that “the salient issue in a Title VII claim” will always be one’s having been singled out and treated differently than nonclass members? When a decision-maker discriminates against certain class members for acting too much or too little like stereotyped notions of what the decision-maker thinks the class is or should be, does the decision-maker confer discriminatory, adverse effects upon protected class members “because of” their status?<sup>252</sup>

This interpretation of *Hopkins* is questionable and inconsonant with a well-accepted form of gender discrimination, family responsibility discrimination (FRD), in which women with children are treated differently than either men or women without children on the basis of their sex and stereotyped notions about women as caretakers of children.<sup>253</sup> Virtually every circuit has adopted the notion that FRD

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247. No. 06-CV-15126, 2007 WL 3173962, at \*3 (E.D. Mich. Oct. 26, 2007).

248. *Id.* at \*6.

249. *Id.*

250. *Id.*

251. *See id.*

252. *See* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 386–96 (2004); Shin, *supra* note 36, at 499.

253. *See* Albiston et al., *supra* note 43, at 1296–98; Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369 (2008); Joan C. Williams & Stephanie Bornstein, *The Evolution of “FRD”: Family Responsibilities Discrimination and Developments in*



contravenes Title VII's mandate even though the discrimination does not systemically discriminate against all women.<sup>254</sup> Rather, the discrimination is recognized as targeting women who happen to be in certain circumstances.<sup>255</sup> The genesis of FRD derives from the courts' acceptance—and the Supreme Court's having taken judicial notice—of the fact that women are perceived in society as assuming the responsibility for caring for children and may resultantly be unjustly perceived as having fewer resources and less time and capacity for work outside the home than they would without children.<sup>256</sup> While the recognition and validation of FRD as a cognizable cause of action premised on an erroneous stereotype is a step toward recognition that discrimination is nuanced and often able to elude the rigid codification that federal legislation tends to impose upon it, FRD is one of the few steps that the law has taken in this direction. FRD does not allege that a woman has been “singled out because of h[er] membership in a protected class and treated less favorably than those outside the class,” and yet it forms the basis for a cognizable Title VII lawsuit.<sup>257</sup>

So why is it that courts should not construe the normative stereotype that a man should be capable of “controlling” his wife's actions as disparate treatment “because of sex” when courts presume that the stereotype that women with children are less capable at work is? The

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*the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1313 (2008); Joan C. Williams & Consuela A. Pinto, *Family Responsibilities Discrimination: Don't Get Caught off Guard*, 22 LAB. LAW. 293, 293–95 (2007); see also *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (May 23, 2007), <http://www.eeoc.gov/policy/docs/caregiving.html> (describing situations in which disparate treatment of a caregiver may constitute unlawful disparate treatment on the basis of gender in violation of Title VII because “[e]mployment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class”).

254. See, e.g., *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 44 (1st Cir. 2009) (noting that “[t]he Supreme Court and several circuits, including this one, have had occasion to confirm that the assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex-stereotyping and that adverse job actions on that basis constitute sex discrimination”); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (finding that sex-stereotyping existed where decision-maker admitted he did not promote plaintiff “because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that”); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004) (noting that “it takes no special training to discern stereotyping in the view that a woman cannot ‘be a good mother’ and have a job that requires long hours, or in the statement that a mother who received tenure ‘would not show the same level of commitment [she] had shown because [she] had little ones at home’”).

255. See *Albiston et al.*, *supra* note 43, at 1296–98; Williams & Bornstein, *supra* note 253, at 1313.

256. See *Albiston et al.*, *supra* note 43, at 1296–98.

257. See *id.* at 1285–86; see also Williams & Pinto, *supra* note 253, at 293–94 (discussing the development in FRD case law and the different causes of action that can be brought).

court does not provide an answer to this question. Is it because women have historically been discriminated against, whereas men have not? Title VII jurisprudence dictates that men are no less deserving of full protection under its language than are women.<sup>258</sup> Is it because the alleged stereotype that underlies this case is not as societally entrenched—meaning as known, accepted, and believed on a widespread basis—as that which underlies FRD? It ought not matter how well entrenched a stereotype is, though, if a particular decision-maker operated under the assumption that a given stereotype was true and then conferred disparate treatment upon an employee because of protected class status, notwithstanding the fact that the stereotype was esoteric or even wholly fabricated by the decision-maker.<sup>259</sup>

No good reason seems to explain why the thinking that “you are a man who cannot control his wife, therefore not the ‘right’ kind of man, and therefore will suffer an adverse action,” is not, if proven to be the thinking at issue, discrimination because of sex. It may represent intraclass discrimination, but so does FRD, and so does the stereotyping in *Hopkins*. Unless being perceived as the wrong kind of woman only violates Title VII when the woman is seen as too manly or too womanly, no reason exists to explain why the above train of thought should not violate Title VII.

Moreover, the court in *Maturen* went on to note that even if the alleged attitude at issue were to be construed as a variety of sex discrimination, “[a]t most, Plaintiff has averred facts that demonstrate that the store manager held a chauvinistic view that men should control their wives’ behavior and that, since Plaintiff was unable to do so, he did not live up to the store manager’s conception of masculinity” because “the Sixth Circuit has interpreted the [*Hopkins*] theory as inapplicable to scenarios where the ‘gender non-conforming behavior . . . is not behavior observed at work or affecting his job performance.’”<sup>260</sup>

This stance similarly makes no sense in the larger context of Title VII and its broad remedial goal of “‘strik[ing] at the entire spectrum of disparate treatment of men and women resulting from sex

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258. See Albiston et al., *supra* note 43, at 1300–01 (noting that FRD claims brought by men are potentially meritorious when decision-makers penalize men who fail to conform to the male breadwinner stereotype); Williams & Bornstein, *supra* note 253, at 1320–21 (discussing how men, as well as women, are affected by FRD and how “[m]en as well as women are successfully suing for FRD”).

