# Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law

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Mike Ueda, a graduating MBA with a concentration in marketing, and whose grandparents happened to come from Japan, sends his resume to a well-known advertising firm and subsequently interviews on campus with one of the firm's account executives. The members of the firm recruiting committee, which includes no Asians or women, review Mike's resume and the interviewer's notes and decide not to grant him further interviews. One of the firm's executives, who never met Mike, writes that Mike seems "too reticent" and "too rigid" to survive in the aggressive, backslapping world of advertising.[1] Mike sues the employer for employment discrimination. Mike's attorneys discover before trial that the same executive had also described three women applicants, also whom he had never met, as "too reticent" and "too rigid." Mike's attorneys seek to introduce at trial the comments about the women to show that the hiring process permitted distortion of applicants' qualifications, and that Mike's qualifications had been distorted because of his grandparents' birthplace. The firm seeks to exclude the comments about the women, arguing that any purported discrimination because of gender has nothing to do with discrimination against Mike because of his race or national origin.

A prominent Los Angeles law firm considers electing Jean Siegel, who happens to be a woman, to partnership. The 142 partners, spread out over six cities, admit associates to the partnership by consensus. All partners may contribute evaluations or impressions of any associates, like Jean, whom the partners may elect to partnership. Jean has brought in more revenue to

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1. For an example of stereotyping Asians as reticent, see Woodbury County v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 165-67 (Iowa 1983) (reticence during job interview given as one of three reasons for not hiring Chinese-American woman).

the firm than any other associate up for partnership that year, and has won election to positions in several civic organizations, including the presidency of the local chapter of the National Organization for Women. Attorneys who have worked with Jean rave about her courtroom skills, and management committee members mention the money she has made for the partnership. But a number of attorneys, many of whom have never worked with her, mention that they have heard that she can be too aggressive. In fact, one top partner, a former congressman, tells the managing partner that "Jean is just too bitchy." Eventually, the managing partner tells Jean that she will not be made a partner and that she cannot remain with the firm because of her "people problems." He advises her to try to "walk more feminine, talk more feminine, and dress more feminine" to get ahead elsewhere.[2] "To put it bluntly," the managing partner says, "if you're not a dyke, you don't need to act like one." Jean sues the firm for employment discrimination. In preparing her case for trial, Jean finds out that a black associate, who was also asked to leave, had been described as "too uppity"[3] by the former congressman and was told by the managing partner to "tone down" if he expected to make it as a corporate attorney. A different partner also described another associate, who happened to be Jewish, as "too pushy" without ever having met that associate. Jean tries to introduce these comments about the black associate and the Jewish associate at trial to show that the firm treated attorneys who were not white Anglo-Saxon Protestants ("WASPs") differently from attorneys who happened to be WASPs. The firm moves to exclude the evidence of racial and religious discrimination as irrelevant to the suit it characterizes as one alleging gender discrimination.

Liz, who happens not to be married, works as a convention coordinator for a leading hotel in downtown Boston. The hotel owner comes from a prominent Boston family and is active in a number of organizations that describe themselves as promoting "traditional family values." The hotel owner receives an anonymous note that Liz has been "getting around" all over Boston. The manager fires her for not representing the kind of traditional values promoted by the hotel.[4] Liz sues, alleging employment discrimination. She contends that the hotel owner's notions of traditional values actually resulted in women, but not men, being fired for having nonmarital sex. She discovers that the owner fired one man after hearing that he had a male lover. Liz seeks to introduce the man's firing at trial as

2. A partner in an accounting firm gave a woman this exact advice in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) (plurality opinion), discussed at notes 105-114 *infra* and accompanying text.

3. *See, e.g.*, Taylor v. Jones, 653 F. 2d 1193, 1199 (8th Cir. 1981) (finding of racial harassment supported by evidence that black employee was called "uppity"); Oaks v. City of Fairhope, 515 F. Supp. 1004, 1018 n.8 (S.D. Ala. 1981) (black woman referred to as "uppity woman" and a "bitch").

4. For examples of employment decisions based on "immoral" conduct, see Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983) (candidate's sexual activity played major role in decision against hiring), *cert. denied*, 469 U.S. 979 (1984); Meleen v. Hazelden Found., 740 F. Supp. 687 (D. Minn. 1990) (upholding dismissal of psychotherapist for violating policy against dating former clients); Karp v. The Fair Store, 709 F. Supp. 737 (E.D. Tex. 1988) (company policy prohibiting immoral conduct used to justify termination of company executive).

evidence that the "values" policy was applied inconsistently, treating sex outside marriage as permissible for straight men, but impermissible for women or gay men. The hotel manager objects to admission of the evidence on the grounds that discrimination against gays is a separate issue from that raised by Liz's allegations, and because current interpretations of Title VII distinguish discrimination based on sexual orientation from discrimination based on gender, prohibiting only the latter.[5]

Backstreets, a bar, advertises for a bouncer. The bouncer does heavy lifting in the back and comes up front only to assist the regular doorman in evicting unruly patrons. Steve, a forty-five-year-old former policeman and state champion kickboxer, goes to Backstreets and talks to the manager about the job. The manager comments on Steve's thinning gray hair and asks about his age. Before Steve can describe his experience, the manager says he thinks Steve couldn't handle the job. Steve sues for employment discrimination on the basis of age.[6] During one of his daily two-hour workouts, he learns that Mary, a judo instructor and part-time alligator wrestler, also was rejected for the job after the manager said she couldn't handle it. Steve seeks to introduce Mary's testimony to show that Backstreets did not hire him because the manager relied on stereotypical notions of the kind of people strong enough to throw others out of a bar. Backstreets moves to exclude Mary's testimony, arguing that gender discrimination can never be probative of age discrimination.

## I. INTRODUCTION: GENERALIZED AND ATOMIZED DISCRIMINATION

Each example above illustrates the clash between two fundamentally different understandings of discrimination—what I shall call "atomized" and "generalized" discrimination. The examples suggest plainly how these two theories affect what evidence of discriminatory motivation a judge will admit or any jury will consider in a given trial. Apart from particular outcomes in specific trials, this note suggests that greater attention to generalized discrimination will ease the entire project of eradicating discrimination so that employers will judge individuals from different groups consistently as individuals, and not because they happen to be members of some group.[7]

5. Discrimination on the basis of sexual orientation has been held not to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982). *E.g.*, DeSantis v. Pacific Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (Title VII's prohibition of sex discrimination does not reach discrimination based on sexual orientation); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978) (Title VII does not protect applicant denied job because he appeared too effeminate). *But see Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1581 (1989) (arguing that properly construed, Title VII should reach discrimination against gays and lesbians because such discrimination, penalizing "individuals who do not conform to stereotypical ideas about the way men and women should behave," is "precisely the sort of gender-specific discrimination that title VII was designed to eradicate").

6. *Cf.* EEOC v. Spokane Concrete Prods., 534 F. Supp. 518 (E.D. Wash. 1982) (employer rejected female applicant for truckdriver postion based on "eyeball test" of strength).

7. This idea is sometimes called the merit principle. *See, e.g., Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2037 & n.10 (1987) (student author) ("our society professes a commitment to

### A. *The Distinctions Between Atomized and Generalized Discrimination*

Different versions of both atomized and generalized discrimination exist, but any version of either will share certain similarities. Atomized and generalized discrimination begin from two different perspectives in understanding discrimination. Theories of atomized discrimination begin by identifying the kind of discrimination with the ways in which different *victims* might describe themselves; theories of generalized discrimination begin instead by probing how *perpetrators* of discrimination viewed different victims.[8] In the bouncer example above, a version of atomized discrimination would begin by identifying Steve as an older man and Mary as a woman and labeling one decision as age discrimination and the other as sex discrimination; generalized discrimination would suggest that both Steve and Mary suffered because the employer thought that only young men are strong enough to be bouncers. Generalized discrimination theories would call this discrimination in favor of young men or discrimination by stereotyping.

Theories of atomized discrimination, then, presuppose that people discriminate against those with a particular set of traits associated with some fairly discrete group, and that people might discriminate differently with regard to individuals of, say, different race than they would with regard to individuals with differences in other traits, such as gender, national origin, or sexual orientation. I call such theories of discrimination atomi*zed* to emphasize the active choice of the theorist in defining the boundaries of the victimized groups. Like atoms of a molecule, different instances of atomized discrimination may also be part of a larger and intrinsically related system of discrimination.