259. See McGinley, *supra* note 180, at 474–75.

260. *Maturen v. Lowe’s Home Ctrs., Inc.*, No. 06-CV-15126, 2007 WL 3173962, at \*6 (E.D. Mich. Oct. 26, 2007).

stereotypes.”<sup>261</sup> If gender nonconforming behavior is not observed in the workplace but is still used as the basis for a workplace-related consequence, it is certainly no less an action taken “because of” protected class status than it would be if the behavior were discernible at work. If anything, using behavior that does not bear upon performance at work as the basis for an adverse action would be inherently more indicative of irrational prejudice than relying on workplace behavior to form the basis for evaluations and consequences.

In *Moren v. Progress Energy, Inc.*, the plaintiff alleged that he was harassed because of the perception that he was “a particular kind of man.”<sup>262</sup> The court found this allegation vague and cryptic but hazarded a guess that his claim meant that he felt that he was perceived as homosexual.<sup>263</sup> The court distinguished *Hopkins* from the case before it, observing that

the discrimination in *Hopkins* was based on gender stereotyping, that is, stereotyping based on feminine characteristics that are traditionally associated with women. Hopkins was not perceived as feminine; rather, she was perceived as masculine. The Court stated that “[t]here were clear signs . . . that some of the partners reacted negatively to Hopkins’ [masculine] personality because she was a woman.” In light of this analytical framework, a claim under Title VII could be stated if Moren was able to show that the harassment he allegedly suffered was based on his perceived failure to conform to a masculine gender role. Moren, however, cannot.<sup>264</sup>

Again, because the plaintiff could not show that his “behavior at work . . . [was] reasonably perceived as feminine, and, therefore, as that of a homosexual,” the court found that his claim could not survive.<sup>265</sup>

It is important to note that numerous cases in which a homosexual plaintiff alleged a failure to comport with the gender stereotypes of a decision-maker, courts have erected what many scholars believe to be an artificial bifurcation between cases involving sex discrimination and cases involving sexual orientation discrimination.<sup>266</sup> By stating that

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261. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

262. No. 8:07-cv-1676-T-17, 2008 WL 3243860, at \*5 (M.D. Fla. Aug. 7, 2008).

263. *Id.*

264. *Id.* (quoting *Hopkins*, 490 U.S. at 235) (citation omitted).

265. *Id.* at \*5–6.

266. See generally Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205 (2007); Ryan M. Martin, *Return to Gender: Finding a Middle Ground in Sex Stereotyping Claims Involving Homosexual Plaintiffs Under Title VII*, 75 U. CIN. L. REV. 371 (2006); Ilona M. Turner, *Sex Stereotyping Per Se:*

gender stereotypes are not in play, but homosexual animus is, courts are able to clear their dockets of these cases without acknowledging that such animus is nearly always bound up in or at least accompanied by disappointment that one has not conformed to her traditional gender role. This practice has served systemically to disadvantage homosexual plaintiffs.

## 2. Is the Stereotype Entrenched?

Must a stereotype be entrenched or societally known or accepted before it is deemed evidence of discrimination that could so much as raise a triable issue of fact and stave off a grant of summary judgment? While the case law on point would seem to indicate that the answer is yes, a more searching look into how and why an individual comment is used by a speaker to stereotype an employee would seem to be the best indicator that the alleged class-based discrimination did, in fact, go on.

To the extent that stereotypes can create an inference of discrimination,<sup>267</sup> an individual alleged stereotype should be shown to inhere in the mind of the decision-maker. But need it be established in the outside world?

In *Love v. Motiva Enterprises, LLC*, the plaintiff alleged that she had been the victim of gender stereotyping in the form of complaints that she did not conform to her supervisor's "idea of a liberated, physically fit woman" or of a "slimmer, liberated woman."<sup>268</sup> The court rejected this claim, finding that someone's idea of a "liberated, physically fit woman by definition cannot constitute a stereotype, which is based on society's general ideas about traits commonly thought to be shared by persons of the same physical type."<sup>269</sup> The court noted that "[w]hatever [someone's] individual ideas may have been about women's liberation and physical appearance, these do not constitute gender stereotypes."<sup>270</sup> Comparing the case at issue to *Hopkins*, the court observed that "*Hopkins*

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*Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007); Maurice Wexler & Angela Davis, *Transsexualism, Sex Stereotyping, and Price Waterhouse v. Hopkins: A Staircase to Paradise or a Slippery Slope?*, 36 U. MEM. L. REV. 41 (2005).

267. See *Sassaman v. Gamache*, 566 F.3d 307, 313 (2d Cir. 2009) ("When employment decisions are based on invidious sex stereotypes, a reasonable jury could infer the existence of discriminatory intent"); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004) ("[C]omments made about a woman's inability to combine work and motherhood are direct evidence of [sex] discrimination.").

268. No. 07-5970, 2008 WL 4286662, at \*9 (E.D. La. Sept. 17, 2008).

269. *Id.* at \*10.

270. *Id.* The court added, "at least not as such stereotypes have been recognized among the circuits in sexual stereotyping harassment claims." *Id.*

involved the general belief that women should be meeker than men (i.e. not ‘liberated’).<sup>271</sup> Therefore, the court rejected the notion that there was any legal significance behind the allegation that *this* plaintiff failed to conform to the image of one who was *too* liberated.<sup>272</sup>

Moreover, the court found that this case failed to “fit the mold” of an actionable same-sex sexual stereotyping harassment claim because while the plaintiff alleged that she had been stereotyped for failing to comport herself as a woman should, she never claimed that she had been harassed for acting too much like a man or having male mannerisms.<sup>273</sup> This, the court held, was fatal to her claim.<sup>274</sup>

In this case, the allegation made—construed in the light most favorable to the plaintiff and presumed to be true, as per the summary judgment standard—was that the plaintiff was not the “right type of woman” insofar as the decision-maker conceptualized the way in which women should appear.<sup>275</sup> In that sense, this may be considered a gender stereotype. The court, however, refused to deem this a gender stereotype that might raise an inference of gender discrimination because it was not a “general belief,” which may refer to a societally entrenched belief about the conception or idealization of women, as was found in *Hopkins*.<sup>276</sup>

Ostensibly, the question of how entrenched the stereotype is should not be relevant, so long as it inheres in the decision-maker’s mind. Stereotypes are nefarious because of the mindset they evince; that mindset is subjective and should not need societal reinforcement to be valid evidence of animus, prejudice, or misperception that may have precipitated class-based disparate treatment. Moreover, whether the stereotype invoked goes toward the woman being “too manly” ought not be the dispositive question as to whether she can prove sex discrimination. To the extent any decision-maker is inclined to see a protected class ideal in a certain way and then judges a protected class member in a way in which he would not judge a non-class member for failing to conform to this ideal, the class member experiences discrimination on the basis of class status.

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271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* (noting that “all the circuit cases recognizing same-sex sexual stereotyping claims have involved harassment of men for having feminine traits or mannerisms, or women for having male traits or mannerisms”).

275. *Id.* at \*9–10.

276. *Id.* at \*10. As a separate matter, she was not, as Ann Hopkins was, found to be *too much like a man*, but rather the “wrong type” of woman. *Id.*

3. Was the Stereotype Explicit or Too Tacit or “Inartful” to Evince Prejudice?

If a plaintiff is fortunate, she will have an expressed, explicit stereotyped comment to buttress her assertion that she was adversely affected by the stereotyped beliefs of others and the employer thus acted on the basis of her protected class status. For example, in a 2009 district court case, the plaintiff claimed that she was the victim of gender stereotyping after she was told, following her nonselection for a Customer Relationship Manager (CRM) program, that she needed to be “more motherly, soft, and kind, rather than aggressive, strong, and arrogant.”<sup>277</sup> The defendants maintained that they chose not to select the plaintiff on the basis of her interview, emphasizing that she “admit[ted] that [another candidate] had better performance appraisals than she did, was outstanding, and was more qualified for the CRM position” and that the plaintiff testified that “she was not more qualified than” others.<sup>278</sup> As the court recited, it was “the defendants’ position that Casella was officially turned down for the CRM position based on her ‘Communication,’ defined, in part, as a candidate who did not demonstrate an ability to speak clearly and answer questions succinctly; they selected candidates who were able to more fully respond to questions.”<sup>279</sup>

The plaintiff, however, contended that “all of the female candidates with whom she was familiar and who were selected fit the stereotype of being soft and non-aggressive.”<sup>280</sup> She pointed out that when she questioned a decision-maker as to “why she was not selected, he told her that she was ‘too cocky,’ ‘overly arrogant,’ that she should not be ‘so aggressive’ and ‘strong’ and that she reminded him of himself.”<sup>281</sup> Another decision-maker told her “that he had heard she was turned down because she was ‘cocky and arrogant and aggressive’ and that she ‘needed to become more softer [sic], more motherly; that if [she] was a man, it was acceptable, it’s not acceptable out of a woman and that we need to address it.’”<sup>282</sup> A non-decision-maker gave the plaintiff “an overview of the evolution of women in business and told [her] that today

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277. *Casella v. MBNA Mktg. Sys. Inc.*, No. 8-176-B-W, 2009 WL 1621411, at \*1 (D. Me. June 9, 2009).

278. *Id.* at \*14.

279. *Id.*

280. *Id.*

281. *Id.* at \*14 n.24.

282. *Id.*

‘women are actually looked at as mothers, that they need to be a little softer, a little kinder . . . more motherly.’”<sup>283</sup> This individual also told her to “take the Myers-Briggs’ instrument, . . . so that she [could] look at her personality and see what she could do to change her personality and to get it in line with what the Bank expects of a female manager, to be more motherly and soft.”<sup>284</sup> She was told, after her interview, “that she ‘scared him’ and was ‘very aggressive’ and ‘came on very strong.’”<sup>285</sup> Moreover, the court noted, “[n]one of the individuals whom Casella spoke to about why she did not get selected said anything to her about ‘communication.’”<sup>286</sup>

The court found that the plaintiff had adduced enough evidence of discrimination to warrant a denial of summary judgment.<sup>287</sup> As in *Hopkins*, the statements made to the plaintiff were explicit to such an extent that any legitimate concerns that the defendants may have had about traits or skills unrelated to the plaintiff’s gender were eclipsed by the articulated beliefs about women and the type of woman that the plaintiff was.<sup>288</sup> As the court said, “at summary judgment [the court does] not decide which explanation for the non-promotion is most convincing, but only whether [the plaintiff] has presented sufficient evidence regarding [his or] *her* explanation.”<sup>289</sup>

Often, however, although the same sentiments may be lurking beneath the surface of the plaintiff’s interactions with decision-makers, they are left unarticulated, partially articulated, or even coded, such that they are not discernible as stereotyped beliefs. In a 2007 district court case, the plaintiff, a Hispanic female, alleged that that her “style of communication” was perceived as “aggressive and inflammatory,” which she claimed were “stereotyped characterizations that are often used when women and people of color are self-confident, intelligent and assertive.”<sup>290</sup> She argued that the defendant’s position that she was difficult—“reacting quickly and negatively in her interactions with co-workers” and responding to co-workers in an “angry and defensive” manner—only served to illustrate her employer’s “application of a

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283. *Id.*

284. *Id.* at \*17.

285. *Id.* at \*14 n.24.

286. *Id.*

287. *Id.* at \*27.