Theories of generalized discrimination, in contrast, presuppose that discrimination occurs when the perpetrator favors members of a preferred group—often a group including the discriminator, and often a traditionally advantaged group, like Protestant straight (heterosexual) males of Northern European origin. Sometimes a discriminator may favor the preferred group consciously. A common means of generalized discrimination—discrimina-

judge people by their inner worth"). I prefer to use the term consistency since merit presupposes that the basis for decisions is somehow ultimately a good end, such as individual intelligence, and that the means of assessment, such as test scores or grades, are satisfactory proxies. I am persuaded, however, that merit is a much more complicated matter in both respects. I genuinely do not know whether it makes sense for persons to be rewarded according to, say, intelligence, or whether any given means, say test scores, is the appropriate one to judge that merit. *See* Ronald Dworkin, *Why Bakke Has No Case*, NEW YORK REVIEW OF BOOKS, Nov. 10, 1977, at 11.

8. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-54 (1978) (contrasting "victim perspective" that focuses on "actual social existence as a member of a perpetual underclass" with the "perpetrator perspective" that is usually followed by the Court and which is indifferent to the victim). Freeman criticizes the Court for its fixation on the perpetrator perspective in fashioning the intentional discrimination requirement. *Id.* at 1053-57; *see also* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 71-74 (1987) (emphasizing the importance of recognizing the perspective of those categorized as "different" by the legal system). This note, in contrast, criticizes the habit of paying excessive attention to the peculiar characteristics of particular victims in analyzing the intent of the alleged discriminator, rather than criticizing doctrines such as the intent requirement.

tion by stereotyping[9]—may be perpetrated by individuals who are not fully conscious of their favoritism, but nonetheless favor a preferred group by evaluating individuals outside the preferred group unfairly. Stereotyping may involve evaluation of individuals in light of characteristics that the evaluator associates with a particular group. For example, employers may think only white males are vocal enough in competitive business, and thus assume that Mike and some women are "too reticent" without ever evaluating them as individuals. Backstreets may think that only young males are strong enough to be bouncers, and presume that Mary and the older-looking Steve are unfit without ever considering their qualifications as accomplished athletes. Stereotyping may also involve notions of the "proper" behavior for members of those outside the preferred group. An employer who believes that only white Protestant males may properly act assertively will find assertiveness inappropriate in non-whites, non-Protestants, and females. Such an employer might label blacks "uppity," Jews "pushy," and women "bitchy" if they behave assertively. Similarly, sex outside marriage may be common, but Liz alleges that her employer finds this acceptable only for straight males.

Saying that greater attention to generalized discrimination will help to eradicate discrimination does not deny the existence of discrimination against particular victims, but traditional atoms of discrimination—such as anti-black, anti-Latino, and sexist biases—deserve the kind of skepticism they have recently attracted. Recent writings have powerfully shattered such atoms by suggesting that discrimination may sometimes be directed differently against black men and black women,[10] or assimilated and unassimilated Latinos,[11] or light-skinned and dark-skinned blacks.[12] Courts

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9. *See* notes 102-104 *infra* and accompanying text.

10. *See* Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1032-35 (5th Cir. 1980) ("discrimination against black females can exist even in the absence of discrimination against black men or white women"); Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986) (explicitly adopting *Jeffries* in upholding black females as a subclass of women for Title VII purposes under a "sex plus" theory of discrimination), *aff'd*, 834 F.2d 697 (8th Cir. 1987); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984); Carter v. Dialysis Clinic, 28 Fair Empl. Prac. Cas. (BNA) 268, 269 (N.D. Ga. 1981) (denying motion to dismiss claim of "race and sex discrimination"). *But see* Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 145 (E.D. Mo. 1976) (speaking of "Pandora's box" of compound discrimination claims), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 55 (8th Cir. 1977). Courts' analyses of the discrimination claims made by black women have received a wave of criticism. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. L.F. 139, 159; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 34-35 (1989).

11. Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985) (student author); *cf.* James P. Scanlan, *The Bottom Line: Limitation to the Rule of* Griggs v. Duke Power Co., 18 U. MICH. J.L. REF. 705, 731 (1986) (noting that a "bottom line" approach to discrimination that merely looked at the total percentage of any Latinos as would "permit persons to be disadvantaged by certain selection practices precisely in proportion to (it might be termed) how Hispanic they happen to be").

12. Walker v. Secretary of Treasury, 713 F. Supp. 403 (N.D. Ga. 1988) (allowing light-skinned black to state claim against dark-skinned black); *cf.* Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214, 1218 (5th Cir. 1987) (plaintiff's "assertion that he is East Indian is sufficient to put him

themselves have split traditional atoms of national origin based on existing nation-states into subatoms reflecting how discriminators view victims, such as Gypsies,[13] Cajuns,[14] and Serbians.[15] The shattering of these atoms may be appropriate in particular cases where discrimination is directed against such subatomized groups. There is no need to choose a single theory of generalized or atomized discrimination as *the* appropriate description of discriminatory intent for every case. Discrimination may be directed toward members of a more particularized group, members of a certain race, for example, and may also be directed toward members of some more general group, such as those who are "different."[16] As we question the attention given to traditional atomized groups, though, we might also look not just into the atom but beyond it, as generalized discrimination does. Though different in other respects, these atomized and subatomized groups may be products of general phenomena that plague individuals from many, or all, of these groups. Individual members of particular atomized or subatomized groups might simultaneously be members of a single group of those outside certain preferred groups. Four individuals may all be non-WASPs, though one is black, another Korean, another Jewish, and another Native American.

Despite the recent attention given to subatomized groups in legal discourse, commentators (and much of the public at large, for that matter) have neglected generalized discrimination. Much of this inattention to generalized discrimination occurs without many of us noticing. Far from consciously choosing one understanding of discrimination, many of us slip into the habit of viewing discrimination as atomized, partly because our legal system teaches and preserves the notion of discrimination as atomized. Courts often apply antidiscrimination statutes that read in general terms to

within the statute's protection"), *cert. denied,* 484 U.S. 1010 (1988). *But cf.* Ali v. National Bank of Pakistan, 508 F. Supp. 611, 612 (S.D.N.Y. 1981) (rejecting national origin claim based on discrimination against lighter-skinned Pakistanis by darker-skinned Pakistanis because of lack of expert testimony or citation to treatises on the different treatment of light-skinned Pakistanis). For historical and sociological distinctions between light- and dark-skinned blacks, see GUNNAR MYRDAL, AN AMERICAN DILEMMA 697 (1962); PAUL R. SPICKARD, MIXED BLOOD: INTERMARRIAGE AND ETHNIC IDENTITY IN TWENTIETH-CENTURY AMERICA 248 (1989); *School Daze* (Forty Acres and a Mule Filmmakers 1988) (portraying differences based on skin color at an American college); Ozzie L. Edwards, *Skin Color as a Variable in Racial Attitudes of Black Urbanites,* 3 J. BLACK STUD. 473, 477 (1973); Thomas Sowell, *Three Black Histories,* in ESSAYS AND DATA ON AMERICAN ETHNIC GROUPS 8-9 (T. Sowell ed. 1978); *cf.* Scanlan, *supra* note 11, at 726 (arguing that accepting the "bottom line" defense to discrimination charges, which would carry a conclusive presumption that a company did not discriminate against members of a group if that group was adequately represented in the company, would allow employers to exclude darker-skinned blacks, who traditionally have had lower socioeconomic status).

13. Janko v. Illinois State Toll Highway Auth., 704 F. Supp. 1531 (N.D. Ill. 1989).

14. Roach v. Dresser Indus. Valve & Instrument Div., 494 F. Supp. 215 (W.D. La. 1980).

15. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988).