288. *Id.* at \*22–24.

289. *Id.* at \*1 (quoting *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 47 n.11 (1st Cir. 2009)).

290. *Valles-Hall v. Ctr. for Nonprofit Advancement*, 481 F. Supp. 2d 118, 132 (D.D.C. 2007).

double-standard and stereotyping of [her].”<sup>291</sup> The only explicit reference that a supervisor had made to her race was a comment that “[i]f making judgments about people and telling them is a cultural thing, then maybe we should tell the staff it’s a cultural thing and they should buck up and take it.”<sup>292</sup> This same supervisor, however, informed the plaintiff that she deemed her “behavior not to be ‘a cultural thing’ but rather to be ‘verbal abuse.’”<sup>293</sup>

The court, however, refused to consider the comments direct evidence of discrimination, dismissing it instead as “an uninformed and insensitive statement regarding Plaintiff’s ethnicity or national origin, but not an intentionally discriminatory statement.”<sup>294</sup> It was, “[a]t most, . . . a stray remark that, although probative of discrimination, cannot serve as direct evidence of discrimination.”<sup>295</sup> The court granted summary judgment on her claim,<sup>296</sup> concluding that in terms of evidence as to the stereotyped belief, the plaintiff had furnished “only her own speculation that [the supervisor’s] reaction . . . demonstrated racial bias.”<sup>297</sup>

The court’s failure to marry the remark that it deemed “probative of discrimination” with the allegation of unarticulated or coded racial bias proved fatal to the claim.<sup>298</sup> Maintaining that the plaintiff proffered only her own speculation seems to run counter to the court’s admission that the remark it dismissed as “stray” was probative of discrimination. This evinces its failure to merge the idea of a nexus between the underlying bias alleged and the lens through which the plaintiff’s character traits and alleged foibles were seen. Even as the court acknowledged the potential of the remark to be probative of discrimination, it refused to incorporate the discrimination into the larger picture of the alleged stereotyped belief, absent “direct evidence.”<sup>299</sup> “Direct evidence,” however, as the courts have defined it, usually means an explicit, smoking gun, as seen in *Casella*.<sup>300</sup> In light of how easy it is to mask, code, or simply not express

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291. *Id.* at 132, 147, 150.

292. *Id.* at 132.

293. *Id.*

294. *Id.*

295. *Id.* at 141.

296. *Id.* at 152.

297. *Id.* at 150.

298. *Id.* at 141.

299. *Id.*

300. See *supra* notes 277–89 and accompanying text. The court in *Valles-Hall* stated that, “at a minimum, direct evidence does not include stray remarks in the workplace, particularly those made by nondecision-makers or statements made by decision-makers unrelated to the decisional process itself.” *Valles-Hall*, 481 F. Supp. 2d at 141 (quoting *Brady v. Livingood*, 456 F. Supp. 2d 1, 6 (D.D.C. 2006)).



such damning sentiments, it would seem likely to be fatal to many legitimate stereotyping claims to require a “smoking gun” beyond a statement that the court admitted had some probative value simply for the case to survive summary judgment.

The lesson to be learned from stereotyping allegations, though, is that in most cases, voiced words matter. The articulation of words rather than mere allusions or implicit references to ideas or images will typically be critical to the outcome of a determination, even if the unarticulated sentiments actually lurk beneath the surface.<sup>301</sup>

Sometimes, however, courts will give enough credence to an allegation of stereotyping where comments have been far less than explicit. In a Ninth Circuit case, the plaintiff alleged that gender stereotyping had tainted the decision to lay her off.<sup>302</sup> She said that “her supervisor would rarely hear women in staff meetings and gave her inferior work assignments” and that her supervisor told her that others found her “pushy and aggressive.”<sup>303</sup> The court noted that the plaintiff understood these remarks to mean her supervisor found her “pushy and aggressive for a woman.”<sup>304</sup> The court thus concluded:

Sexual stereotyping, as possibly indicated by such remarks, can serve as evidence that gender played a role in the employer’s decision. While her supervisor’s comments might not have been as blatant as the sex stereotypes in [*Hopkins*], the subjective nature of the skills matrix—prepared specifically for the workforce reduction—left ample room for such stereotypes to affect [her] scores, especially in areas such as “leadership” and “teamwork” where aggressiveness by a female might be impermissibly penalized.<sup>305</sup>

This, combined with the plaintiff’s testimony about the shortcomings of a comparator who did not meet her fate, led the court to decline to grant summary judgment on the plaintiff’s case.<sup>306</sup>

In other cases, even the presence of a word or phrase that adverts indirectly to a gendered or racial stereotype has been enough to surmount

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301. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring) (“Thus, 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.” (citation omitted)).

302. *Margolis v. Tektronix, Inc.*, 44 F. App’x 138, 139 (9th Cir. 2002).

303. *Id.* at 141.

304. *Id.*

305. *Id.* (citation omitted).

306. *Id.* at 141–42; see also *Sullivan*, *supra* note 119, at 237 (“[T]he grant of summary judgment or the ultimate finding with respect to discrimination will also depend not merely on one comparator plus expert witness but rather on what other evidence both sides are able to adduce.”).