16. A perpetrator of discrimination may treat a person differently because she is a woman, because she is black, or because she is a black woman. *See* Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination,* 55 N.Y.U. L. REV. 793, 797 (1980) (discrimination based on a single characteristic, such as race, can coexist with "compound" discrimination based on two characteristics, such as race and gender).

protect only certain atomized groups.[17] The fourteenth amendment's equal protection clause may speak of the rights of "persons,"[18] but equal protection gets applied differently to different people, depending on whether the Court identifies the victim's group by race or ethnicity, gender, or some other characteristic, such as age.[19] In settling on the kind of scrutiny it applies, the Court explicitly thinks of discrimination as atomized when it recounts how certain groups have suffered a "history of purposeful discrimination,"[20] and overlooks the generalized American, indeed human, history of discrimination against people unlike "us."[21] Similarly, legal scholars examining discrimination have sometimes hinted at generalized notions of discrimination in what amounts to academic dicta, still limiting any discussion of discrimination to a particular atomized group.[22] Law students learn to think in terms of atomized discrimination not just by studying particular cases, or by the organization of these cases in casebooks by atomized

17. *Cf.* Minow, *supra* note 8, at 70 (19th century California authorities labeled Chinese as "Indians" and Mexicans as "whites" to fit them into recognized categories).

18. "No State shall make or enforce any law which shall . . . deny to any *person* within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

19. Classifications based on race receive strict scrutiny, Korematsu v. United States, 323 U.S. 214 (1944); those based on gender receive intermediate scrutiny, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); and classifications based on other characteristics receive rational basis scrutiny (*see, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (applying rational basis scrutiny to age-based classifications)). In contrast to the atomized conception of discrimination implicit in the Court's equal protection jurisprudence, a view of generalized discrimination sometimes seems to animate Justice Stevens's conception of equal protection. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (noting that "[t]here is only one Equal Protection Clause"). *See generally Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987) (student author).

20. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (considering history of purposeful discrimination against women).

21. *See* text accompanying note 34 *infra*.

22. Often scholars presume that different forms of discrimination are not related, at least not for all purposes. *See, e.g.*, Freeman, *supra* note 8, at 1050 n.8 (recognizing that his discussion of racial discrimination may apply to "other" forms of discrimination but noting that the other forms "demand separate scrutiny in their own particular contexts"). Some other scholars, however, assume that their analyses of discrimination against one group applies to other groups not considered in detail. *See, e.g.*, Nadine Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 345 n.3 (1980) ("[D]ata and examples are drawn primarily from the area of sex discrimination. . . . While the case is not made here, the theory proposed is fully applicable to other types of discrimination."); Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 294 n.13 (1982) ("While much of the emphasis in this article is on racial discrimination . . . its analysis is generally applicable to discrimination *on the other grounds enumerated in Title VII as well.*") (emphasis added); Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360 n.8 (noting that the prejudice which affects the "ethnic minorities of color" examined in the article may affect "other out-groups" that are not "pursued in detail, for reasons of space"). Other authors, unable to invoke space limitations, justify limiting their discussion to particular groups with vague claims of the need to avoid complication. In an extensive treatment of intermarriage, including prejudice experienced by those in relationships with people of different ethnic or racial backgrounds, one author explains: "Although [homosexual relationships] . . . seem an increasingly prominent feature of modern life, and although ethnic issues may be relevant to homosexual relationship dynamics, nonetheless, to introduce the homosexual issue would make this book too complicated to write." P. SPICKARD, *supra* note 12, at 383 n.33.

groups,[23] but also by the kinds of courses law schools offer: Feminist Legal Theory, Sexual Orientation and the Law, Latino Status and the Law.[24] Students leaving school to practice antidiscrimination law find treatises and reporters similarly organized, cases grouped largely according to the characteristics of the person bringing suit: how old she is, what race people identify him as, where we think her ancestors came from, or what kind of people we presume he likes to sleep with.[25] If a person goes to a lawyer to get legal help for having been treated unfairly, that lawyer typically will convert instances of generalized discrimination into one of the law's atomized categories. This is not to suggest that American jurisprudence created atomized discrimination, but that our legal system and legal training make it seem natural to think about discrimination as atomized and difficult to think about it in a generalized way,[26] or to organize research to support a more generalized understanding of discrimination.[27]

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23. *E.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW xlviii-l (11th ed. 1985) (discussion of equal protection cases divided into sections on race, alienage, gender, and "other classifications arguably warranting heightened scrutiny").

24. *See, e.g.*, STANFORD UNIVERSITY BULLETIN, SCHOOL OF LAW 1989-1990. Course 380, Gender Discrimination, examines "constitutional and statutory challenges to gender-based discrimination." *Id.* at 31. Course 416, Latino Status and the Law, "explore[s] issues related to the status of Latinos in the context of the sociohistorical processes of the United States" and "foster[s] students' ability to conduct research on the problems of Latinos in contemporary society." *Id.* at 32. The description of Course 394, Sexual Orientation and the Law, explains that "[t]he history and status of lesbian, gay, and bisexual persons in the American legal system bears strong resemblances to, and important distinctions from, the experiences of women, people of color, and religious minorities," but notes that the course explores the law "with emphasis upon the phenomenon of discrimination as it affects sexual minorities, especially gay people." *Id.* at 34. Course 259, "Constitutional Law: Minority Issues," focuses only on racial minorities; it "provide[s] participants with an opportunity to consider in some depth the impact of *racism* on American law and . . . [how] lawyers may best employ their skills and positions to combat *racism*" and examines the "doctrine and legal theory applicable . . . to *racial* issues." *Id.* at 23 (emphasis added).

25. *See, e.g.*, 1 Empl. Prac. Guide (CCH) (1987). The reporter organizes cases according to racial discrimination, age discrimination, sex discrimination, discrimination on the basis of national origin, and handicap discrimination. The listings in the indexes under "discrimination" direct the reader to "see also specific types of discrimination." *Id.* at 102 (Index); *see also* 8B Fair Empl. Prac. Cas. (BNA) § 499, at 117 (discrimination heading in the index refers to the following atomized categories: age, handicap, health status, national origin, pregnancy, race, and sex); *cf.* Randall Samborn, *Many Americans Find Bias At Work*, Nat'l L.J., July 16, 1990, at 1 (distinguishing between the 25% of Americans who felt discriminated against because of "racial/ethnic/religious bias," "age discrimination," "handicapped [sic] bias" and those who felt victimized by "*discrimination that did not fit any of those classifications*") (emphasis added). Courts confronted by generalized discrimination dissect the various policies and practices like early empiricists pulling the wings from flies. *See, e.g.*, Kelly v. Metro-North Commuter R.R., 51 Fair Empl. Prac. Cas. (BNA) 1136 (S.D.N.Y. 1984) (dividing claims based on age, religious, and gender discrimination without noting any relationship between the charges).

26. The way we think about the world may, to some degree, reflect how society subtly teaches us to think about the world. In legal thought, this concept of "hegemony" is often linked with Critical Legal Studies. *See* Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (D. Kairys ed. 1982). In the social sciences, the view is associated with self-styled radicals. *See* STEVEN LUKES, POWER: A RADICAL VIEW 23 (1974) (noticing that people may be so conditioned by society that they cannot even imagine how things might be different).

27. *See* Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (arguing that systems for categorizing cases inhibit creative legal research).

The social sciences provide considerable support for theories of generalized discrimination. Consider psychology first. For some psychologists, the notion of generalized discrimination is almost a truism. "If there's one thing that represents a lawlike statement in social psychology, it's that a person who's prejudiced toward one group is prejudiced toward others."[28] The theory of the authoritarian personality and other psychodynamic theories trace discrimination to the character development of particular persons who redirect their own anger toward those who differ from authority figures.[29] The most important insight of such theories is sometimes taken as a flaw: These theories predict generalized discrimination and cannot readily explain discrimination focused only against certain out-groups.[30] Allport's classic study of prejudice, from the perspective of social learning theory, described much of what I call generalized discrimination by looking to the historic experience of discrimination.[31] Though limited in conclusively establishing the exact kind of generalized discrimination described in this note, empirical research also provides some support for theories of generalized discrimination.[32]

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28. Dr. Howard Ehrlich, National Institute Against Prejudice and Violence, *quoted in* GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, HOMOPHOBIA: DISCRIMINATION BASED ON SEXUAL ORIENTATION § 6.1 (1989).

29. *See* ANDREW BAUM, JEFFREY D. FISHER & JEROME E. SINGER, SOCIAL PSYCHOLOGY 279 (1985); Wolfgang Stroebe & Chester A. Insko, *Stereotype, Prejudice, and Discrimination: Changing Conceptions in Theory and Research,* in STEREOTYPING AND PREJUDICE: CHANGING CONCEPTIONS 17-21 (D. Bar-Tal, C. Graunmann, A. Kruglanki & W. Stroebe eds. 1989).

30. Delgado, Dunn, Brown, Lee & Hubbert, *supra* note 22, at 1377; Stroebe & Insko, *supra* note 29, at 18 ("While it may account for the origin of aggressive energy, it cannot account for the choice of targets.").

31. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 68 (1954) ("One of the facts of which we are most certain is that people who reject one out group will tend to reject other out groups. If a person is anti-Jewish, he is likely to be anti-Catholic, anti-Negro, anti-any out group.").

32. *See, e.g.,* HOWARD J. EHRLICH, THE SOCIAL PSYCHOLOGY OF PREJUDICE 129 (1973); Sam G. McFarland, *Religious Orientation and the Targets of Discrimination,* J. SCI. STUD. OF RELIGION, Sept. 1989, at 324 (identifying a "general tendency to discriminate" on the basis of race, sex, and sexual orientation); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender,* 1988 WIS. L. REV. 187, 221 ("Not surprisingly, negative attitudes toward lesbian and gay people correlate strongly with traditional, sexist concepts about the appropriate role of men and women."). Ehrlich earlier criticized some studies for overestimating the extent of the correlation, caused in part by use of a "forced response format" in which persons were asked to state their attitudes instead of a format in which persons listed the groups they viewed negatively. H. EHRLICH, *supra,* at 324. The forced response format led to a higher level of prejudicial attitudes, and thus, higher correlations. Criticism of the forced response format now seems rather misguided since much racism and other prejudices are "aversive," in that people do not feel comfortable articulating the prejudices that their behaviors reveal. *See generally* JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970). Most attitudinal surveys in the social psychology literature provide only limited explanations of generalized discrimination. First, the literature tests prejudicial attitudes rather than discriminatory acts, and some literature suggests that prejudicial attitudes imperfectly predict the extent of discriminatory acts. *See, e.g.,* A. BAUM, J. FISHER & J. SINGER, *supra* note 29, at 84. Second, the studies test articulated prejudicial attitudes which may not reveal semiconscious stereotyping, *see* notes 111-114 *infra* and accompanying text. Third, differences in the level of articulated prejudice may inordinately reflect differing degrees of social acceptability in articulating certain kinds of prejudice. *Cf.* Daniel Goleman, *Homophobia: Scientists Find Clues To Its Roots,* N.Y. Times, July 10, 1990, at C11, col. 2 (discrimination against women and gay men seemingly more socially acceptable than discrimination against ethnic and racial minorities). Fourth, by testing generalized attitudes rather than stereotypes of particular abilities, the empirical literature does not test the argument of this note that relevance

Historical literature is less explicit, but might easily fit a theory of generalized discrimination. A conscientious historian might have considerable trouble confining the "history of purposeful discrimination" to particular groups. The nativism and xenophobia embodied in slogans like "one hundred percent Americanism" and distrust of "hyphenated Americans"[33] suggests a generalized discrimination against all those who miss the hundred percent, with no regard to what comes before the hyphen, be it Italian, Jewish, or some other grouping. The modern Ku Klux Klan began not from prejudice against some atomized group, but from the search for any outsider to represent the "alien menace" that threatened the rural South.[34]

### B. *A Specific Legal Application of Generalized Discrimination: Admission of Evidence of Discriminatory Motivation Under Federal Employment Law*

Because the atomized notion of discrimination pervades much of the legal discourse on discrimination, in courts, the academy, and the United States in general, relatively few cases have alleged generalized discrimination explicitly. Some federal courts already consider evidence of the treatment of members of one group, such as blacks, as evidence of intent to discriminate against a member of another group, such as women.[35] Others have taken weak equal employment opportunity enforcement for all protected groups as evidence of discriminatory motivation against members of particular atomized groups.[36] In the context of labor unions, courts have sometimes recog-

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turns on the exact nature of the story of discriminatory motivation. *See* notes 59-60 *infra* and accompanying text.

33. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925 (1963); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

34. The birth of the modern Klan exemplifies the history of generalized discrimination. The myth of the black beast rapist and the institution of lynching are most often associated with atomized discrimination against blacks, but were redirected against Jews in the infamous Leo Frank case that spawned the modern Klan. In that case, agitation over the murder and reputed rape of a young, white Southern woman started a familiar search for a rapist from "outside" the community. That ordinarily would have meant a "black beast rapist," but anger focused instead on a local factory manager, who happened to be Jewish. "In the Frank case," Southern historian Joel Williamson observed, "white Atlanta, white Georgia, and the white South at large were stoutly and steadfastly determined not to see a Black beast rapist when they had one right before their eyes . . . . Frank stood for the alien menace to the South." JOEL WILLIAMSON, THE CRUCIBLE OF RACE 471 (1984). The group that lynched Frank, calling itself the Knights of Mary Phagan, after the murdered girl, later went on to form a branch of the Ku Klux Klan. *Id.* at 472. On the relatedness of violence directed against blacks and Jews in the context of the Frank case, see ELLY BULKIN, MINNIE BRUCE PRATT & BARBARA SMITH, YOURS IN STRUGGLE 117 (1984). On the symbolism of the Frank case, see Clark J. Freshman, *By the Neck Until Dead,* AM. POL., Jan. 1988, at 29; Clark J. Freshman, Beyond Pontius Pilate and Judge Lynch: The Pardoning Power in Theory and Practice in the Leo Frank Case (1986) (unpublished thesis) (on file with the *Stanford Law Review*).

35. *See* notes 93-101 *infra* and accompanying text.

36. In Tyson v. Levinson, 52 Empl. Prac. Dec. (CCH) ¶ 39,668, at 61,233 (D.D.C. 1990), Judge Gesell inferred discriminatory motivation from, *inter alia,* the employer's neglect of its Equal Employment Opportunity function generally, not just in relation to racial discrimination. "Vice Chairman Johnson testified that 'there has been a perception at the Board for quite some time that the EEO function has not been given sufficient importance in the hierarchy at the Board.' The Court considers this a polite understatement." *Id.* at 61,237; *see also* Gonzales v. Police Dept., 901 F.2d 758, 761 (9th Cir. 1990); Taylor v. Teletype Corp., 648 F.2d 1129, 1135 n.14 (8th Cir. 1981), *cert.*

nized how different types of atomized discrimination operate in one way to divide employees and interfere with collective bargaining.[37]

This note argues that trial courts[38] can and should admit more evidence of generalized discrimination. For trial courts to do so is entirely consistent with existing Supreme Court doctrine. At its deepest level, the version of generalized discrimination analyzed here shares in the Court's understanding of antidiscrimination law as promoting the goal that people be treated as individuals and not merely as members of particular groups.[39] Evidence of generalized discrimination will become increasingly relevant as more allegations that an employment decision process was tainted by "stereotyping" are made, since the Supreme Court recognized the sufficiency of such a claim in *Price Waterhouse v. Hopkins*.[40] Moreover, evidence of generalized discrimination favors neither plaintiffs nor defendants, and can be useful to the cases

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*denied*, 454 U.S. 969 (1981). Courts differ on whether departure from an affirmative action plan is itself a violation of fair employment laws. *Compare* Morman v. John Hancock Mut. Life Ins. Co., 672 F. Supp. 993, 995 (E.D. Mich. 1987) (departure can be "sword to challenge . . . propriety of . . . treatment") *and* Fang-Hui Liao v. Dean, 658 F. Supp. 1554, 1559 (N.D. Ala. 1987) (departure from affirmative action plan is itself a violation of Title VII) *with* Yatvin v. Madison Metro. School Dist., 840 F.2d 412 (7th Cir. 1988) (dictum) (although court found no deviation from affirmative action plan, it hypothesized an evidentiary role in some instances). In a parallel fashion, an affirmative action plan may be probative of lack of discriminatory intent. Coser v. Moore, 739 F.2d 746, 751 (2d Cir. 1984). An affirmative action plan that benefits groups cannot be a bar to liability, EEOC v. Keko Indus., 748 F.2d 1097 (6th Cir. 1984), since the Court construes Title VII as protecting individuals. *See* note 39 *infra* and accompanying text. Whether existing cases that consider affirmative action plans consider treatment of persons from groups other than the plaintiff's is not always entirely clear. In Norris v. City and County of San Francisco, 900 F.2d 1326 (9th Cir. 1990), the court remarked that "[t]he EEO report noted an underrepresentation of women and all minorities, except Asians," *id.* at 1328, but the case does not mention whether its conclusion that departure from an affirmative action plan is "clearly relative evidence, probative of the Department's discriminatory intent" included all minorities. *Id.* at 1331.