the summary judgment hurdle. It is interesting to examine which words can catapult a case over the hurdle when the alleged stereotyped belief is otherwise tacit. In *Collins v. Cohen Pontani Lieberman & Pavane*, the plaintiff was told by a partner for whom she worked that he “‘could not talk to her’ and was uncomfortable with her.”<sup>307</sup> He later told her that “‘the partners thought she was ‘difficult’ and that she had not expressed enough gratitude for her raise.”<sup>308</sup> When she asked the partner for help in her interactions with a paralegal that she found uncooperative, “‘he told her that she was not ‘sweet’ enough and needed to use more ‘sugar’ with any paralegal who was uncooperative.”<sup>309</sup> The court found that “‘a reasonable jury could find that [the] statement indicates that (1) he holds stereotypes that women should be ‘sweet’ and non-aggressive, and (2) that [the partner] believed that Plaintiff did not fit this stereotype.”<sup>310</sup> Therefore, the court found, the remark could support a factual finding that the defendant’s “‘failure to provide Plaintiff with sufficient work was motivated by Plaintiff’s failure to fulfill sex stereotypes of ‘sweetness,’” and amounted to unlawful discrimination.<sup>311</sup> The court found the remark especially probative because the partner was the defendant’s managing partner and worked closely with the plaintiff regarding her work requests.<sup>312</sup>

Similarly, in *Kahn v. Fairfield University*, the defendant deemed the plaintiff to have a problem with her communication style, personality, and work style.<sup>313</sup> The plaintiff had been the subject of staff complaints about her “‘overbearing work style and her habit of requiring staff entitled to overtime to work without compensation for extra hours.”<sup>314</sup> Others reported feeling “‘condescended to or lectured to or felt in some way . . . told what to do or felt in some way belittled” and believing that the plaintiff lacked “‘the courtesy of listening.”<sup>315</sup> At meetings, committee members reported feeling that she was “‘arrogant’—that she would follow through on her own agenda regardless of whether or not she had departmental or faculty support.”<sup>316</sup>

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307. No. 04 CV 8983(KMW)(MHD), 2008 WL 2971668, at \*2 (S.D.N.Y. July 31, 2008).

308. *Id.*

309. *Id.* at \*9.

310. *Id.*

311. *Id.*

312. *Id.*

313. 357 F. Supp. 2d 496, 504 (D. Conn. 2005).

314. *Id.* at 505.

315. *Id.*

316. *Id.* at 506.

The court noted that “[s]uch characteristics might be considered positive, leadership traits. On the other hand, they might be considered flaws that make a person a less effective administrator. In context, they may also be considered improper gender stereotypes.”<sup>317</sup> The court went on to find that the “conclusory statements that Kahn was ‘arrogant’ or ‘difficult to work with’” were baseless and proved largely unsubstantiated when the speakers were questioned about the remarks.<sup>318</sup> Thus, the court found, “[g]iven the imprecise nature of the University’s purported legitimate, non-discriminatory reasons, the evidence provided by Kahn to support a factual finding of pretext is sufficient to defeat a motion for summary judgment.”<sup>319</sup>

Additionally, in cases where evidence shows that gendered or racial slurs or derogation have invaded the workplace, even in a generalized manner, courts are more likely to connect the environment rife with stereotyped beliefs to specific adverse actions allegedly motivated by stereotyped beliefs. For example, in *Lake v. AK Steel Corp.*, the district court found that a rational juror could conclude that a system put into place to monitor the plaintiff while at work was prompted by “unsubstantiated and unverifiable rumors . . . indicative of a consistent theme in the work place graffiti that African American workers were lazy, untrustworthy and undeserving of a job.”<sup>320</sup> The district court reiterated the premise that an “action taken against a minority employee based on negative stereotyping can be construed by the finder of fact as evidence of discriminatory treatment because of race.”<sup>321</sup> The district court also found that the plaintiff had been accused of theft and disciplined based on similar, unfounded stereotypical inferences about him drawn by decision-makers.<sup>322</sup> However, evidence of substantial disparate treatment in this case compounded the evidence of racial stereotyping.<sup>323</sup> In any event, whether a remark is reflective of a mindset that attributes negative qualities to class members is an important question bound up in the larger question of how probative a stereotyped comment is.

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317. *Id.*

318. *Id.* The court also noted: “For example, Committee member Katherine Schwab, Associate Professor of Art History, when asked to explain why she found working with Kahn ‘frustrating,’ could point only to Kahn’s requests that Schwab gather information regarding her department in ‘only a few days, usually less than a week.’” *Id.*

319. *Id.*

320. No. 2:03CV517, 2006 WL 1158610, at \*29 (W.D. Pa. May 1, 2006).

321. *Id.*

322. *Id.* at \*30.

323. *Id.* at \*32.

Although the rationale given as to why some of these cases ran afoul of Title VII—that a decision somehow informed by stereotyping had affected a protected class member—is vague, something much more capable of precise articulation was clearly going on in each case. In each case, a protected class member had been held to a different—typically higher—standard because of his or her protected class status than someone situated outside the class. To the extent that the plaintiff's failure to meet the different standard resulted in an adverse action that would not have befallen one situated outside the class, a disparate impact of sorts was engendered.<sup>324</sup>

4. Is the Comment Merely an Inartful Characterization of a Trait that Has No Relation to Class Status?

In other cases, courts have found that the comment merely showed that the decision-maker disfavored a plaintiff's personal trait independent of the plaintiff's protected class. In *Cuttino v. Genesis Health Ventures, Inc.*, the plaintiff was terminated for what the court deemed a legitimate reason.<sup>325</sup> The plaintiff, however, contended that although no explicit comments about her race were ever made by anyone at work, she had been targeted for particularly bad treatment because of her status as “an assertive African-American employee.”<sup>326</sup> Her supervisor's poor view of her skills and performance, the plaintiff maintained, was “tainted” by the supervisor's “discriminatory attitude towards assertive African-Americans.”<sup>327</sup> As proof of this, the plaintiff offered a letter authored by the supervisor that characterized her as “violent and insubordinate,” as well as “aggressive and intimidating,” words that the plaintiff felt were “stereotypical terms for race discrimination.”<sup>328</sup>

The district court, however, refused to find that the letter evinced a discriminatory attitude, and it drew attention to the fact that the employer

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324. See generally Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998) (contrasting actionable discrimination with de minimis discrimination, which receives little attention from courts).