37. *Cf.* United Packinghouse, Food and Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1136 (D.C. Cir. 1969) (presence of discrimination against nonwhite workers inhibits collective action of workers against employers), *cert. denied*, 396 U.S. 903 (1969). Similarly, atomized discrimination may prevent all those groups outside the preferred one from combining their resources, or, more modestly, from refraining from acting against each other. *See* notes 131-145 *infra* and accompanying text.

38. Admission of evidence is ordinarily within the discretion of the trial court. 1 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 9, at 658 (P. Tillers ed. 1983).

39. *See* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 709 (1978) (policy of Title VII requires Court to "focus on fairness to individuals"); Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1791 (1989) (plurality opinion). Others have argued that antidiscrimination law should be understood as an attempt to confer benefits on a class and not merely to provide consistent individual treatment. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 313 (1971). This note often refers to the individualistic argument against discrimination, i.e., that discrimination treats people as group members rather than as individuals. One can agree with the idea of generalized discrimination—that discrimination which oppresses people has aspects that reach across the boundaries of seemingly different groups—without agreeing on what precisely those aspects are. *See* text accompanying notes 146-152 *infra*.

40. 109 S. Ct. 1775 (1989) (plurality opinion). The sufficiency of evidence of stereotyping in proving a claim under Title VII was unclear before *Price Waterhouse*. ANDREW J. RUZICHO, LOUIS A. JACOBS & LOUIS M. THRASHER, EMPLOYMENT DISCRIMINATION LITIGATION § 1.19 n.144 (1989). Some defense attorneys have treated the *Price Waterhouse* decision as a new theory of liability that shifts the burden of production to the defendant-employer after the plaintiff has made a prima facie case. William L. Kandel, *Current Developments in Employment Litigation*, 15 EMPLOYEE REL. L.J. 101 (1989).

of both.[41]

Unlike other recent criticisms of antidiscrimination law, this note, in advocating application of a theory of generalized discrimination, does not require modification of the requirement that claimants show that their employers intended to discriminate,[42] and that they would have been hired or promoted absent the discriminatory motivation.[43] Nor does this note require that courts extend standing to sue to persons previously denied protection under various federal employment laws,[44] such as lesbians and gays.[45] This note accepts these understandings and doctrines *arguendo* to show that a version of generalized discrimination can be applied by federal courts to-

41. The choice between atomized and generalized discrimination does not depend on one's sympathies being either for those accused of discrimination or for those who feel victimized by discrimination. Neither generalized nor atomized theories of discrimination necessarily favor defendants or plaintiffs. In some cases, those accused of discrimination may find that a "generalized" approach to discrimination helps their case. A victim may show that some highly particularized group, such as black women, has been treated badly by a certain employer, but the defendant may try to rebut charges of discriminatory intent by showing that she employs many members of other frequently victimized groups, such as black men, white women, Asians, older people, the disabled, or gays. Admittedly, the defendant will find such a strategy of limited use since the Supreme Court has rejected the "bottom line" defense that an individual employee cannot prevail in her own suit when the defendant has acceptably treated other members of her group. *See* Connecticut v. Teal, 457 U.S. 440, 454 (1982); *cf.* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) (employers owe duty of fair treatment to each individual and not to a group). An employer accused of discrimination may offer evidence of minority presence in her workforce to help disprove discriminatory motivation. *Furnco,* 438 U.S. at 580. But "a racially balanced workforce cannot immunize an employer from liability for specific acts of discrimination." *Id.* at 579. *But cf.* Eric Lasker, *The Appearance of Justice and the Bottom Line Defense,* 99 YALE L.J. 865 (1990) (student author) (arguing that the bottom line defense need not be rejected for a "multicomponent employment process" examined under disparate impact analysis).

42. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 (1977) (requiring proof of discriminatory motive). For critiques of the intent requirement, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987) (criticizing intent requirement in the context of constitutional challenges to state conduct based on the equal protection clause); Taub, *supra* note 22, at 418.

43. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1786 (1989) (plurality opinion). For a criticism of the application of the causation requirement in the *Price Waterhouse* context, see *The Supreme Court, 1988 Term—Leading Cases,* 103 HARV. L. REV. 137, 348-50 (1989) (advocating attaching liability wherever there is proof of discriminatory motive); Cheryl A. Pilate, Price Waterhouse v. Hopkins: *A Mixed Outcome for Title VII Mixed-Motive Plaintiffs,* 38 KAN. L. REV 107, 139-40 (1989) (student author) (same). For criticism of the causation requirement pre-*Price Waterhouse,* see Brodin, *supra* note 22, at 293; Taub, *supra* note 22, at 364-65 (requirement of "but for" causation fits the social reality of sexual harassment poorly).

44. *See, e.g., Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance,* 100 HARV. L. REV. 2035 (1987) (student author) (arguing for an extension of antidiscrimination law to physically unattractive persons).

45. It does, however, promote nondiscrimination against all individuals, including those not currently protected, if it is correct in its hypothesis that a generalized theory of discrimination would lead to more accepting work environments and more consistent legal treatment of individuals. *See* text accompanying notes 129-145 *infra.* It may have the coincidental effect, moreover, of providing deterrent protection for those people unprotected under existing statutes. If discrimination against the unprotected can help prove general discrimination, and thus support the claim of a protected victim, then an employer will tend not to discriminate. That is, if an employer knows that discrimination against nonrelatives or gay men will increase the chances that a black will prevail in an employment discrimination claim based on race, she will be less likely to act on her nepotistic or homophobic inclinations, although nonrelatives and gays might remain unable to sue under Title VII for relief.

day. I do suggest in the conclusion that we might want to consider other versions of generalized discrimination arguably more descriptive of the experience of discrimination visited upon members of different groups.[46]

Part II of this note analyzes the doctrine of discriminatory intent under Title VII,[47] distinguishing three stories (or "theories of the case") for establishing discriminatory intent: discrimination for a preferred group (such as white males), discrimination by stereotyping, and discrimination against some particular atomized group (such as blacks). Part III examines the relevance of discrimination against minority groups other than the plaintiff's in cases alleging discrimination for a preferred group. Part IV analyzes the relevance of discrimination against other minorities in cases alleging discrimination by stereotyping. Finally, Part V moves beyond generalized discrimination as analyzed within the context of the current Court doctrine in Parts II-IV.

## II. EVIDENCE AND THEORIES OF DISCRIMINATION

Title VII makes it illegal for an employer to discriminate against an individual because of that individual's race, color, religion, gender, or national origin.[48] The Supreme Court permits a claimant under Title VII to prevail only when she proves that the employer disadvantaged her because of his discriminatory motivation. Proof of discriminatory motivation, frequently inferred from how an employer treated other employees, will often determine the outcome of an employment discrimination suit. What courts allow as proof of intent will shape their ability to identify accurately victims of discrimination. Moreover, accurately identifying the real victims of discrimination is essential to deterring future violations in accordance with Title VII's statutory goal of eradicating discrimination.[49]

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46. I do not mean to preclude the possibility that for some purposes, it might be more helpful to think in terms of atomized discrimination—for understanding and empathizing with particular forms of oppression, for example, or for considering the limits of legal remedies in eradicating discrimination. *See* Freeman, *supra* note 8, at 1050 n.8 (suggesting that gender discrimination might be more "tractable" than racial discrimination). This note addresses instead the use of generalized discrimination in analyzing discriminatory motivation and in facilitating cooperation among oppressed persons previously seen only as members of atomized groups. *See* notes 128-145 *infra* and accompanying text.

47. I use Title VII as a convenient example of employment discrimination law. Title VII provides, in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2(a) (1988). The same analysis should apply to any such statute, although the admissibility analysis may vary slightly with the rules of evidence in any given jurisdiction.

48. *See, e.g.*, note 47 *supra*.

49. *Cf.* University of Pa. v. EEOC, 110 S. Ct. 577, 589 (1990) (in rejecting university's claimed privilege of academic freedom to withhold information on tenure process, Court notes the "overriding and compelling state interest in eradicating invidious discrimination").

### A. *The Intuitions of Proving Discriminatory Motivation by Other Acts of Discrimination*

One common means of proving an intent to discriminate is to compare the employer's treatment of the plaintiff with his treatment of other employees. In *McDonnell Douglas Corp. v. Green*,[50] the Court recognized the relevance of an employer's "general policy and practice with respect to minority employment" to proving discriminatory intent in employment discrimination suits.[51] Although a victim of discrimination must still prove intentional discrimination, the trier of fact may infer such intent from evidence that the employer treated the plaintiff and members of her group differently from members of other groups.[52] This disparate treatment method relies on the plaintiff accurately identifying the group of employees like herself. That relevant group may not always be the atomized group of the plaintiff; instead, where a plaintiff seeks to show generalized discrimination has harmed her, the court should look to the employer's treatment of all those who may have been similarly disadvantaged, including members of "other" atomized groups.

When Ann Hopkins sued Price Waterhouse for employment discrimination, the court admitted the most familiar type of evidence of stereotyping: stereotyping of other members of the plaintiff's atomized group—in this case, other women employed by Price Waterhouse. Hopkins wanted to show that Price Waterhouse denied her promotion because the firm's promotion process failed to evaluate properly candidates who happened to be women. Hopkins introduced stereotypical comments made about her as part of her case. Various partners had called her "macho," asked her to take "a course at charm school," and said that she "overcompensated for being a woman."[53] One partner suggested some criticized her use of profanity because she was a woman. The man who explained to Hopkins the decision to

50. 411 U.S. 792 (1973).

51. *Id.* at 804-05; *see also* note 36 *supra* and accompanying text (use of affirmative action plans and generalized discrimination as evidence of discrimination). Since employers rarely write out their discriminatory practices, the best source of this evidence will be the testimony of other employees who feel they have suffered discrimination. Courts have often admitted this sort of "anecdotal evidence." *See, e.g.*, Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1783 (1989) (plurality opinion); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415-16 (10th Cir. 1987) (testimony of fellow employees should be considered in determining whether plaintiff establishes a hostile work environment claim); Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1423-24 (7th Cir. 1986) (evidence of harassment of black workers other than the plaintiff admissible in showing the employer tolerated racial harassment); Krodel v. Young, 748 F.2d 701, 710-11 (D.C. Cir. 1984) (anecdotal evidence properly admitted to show age discrimination).

52. Plaintiffs may also prove discrimination in an increasingly circumscribed number of cases by showing that some employment practice has a disparate impact on a particular minority group. This note does not consider disparate impact cases because of the recent limitations imposed on such causes of action by the Court in Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), and the statistical problems of proof in such cases. *See* Shoben, *supra* note 16, at 821. The principles of generalized discrimination might inform such cases if Congress revived the disparate impact avenue. *See* Civil Rights Act of 1990, S.2104, 101st Cong., 2d Sess., 136 CONG. REC H9552-55 (1990). Most plaintiffs currently litigate under a disparate treatment theory. BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 594 (2d ed. 1983).

53. *Price Waterhouse*, 109 S. Ct. at 1782 (plurality opinion).

deny her partnership told her to "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[54] To prove discriminatory motivation, Hopkins introduced evidence of discriminatory stereotyping of other women. At trial she showed that another female candidate for partnership was criticized for being too much "one of the boys,"[55] but that a male candidate was praised for being an "aggressive, good old boy."[56] Another rejected woman candidate was described as "curt, brusque and overly aggressive."[57] The Supreme Court concluded that this evidence showed that "other female candidates had been evaluated in sex-based terms."[58]

However correct the trial court may have been in admitting evidence of other victims of discriminatory stereotyping at Price Waterhouse, that court and the advocates before it might also have looked for evidence of generalized discrimination. Admitting evidence of stereotyping of only those victims who happen to be women makes sense if the employer discriminated against persons because they were women. But limiting evidence only to the atomized group of women makes no sense if an employer is motivated by a preference for a group, such as white Protestant males, that excludes not just women, but members of other atomized groups as well. Sometimes we can never know with certainty the real reason someone discriminates any more than we can know the inner mental processes of any wrongdoer. Certainly we cannot know in advance of discovery of all the facts precisely what motivated an employer. Consider an employer who discriminates against a black woman. He might dislike women. He might dislike blacks. He might dislike all black women. He might consciously prefer some other group, or, with some vague awareness, tend to interpret some behavior, like assertiveness, as improper behavior for blacks (or women, or black women).

Whether treatment of other employees is relevant depends on the particular story of intent the plaintiff tells to explain why she believes that her employer discriminated against her.[59] If a black woman argues that her employer treated her differently because of some feeling about blacks, then how he treated white women might tell us little.[60] If instead she argues that her

54. *Id.*

55. Index to Plaintiff's Proposed Findings of Fact at 35, Hopkins v. Price Waterhouse, 618 F. Supp. 1109 (D.D.C. 1985) (No. 84-3040), *aff'd in part, rev'd in part,* 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds and remanded,* 109 S. Ct. 1775 (1989) (plurality opinion) (burden on employer after establishment of direct evidence of discrimination should be to show that same decision would be made absent discriminatory animus, but only by preponderance of the evidence, and not by clear and convincing evidence), *on remand,* 737 F. Supp. 1202 (D.D.C. 1990) (Price Waterhouse ordered to make Hopkins a partner).

56. *Id.* at 36.

57. *Id.* at 35.

58. *Price Waterhouse,* 109 S. Ct. at 1783 (plurality opinion).

59. *See* Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417, 1424 (7th Cir. 1986) ("The probative value of other discriminatory acts depends not only on their relevance to the acts of which the plaintiff complains but also on the nature of the discrimination charged.").

60. In the initial stages of discovery, of course, a victim might not understand the reason for discrimination and might seek evidence consistent with a number of stories. As long as the victim does not have enough facts to know the precise stories of discrimination she will advance, *all* non-

employer preferred those he perceived as white and male, then treatment of any non-males, including white women, would be relevant to her argument.

### B. *The Evidentiary Framework For Admitting Evidence of Other Acts of Discrimination and Three "Stories" of Discriminatory Motivation*

The same principles that govern other civil litigation also govern Title VII cases.[61] Under general evidentiary principles, whoever decides what story accurately describes a case, be it judge or jury,[62] should consider all relevant evidence,[63] giving it, as the Supreme Court has said, "whatever credence it deserves."[64] The Federal Rules of Evidence allow admission of evidence of similar acts, such as the treatment of similar employees in the Title VII context, to establish motive.[65]

Given the nature of discrimination in today's workplace and what the Court currently requires as proof of discrimination,[66] establishing discriminatory intent is practically impossible without relying on evidence of similar acts of discrimination. Rarely will discriminators admit that a person would have been hired or promoted if she or he had been another gender, practiced a different religion, or looked less like a member of some particular ethnic group. Moreover, in large organizations such as Price Waterhouse, the intent behind a decision made by "consensus" or in a "collegial" manner will rarely be rendered at any discrete moment or in any clear statement.[67] Be-

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privileged information about the employer discriminating against *anyone* is discoverable, so long as such information is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b).

61. *Price Waterhouse*, 109 S. Ct. at 1782 (plurality opinion).

62. Since Title VII is an action in equity, claims under it may be decided by a judge alone. Advisory juries may be empaneled at the discretion of the court under FED. R. CIV. P. 39(c). Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972). Title VII actions may be brought in conjunction with other laws that offer legal remedies, and some courts allow juries to determine all issues common to legal and equitable claims. *See, e.g.*, Sisco v. J.S. Alberici Constr. Co., 655 F.2d 146, 150-51 (8th Cir. 1981) (jury to decide factual issues common to claims under both Title VII and 42 U.S.C. § 1981), *cert. denied*, 455 U.S. 976 (1982); Thomas v. Resort Health Related Facility, 539 F. Supp. 630 (E.D.N.Y. 1982) (plaintiff entitled to jury trial on issues relating to legal claims for emotional distress and for backpay under § 1981, even though Title VII ordinarily requires bench trial on backpay).

63. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; *see also* J.H. WIGMORE, *supra* note 38, § 10, at 667 (describing axiom of modern evidence law as "all facts having rational probative value are admissible, unless some specific rule forbids").

64. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 n.3 (1983).