325. No. 3:04 CV 575(MRK), 2006 WL 62833, at \*3 (D. Conn. Jan. 11, 2006). The court cited the plaintiff's “lack of understanding of fundamental accounting and booking practices, and her history of bookkeeping and training errors, the most recent of which . . . led the financials to incorrectly show bad debt, and her failure to train the bookkeeper and oversee proper accounting for residents' funds.” *Id.*

326. *Id.* at \*5.

327. *Id.*

328. *Id.* at \*5–6.

replaced the plaintiff with another African American employee.<sup>329</sup> The district court found that words like “lying” and “violent,” standing alone, were not “racial code words.”<sup>330</sup> This, combined with the fact that the plaintiff had an admitted “strong, assertive personality that might come across as intimidating,” as well as an admitted “personality conflict” with her supervisor, meant that the description—apt or not—did not permit the court to deny summary judgment on the claims.<sup>331</sup>

Indeed, the problem with unarticulated or even partially articulated stereotypes is one of proof. If a plaintiff like Cuttino *could* demonstrate that traits that she possessed were not tolerated as well in her as they would be in one who was not a member of her protected class, she should certainly have a cognizable claim of race discrimination. Moreover, if she could show that a decision-maker was more prone to discerning or ascribing certain traits to her than he would be to one who was not a member of her protected class (in this case, race), she should certainly have a cause of action. However, demonstrating these things without a smoking gun—an explicit statement or comment that references her protected class—would be incredibly difficult.<sup>332</sup> Many courts have found that without comparators,<sup>333</sup> or even with potential, but not perfect, comparators,<sup>334</sup> the absence of a smoking gun comment is fatal to a plaintiff’s claim.

Once it has been established that there is a stereotype in play, courts go on to ascertain whether a tenable connection exists between the stereotype and the adverse action at issue. The bulk of this Article focuses on stereotypes themselves and fleshing out and evaluating the

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329. *Id.* at \*6.

330. *Id.*

331. *Id.*

332. *See, e.g.,* EEOC v. St. Michael Hosp. of Franciscan Sisters, Milwaukee, Inc., 6 F. Supp. 2d 809, 824 (E.D. Wis. 1998) (“The EEOC . . . claims that passing over Johnson for the . . . position was . . . on account of Johnson’s race. This claim is grounded primarily in [a] belief that Johnson was too aggressive. The EEOC claims that this reliance on aggressiveness amounts to impermissible stereotyping. While it is possible that such is true, the EEOC proffers no evidence that Jurishica was engaging in racial stereotyping in this respect.”).

333. *See* Sullivan, *supra* note 119, at 192 (“Thus, only when those factors are ruled out by an almost-twin comparator will the courts permit the inference of discrimination.”).

334. *See, e.g.,* Blue v. Def. Logistics Agency, 181 F. App’x 272, 273 (3d Cir. 2006) (“To establish a prima facie case . . . a plaintiff must show . . . non-members of the protected class were treated more favorably.”); Geier v. Medtronic, Inc., 99 F.3d 238, 243 (7th Cir. 1996) (requiring the plaintiff to discuss comparison group as part of the direct evidence); *see also* Sullivan, *supra* note 119, at 208 (citing several cases where not being able to produce a comparator was fatal to the plaintiff’s claim). *But see* EEOC v. Nw. Mem’l Hosp., 858 F. Supp. 759, 764 (N.D. Ill. 1994) (finding that failure to show similar treatment of comparable, nonpregnant employees was not fatal to the plaintiff’s case).

questions embedded in discerning whether the alleged “stereotyping” evinces something actionable. However, once a stereotype that can evince discrimination is discerned, it is important to examine the questions bound up in this next part of the analysis.

*B. Was There a Proper Nexus Between the Stereotype and the Harassment or Adverse Action or Change in Terms and Conditions?*

In *Zhao v. State University of New York*, the plaintiff sued her employer for national-origin discrimination in violation of Title VII.<sup>335</sup> In the course of attempting to demonstrate the existence of this discrimination, Zhao proffered what she deemed to be a stereotyped comment made by one of her interviewers, Dr. Batuman, that “she liked to employ Chinese people because they work very hard and very long hours.”<sup>336</sup> Zhao alleged that once she was hired, this same decision-maker commented that she was not in the laboratory enough and questioned the commitment that a recommender had attributed to her.<sup>337</sup> She also alleged, among other things, that this same individual “told a story about her Chinese babysitter’s husband,” insisted that she be in the lab such that she became wary of taking restroom or lunch breaks, denied her library privileges, humiliated her by mocking her heavy accent, and at a party attended by some Turkish guests, asked her “whether she though[t] Turkish people are ‘more lovely’ than Chinese people.”<sup>338</sup> Moreover, Zhao pointed to what she saw as a “lack of resources and staffing in the laboratory,” which she blamed on Dr. Batuman’s “unrealistically high expectations regarding her performance based on ethnic stereotyping of individuals of Chinese origin.”<sup>339</sup>

The district court denied the employer’s motion for summary judgment, citing, among other things, Dr. Batuman’s comments at the time she hired Zhao, which, the district court said, “reflect[ed] that she may have higher performance expectations for individuals of Chinese origin because of her belief in certain ethnic stereotypes.”<sup>340</sup> These statements, said the district court, “combined with . . . other statements . . . relating to Dr. Zhao’s national origin and also that Dr. Batuman may have imposed work requirements and expectations that

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335. 472 F. Supp. 2d 289, 295 (E.D.N.Y. 2007).

336. *Id.* at 308.

337. *Id.* at 302.

338. *Id.* at 302–03, 308–09.

339. *Id.* at 309.