65. FED. R. EVID. 404(b). "Other acts" are most often used to prove intent in criminal cases, but can be used for the same purpose in Title VII and other civil suits. *See, e.g.*, Dial v. Travelers Indem. Co., 780 F.2d 520, 523-24 (5th Cir. 1986) (allowing evidence of source of other fires reported by insurance claimant to prove the likely source of fire at issue in dispute at bar).

66. *See* note 51 *supra* (employers rarely write out motivations).

67. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982); *cf.* Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time For Reality*, 39 BUS. LAW. 1477 (1984), *reprinted in* WILLIAM L. CARY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 492-94 (6th ed. 1988) (describing reality of decisionmaking in large organizations).

cause of this difficulty in proving discrimination, courts have excluded relevant evidence[68] much more reluctantly in discrimination cases than in other contexts.[69]

Those attempting to prove discriminatory intent, then, will often turn to evidence of discrimination against other victims to prove discriminatory motivation. Plaintiffs will tie such circumstantial evidence of discrimination into various stories of the case that point to discriminatory motivation. I here use the term "story" of discrimination, rather than the traditional "theories of the case," to avoid confusion with my use of theories of generalized and atomized discrimination. Evidence of discriminatory treatment of employees other than the plaintiff in Title VII cases will be relevant and ordinarily admitted[70] whenever it makes the plaintiff's story of discrimination more or less likely than if such evidence were not considered.[71]

Attorneys have told at least three different types of stories to connect various pieces of circumstantial evidence in attempting to establish an employer's discriminatory motivation. The three types of stories are: (1) that the employer practices discrimination against a particular group, (2) that he discriminates in favor of a particular group,[72] and (3) that he discriminates by stereotyping. Claims of discrimination by stereotyping have rarely been asserted, probably because before *Price Waterhouse* lawyers doubted courts would accept such claims.[73] These three types are merely exemplary and are

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68. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

69. Not all evidence that disadvantages a party leads to "undue" prejudice. In rejecting the claim that letting the plaintiff introduce evidence that the employer used "nigger" would violate Federal Rule of Evidence 403, the court in Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130 (4th Cir. 1988), explained the distinction between disadvantaging a defendant and being prejudicial.

> All relevant evidence is "prejudicial" in the sense that it may prejudice the party against whom it is admitted. Rule 403, however, is concerned only with "unfair" prejudice. That is, the possibility that the evidence will excite the jury to make a decision on the basis of a factor unrelated to the issues properly before it.

*Id.* at 1134. Moreover, in employment discrimination cases, evidence of discrimination

> typically includes unflattering testimony about the employer's history and work practices—evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant.... [S]uch background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir. 1988). Some courts have articulated Rule 403 concerns in excluding evidence of discrimination, *see, e.g.*, Schrand v. Federal Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988); Haskell v. Kaman Corp., 743 F.2d 113, 120 (2d Cir. 1984). These, however, are often really concerns about relevance. Even if certain evidence allowed a prejudicial inference to be made, then the proper solution may be to issue a limiting instruction. *See Mullen,* 853 F.2d at 1134.

70. *See* notes 68 & 69 *supra.*

71. *See* note 63 *supra.*

72. *See* notes 88-101 *infra* and accompanying text (examples of discrimination for claims and current treatment).

73. In Oaks v. City of Fairhope, 515 F. Supp. 1004 (S.D. Ala. 1981), the court rejected a stereotyping claim of a woman who alleged that her aggressiveness, assertiveness, or tenacity would have been acceptable in a man but led to her being characterized as an "uppity woman." *Id.* at 1038-39. The court viewed such a claim as "simply insufficient" because these alleged traits were not

intended to facilitate analysis. They certainly do not exhaust all the ways in which people discriminate against one another, nor can they completely describe the "essential" ways in which people feel oppressed by discrimination.[74]

### C. *All Stories of Discrimination and Nonactionable Discrimination: Anti-gay Discrimination as Relevant Evidence*

Under the version of generalized discrimination analyzed in this note, evidence of discrimination against gays, like evidence of discrimination against members of any other group, may sometimes be relevant to any of the stories of discrimination outlined above. For each of the three stories of discrimination, evidence of discriminatory acts may be relevant to a given trial even though the victims of those acts might not win suits of their own, or in some jurisdictions, even state a claim that a judge would allow to go to a jury. To return to the examples in the prologue, treatment of gay persons, or persons labeled as gay based on stereotypes, by Jean's law firm and Liz's hotel may tell us much about how those employers treated those two plaintiffs, even though such treatment of gay (or presumed gay) persons might not be actionable under federal law. As a practical matter, one might think that hostility to gays would make courts less likely to admit evidence of discrimination against them. As a formal matter, one might question whether evidence of discrimination against gays in those areas where such discrimination is not banned by unambigous law is ever relevant.

Despite decisions adverse to gays in constitutional[75] and employment law,[76] legal doctrine[77] does not bar use of discrimination against gays to help illuminate discrimination against members of other groups. In the increasing number of jurisdictions in which the law forbids discrimination against

"immutable." *Id.* at 1039; *see also* note 40 *supra* (discussing reaction to *Price Waterhouse* as new theory of liability).

74. In this note, I do not attempt to exhaust all understandings of discrimination. By temporarily exploring the perspective of the perpetrator of discrimination, I do not mean to imply that all victims experience discrimination in the same way. For a brilliant description of the error of positing some essential experience, *see* Harris, *supra* note 10 (feminist writings by white women seem to presume an essential experience of gender discrimination from which the experience of other women, particularly black women, seem like mere nuances or extreme cases).

75. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-21, at 1430-31 (2d ed. 1988) (concluding that Bowers v. Hardwick, 478 U.S. 186 (1986), upholding Georgia sodomy statute against challenge by gay man, was decided on anti-gay prejudice and not on "principled grounds").

76. *See* note 5 *supra*.

77. This note explores the legal analysis of relevant evidence, and it is certainly subject to the limitation, as is much of any academic literature, of not fully exploring the practice of decisionmakers. "Your emphasis on changing the evidentiary rules and policies to admit evidence of 'other' types of discrimination is . . . very practical, but your assumptions about how to get judges to do it are, well, perhaps naive," one commentator wrote of an earlier version of this note. "They rest on the idea that judges in this area are following rules or logic, and I believe most are following neither; they are following their own gut beliefs about whether discrimination exists, whether they like the plaintiff, whether their own attitudes are biased, whether they would have done the same thing the defendant is accused of doing, etc." Letter from Mary Dunlap, Lecturer at Stanford Law School, to the author (May 18, 1990) (on file with the *Stanford Law Review*).

gays and lesbians,[78] discriminatory treatment of lesbians and gays raises no more complications for immediate application of a theory of generalized discrimination than any other form of discrimination.[79] Even where a court does not allow claims of gays themselves, it may still appreciate how evidence of discrimination against gays can help explain an employer's action against an employee presenting a claim that could prevail under federal or local law. Courts may be hostile to particular kinds of gay conduct without being as hostile to all those who happen to have the status of being gay.[80] This is especially true in the case of stereotyping, where unfair practices are not committed against known gays, but against those labeled as gays, such as the association of Jean's stereotypically masculine habits with her "acting like a dyke."[81] In fact, courts that loathe persons who actually happen to be gay may be especially disturbed by persons too blithely stereotyped and labeled gay.[82] Similarly, an employer might treat badly a man who acted in a stereotypically effeminate way not because the employer suspected the employee of violating a sodomy law, but because he favored stereotypically masculine traits and would mistreat all those he perceived as lacking those traits and possessing stereotypically feminine ones, man or woman, straight or gay.[83]

Current doctrine permits evidence of discrimination that is not itself actionable as evidence of actionable discrimination. Courts regularly admit evidence of discrimination that cannot compel relief itself, including evidence of discrimination that occurred before passage of Title VII, as a result of nepotism, or in the form of racial, religious, or ethnic slurs. A black em-

78. Title VII has been held to not prohibit discrimination against gay men and lesbian women on the basis of their sexual orientation. *See* note 5 *supra*. A significant number of jurisdictions do prohibit discrimination against gays. *See Developments in the Law: Sexual Orientation and the Law, supra* note 5, at 1668 n.51.