340. *Id.*

would not have been imposed on a non-Chinese employee,” furnished a basis in fact for the conclusion at which a reasonable jury could arrive—that Zhao had been the victim of national-origin discrimination.<sup>341</sup>

The district court observed that both the circuit in which it was situated—the Second Circuit—and the Supreme Court had both held that “decisions resulting from ‘stereotyped’ impressions or assumptions about the characteristics or abilities of women violate Title VII.”<sup>342</sup> The court noted: “These same principles undoubtedly apply with equal force to racial and ethnic stereotyping,” even in a case where “[t]he stereotyping involved positive attributes that could have initially favored a plaintiff at the time of hiring.”<sup>343</sup> Indeed, the district court found:

If an employer has crossed the line into making employment decisions based on ethnic stereotyping rather than on the merits, one could easily see how a stereotype that may benefit an employee on one day could result in an adverse employment action on another day. This type of stereotyping in employment decisions, if proven, is precisely the type of evil that Title VII is designed to prevent . . . .<sup>344</sup>

Thus, the fact that Dr. Batuman drew upon so-called positive stereotyping of Chinese people as hardworking engendered an adverse effect when Zhao fell short of the unrealistically high expectations that Dr. Batuman set for her. Ultimately, the court held:

If it is demonstrated that an employer is making any employment decisions based upon these impermissible stereotypes and an employee subsequently suffers an adverse employment action that potentially implicates such stereotypes, a jury may reasonably infer that the adverse employment action resulted from the impermissible stereotyping, as opposed to the proffered non-discriminatory reason for the action.<sup>345</sup>

While this case illustrates the notion that a person can be considered “not enough like” her class and made to suffer for it, the assumptions in this case were explicitly stated.

Again, this case demonstrates that there are multiple questions and issues bound up in the larger question of whether a stereotype—once identified as such—actually operated to motivate a change to the terms

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341. *Id.*

342. *Id.*

343. *Id.* at 310.

344. *Id.*

345. *Id.*

or conditions of a plaintiff's employment, thus rendering the plaintiff discriminated against on the basis of her protected class status. Among the questions that courts have weighed or should weigh while addressing this larger question are whether the remark was made by a decision-maker or one to whom no authority was conferred, whether the remark was made in ample temporal proximity to the decision, and whether the remark was made in reference to the employment decision at issue. These questions will be briefly addressed here, but they turn upon considerations that differ substantially from those that surround the notion of stereotyping.<sup>346</sup>

### 1. Was the Remark Made by a Decision-Maker?

The question of who uttered the allegedly discriminatory remark is and should be important to courts trying to ascertain whether an adverse employment action was motivated by discrimination.<sup>347</sup> In a 2009 district court case, the plaintiff's supervisor commented that "[w]omen are good for only one thing and that is sex" and that "he wanted to get rid of two older employees because they were 'too old to do their jobs well anymore.'"<sup>348</sup> The court judged the case to be "indistinguishable" from *Hopkins*:

Like the Policy Board, the decision makers here, while unbiased themselves, took into account factors allegedly tainted by sexism in making an adverse employment decision. The court, of course, recognizes that the incident leading to Lanahan's termination was investigated and acted upon by unbiased decision makers. However, the court cannot ignore evidence that the decision makers also implicitly relied on Boyd's disciplinary actions in deciding to terminate Lanahan.<sup>349</sup>

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346. These questions will be the central subject of a future article.

347. Thus, the court considered whether the decision-makers made the remark. Courts have used the "cat's paw" theory to "aid[] them in determining when an employer should be liable for an adverse employment decision that may have been 'tainted by a biased subordinate employee.'" Sara Eber, Comment, *How Much Power Should Be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 146 (2008) (quoting Angelo J. Genova & Francis J. Vernoia, *Litigating Employment Discrimination Claims 2007*, in LITIGATION, at 9, 20–21 (PLI Litig. & Admin. Practice, Course Handbook Series No. 10836, 2007)); cf. Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1163 n.211 (2008) ("The courts have even adopted the cat's paw theory in circumstances where a subordinate or peer-level employee expresses bias that influences the ultimate decision-maker.").

348. *Lanahan v. S. Nev. Health Dist.*, No. 2:06CV-01176-LRH-LRL, 2009 WL 395794, at \*2 (D. Nev. Feb. 17, 2009).

349. *Id.* at \*7.



2. Was the Remark Made in Ample Temporal Proximity to the Decision?

Numerous courts have evaluated the length of time that elapsed between the comment made and the adverse employment action at issue to determine whether the action was motivated by discriminatory intent evinced by the comment. The range of elapsed times contemplated, however, has varied from court to court.<sup>350</sup>

3. Was the Remark Made in Reference to the Employment Decision at Issue?

All too often, courts foreclose a plaintiff's case by granting summary judgment to a defendant when the plaintiff proffers a stereotyped comment indicative of a discriminatory mindset but the comment was not specifically made in reference to the particular adverse decision at issue.

In *Boyd v. State Farm Insurance Cos.*, the plaintiff claimed that his employer failed to promote him based on his race.<sup>351</sup> The employer relied on a performance evaluation to justify its decision not to promote the plaintiff, and the evaluation had been prepared by the plaintiff's supervisor, who, evidence showed, called the plaintiff "Buckwheat" and a "Porch Monkey."<sup>352</sup> However, the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant, dismissing these comments as stray remarks without a "causal connection" to the specific failure to promote.<sup>353</sup>

Indeed, several courts have expressed that "when assessing the ultimate issue of intentional discrimination, the court may properly disregard any stray remarks made by the decisionmaker but not causally related to the decisionmaking process."<sup>354</sup> Such disregard often results in

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350. Compare *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir. 2000) (noting "a long time period between a remark and an employment action can defeat the inference of a 'causal nexus between the remark and the decision to discharge'" but holding that a three-to-four-month period of time did not sever the nexus between the intent shown and the adverse action at issue), with *Geier v. Medtronic Inc.*, 99 F.3d 238, 242 (7th Cir. 1996) (not weighing evidence of discriminatory intent that occurred a year before the adverse action).

351. 158 F.3d 326, 328 (5th Cir. 1998).

352. *Id.* at 329–30.

353. *Id.* at 330.

354. *Engstrand v. Pioneer Hi-Bred Int'l, Inc.*, 946 F. Supp. 1390, 1399 (S.D. Iowa 1996); see also *Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App'x 45, 47 (1st Cir. 2010) (noting that probativeness of stray remarks "is circumscribed if they were not related to the employment decision in question"

a grant of summary judgment that precludes the question of discrimination—the ultimate question—from getting before a trier.

## VI. CONCLUSION

The cases of *Sassaman* and *Lautermilch*, both discussed very early on in this Article,<sup>355</sup> are perfectly illustrative of the confusion in the law about when an alleged “stereotyped” comment suffices as evidence that can buttress a discrimination claim. Both cases involved men, a class that people do not traditionally associate with warranting protection under Title VII or with utilizing the statute to vindicate rights. Both cases also involved verbal expressions that reflected certain beliefs, but the extent to which those beliefs about an individual are more broadly moored in class-based animus or an attitude that could foment class-based disparate treatment is more subject to interpretation. That different federal judges came to radically different conclusions in the course of evaluating each case illustrates that reasonable minds can differ on such issues. The relationship of *Price Waterhouse v. Hopkins* to a proper construction of the meaning of comments in each case and their possible legal significance is, at best, unclear and tenuous.

The fact remains, however, that class-based stereotyping and animus remain in the modern workplace. These attitudes are too often belied by the careful phrasing and censoring in which so many engage to comply with the prohibitions against discrimination set forth by the law and companies’ policies. If a plaintiff is fortunate enough to have evidence of a so-called stereotyped comment, a court’s dismissing it too readily as a slip of the tongue or as something that *as a matter of law* could not be construed as evincing discrimination, thwarts the goals of federal antidiscrimination law.

Several comments on the ABA’s website in response to the article about the alienation and stereotyping of female attorneys of color—foremost among them, “Why turn the fact [that] the 75% of minority females are quitters [sic] into a race issue”<sup>356</sup>—epitomize the dangerous mindset that illustrates why stereotyped comments in the workplace are often far more nefarious than many judges have acknowledged and why more, not less, vigilance at the summary judgment stage of litigation on issues of discriminatory intent is needed.<sup>357</sup> Many of the comments

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(quoting *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001)).

355. See *supra* Part II.A–B.

356. Larry, Comment to Weiss, *supra* note 163 (July 22, 2009 2:05 PM).

357. Weiss, *supra* note 163.

evinced a refusal to accept that all employees do not navigate the professional world on an equal footing at the outset—“I don’t give a damn what color skin you are. It’s 2009. Either give me 2,400 in billables or go work at McDonalds”<sup>358</sup>—or a resigned acceptance of a certain amount of discrimination—“if you want to [sic] see real discrimination, [sic] look back 50 years. Nothing today compares; now it’s just about hurt feelings. BFD,” and “‘Asian-American women reported stereotypes about being subservient or willing to work nonstop.’ Isn’t this expected from every attorney!? Talk about over sensitive.”<sup>359</sup> Others, however, try to make the point that this is not at all the case:

Big law is a frat house for the good old white boys . . . where you’re the first person of color that many of these attorneys have dealt with other than their nanny or maid. They all assume that you were only hired as a diversity charity case as no person of color could ever be as qualified, if not more qualified as a white person.<sup>360</sup>

In order to combat stereotyping in decision-makers’ thoughts and actions properly, however, courts must consider how easily decision-makers can mask or mute discriminatory stereotypes that seep into their thoughts or motives. Decades of needless confusion surround the issue of stereotyping, attributable in large part to courts’ overreliance on a single case whose unique facts obscured the rationales for guarding against stereotyping in the first place. The quest for an interpretation, often bereft of a context, and overreliance on *Hopkins* without resort to the true reasons that stereotyped comments and beliefs are suspect in the context of Title VII have convinced too many judges that summary judgment is appropriate when state of mind or intent is legitimately placed at issue by so-called “stray” comments.

Discrimination, like any other state of mind, is elusive, nuanced, and extremely difficult to prove without a smoking gun. The comments posted on the ABA website highlight the discrimination female attorneys of color face and make it clear that race and sex-based discrimination is alive and well in professional America.

To the extent that stereotyped comments belie deep-seated animus harbored on any level of consciousness, it is more important than ever that that rare bits of evidence be given consideration by a trier of fact. In response to some of the more offensive comments on the website, one

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358. Larry, Comment to Weiss, *supra* note 163 (July 22, 2009 2:05 PM).

359. Hadley v. Baxendale, Comment to Weiss, *supra* note 163 (July 24, 2009 8:30 AM).

360. Esq., Comment to Weiss, *supra* note 163 (July 23, 2009 3:25 PM).

(presumably) female attorney of color shot back: “Try walking in my heels for about 5 years at a law office—after you have risen above all the other negative stereotypes in the general public—and you’ll know what it feels like.”<sup>361</sup> Inasmuch as the inability to empathize with others differently situated, to interpret words as the speaker intended them without filtering them through one’s own presumptions and beliefs, and to accord proper weight to the roots and shadows of bias that may or may not be fully expressed permeates our society, cases involving stereotyped comments must be viewed with an eye toward the real reasons why stereotypes in the workplace are suspect and the manifold ways in which they engender disparate treatment. If courts cannot do this adequately, they will prematurely foreclose plaintiffs’ cases at the summary judgment stage and systemically harm employment discrimination plaintiffs.

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361. Native New Yorker, Comment to Weiss, *supra* note 163 (July 22, 2009 12:01 PM).