79. *Cf.* Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d. 1, 50 (D.C. 1987) (Ferrin, J., dissenting) (D.C. Human Rights Act forbids discrimination on the basis of sexual orientation and "does not say one form of discrimination may be less unlawful than another").

80. On the distinction between the status of homosexuality and sodomy as a form of conduct by particular homosexuals, see Watkins v. United States Army, 837 F.2d 1428, 1438 n.14 (9th Cir. 1988) ("[H]omosexual orientation encompasses a range of emotions, desires, and needs wholly separate from sexual conduct and involves an element of individual self-definition in addition to sexual conduct."), *opinion withdrawn en banc,* 875 F.2d 699 (9th Cir. 1989). Others may see gay status as nothing more than a propensity to engage in particular forms of conduct. *Id.* at 1459 n.18 (Reinhardt, J., dissenting) ("What distinguishes the class of homosexuals from the class of heterosexuals is not some vague 'range of emotions,' but the nature of the member's sexual proclivities or interests."). The difficulty with this argument, however, is that the particular conduct criminalized in the Georgia statute at issue in *Bowers* is not practiced by all people who have a homosexual orientation. High Tech. Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 380 (9th Cir. 1990) (Canby, J., dissenting from denial of en banc review). ("[O]ne is a homosexual or a heterosexual while playing bridge just as much as while engaging in sexual activity."). For a brief and brilliant discussion of the inapplicability of *Bowers* to an equal protection claim, see Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection,* 55 U. CHI. L. REV. 1161, 1176 n.79 (1988).

81. *See* text accompanying note 3 *supra*.

82. *But cf.* Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978).

83. *See* note 120 *infra*.

ployee might not be able to sue his employer for firing him on account of his race before the passage of Title VII in 1964, but another black employee in 1965 could use evidence of the first man's firing to establish the employer's discriminatory motivation in a proceeding under Title VII.[84] Employees victimized by religious, racial, ethnic, and other slurs might not themselves obtain any legal remedy, but those words may be admissible as evidence of discriminatory motivation in suits brought by those or other employees of the same firm to remedy actionable unfair labor practices.[85] Similarly, an employee disadvantaged for not being someone's relative may not herself state a claim for relief based on nepotism, but courts admit evidence of employers favoring their own relatives as evidence of illegal discrimination.[86] The law makes no general requirement that acts of discrimination used as evidence in a case be colorable legal claims in their own right.[87]

## III. RELEVANCE AND THE DISCRIMINATION FOR STORY

A discrimination for claim may arise when a victim feels that an employer systematically favors people who have certain traits, thus discriminating against people, like she, who lack those desired traits. The discriminator need not be a member of the preferred group; for example, an employer of color might prefer to employ "Aryans."[88] The typical discrimination for claim, however, often has members of groups that historically have made

84. *E.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); United Air Lines v. Evans, 431 U.S. 553, 558 (1977).

85. Though not necessarily illegal, slurs may be strong evidence of a work environment that is in general racially or sexually harassing. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986) (sex discrimination case). Slurs in the workplace may arguably have less protection under the first amendment because they are not in traditionally public fora, but some courts have admitted evidence of slurs made outside the workplace in employment cases. Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1134 (4th Cir. 1988) (declining "to discount the probative value of a decisionmaker's speech in an unofficial capacity, for it is open to the jury to conclude that the manifestation of racially discriminatory attitudes cannot be rigidly compartmentalized").

86. Holder v. City of Raleigh, 867 F.2d 823, 827 (4th Cir. 1989) ("presence of family preferences as a factor in a promotion might be part of the evidence upon which an inference of invidious motive may be drawn"); *see* Opposition to Defendants' Motion in Limine at 8, Rauh v. Coyne (D.D.C. 1990) (No. 88-0833) ("[E]ven evidence of unfair employment practices not covered by the civil rights laws can support an inference of discrimination based on a classification specially prohibited by those laws."). *But cf.* United States v. Hayes Int'l Corp., 456 F.2d 112, 119-20 (5th Cir. 1972) (nepotism does not necessarily indicate bias). Though employers cannot practice nepotism in filling federal civil jobs, its presence does not create a private right of action. Limongelli v. Postmaster Gen., 707 F.2d 368, 371 (9th Cir. 1983) (per curiam).

87. Mark Kelman suggested to me a more complicated explanation based on legislative intent and what I take to be some kind of public policy exception to relevant evidence. The legislature might allow certain forms of discrimination because it intends to "privilege" them; hence, evidence of such "privileged" discrimination can never increase the probability of employer liability.

88. That the discriminator's membership or nonmembership in the group she allegedly prefers is irrelevant is analogous to the legal irrelevance of the race of the candidate preferred by a minority group in litigation under the Voting Rights Act. Thornburg v. Gingles, 478 U.S. 30, 67-70 (1986) (plurality opinion) (candidate's race irrelevant in determining the preferred candidate of the minority group). In *Gingles*, the plurality reasoned that minorities could prefer a candidate who was not a member of their atomized group and might not support a candidate for office who merely happened to be a member of their atomized group. *Id.* I imagine that perpetrators of discrimination, too, might prefer candiates for jobs who happen not to be a member of the perpetrator's atomized group.

civil rights claims, such as blacks, Latinos/as, and women, trying to show that preference for a traditionally preferred group, such as white Anglo-Saxon Protestant males, resulted in discrimination against them. Discrimination for claims also arise in more unusual contexts with less familiar victims and alleged discriminators, such as claims of preference for Italian-Americans,[89] members of the Dutch Reform church,[90] people of German or Swiss origin,[91] or light-skinned Pakistanis.[92] In all discrimination for cases, victims must show that the employer preferred people with certain traits and disfavored people without them. Evidence of other victims of discrimination for members of a preferred group will always be relevant whenever those other victims, like the plaintiff, are outside of the same preferred group that the plaintiff claims does not include her. For example, where a woman claims discrimination in favor of white males, evidence of discrimination against women and blacks, male and female, is relevant.

Two suits in the District of Columbia illustrate the analysis of relevance in a discrimination for claim. In *Abramson v. American University*,[93] Frederic Abramson alleged that the dean of American University's business school "sought to 'reimpose a "Christian ethic" on [the school], and to create a more "homogeneous faculty" that excluded those who were not white, Christian, and Anglo-Saxon in origin.' "[94] Abramson, an Eastern European Jew, claimed that the dean, by preferring white Christian Anglo-Saxons, discriminated against him on the basis of religion and national origin in violation of Title VII and the District of Columbia Human Rights Act.[95] Abramson sought to introduce testimony of discrimination against four others who were not white Anglo-Saxon Christians: two of the four were Muslim, one was black, and one was Belgian.[96] Over the university's objection, Judge Judy Green admitted this evidence.

> Although it is true that plaintiff's witnesses are neither Jewish nor of Eastern European background, evidence that [the dean] discriminated against other minority groups is surely relevant towards the issue of his discriminatory intent in general, since relevant evidence "means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[97]

89. Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984).

90. Soria v. Ozinga Bros., Inc., 704 F.2d 990 (7th Cir. 1983).

91. Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669 (N.D. Ill. 1984).

92. Ali v. National Bank of Pakistan, 508 F. Supp. 611 (S.D.N.Y. 1981).

93. 48 Empl. Prac. Dec. (CCH) ¶ 38,439, at 54,500 (D.D.C. 1988).

94. *Id.* Even in the context of what is plainly a discrimination for claim, the *Abramson* court sometimes slips into the familiar language of atomized discrimination claims, characterizing the victim's allegation as an "assertion of a general campaign against non-white, non-Christian, non-Anglo-Saxon faculty." *Id.* at 54,501 n.2.

95. *Id.* at 54,501.

96. *Id.* at 54,501 n.1.

97. *Id.* at 54,501 (citations omitted) (emphasis in the original).

In *Rauh v. Coyne*,[98] Judge Harold Greene declined to follow *Abramson* and excluded evidence of discrimination against black employees and customers in a disparate treatment claim brought by a white woman. As in *Abramson*, the plaintiff claimed that the employer discriminated for a certain preferred group. Rauh sought to prove that her employer thought "only a certain category of people are fit to manage his hotel business," namely, "white males—or at least non-American Negro males."[99] Proving this preference for white males would prove discriminatory intent against females because it would show that the hotel owner was "generally biased against all those whose characteristics place them outside of the desired category."[100] The plaintiff argued that evidence of the treatment of other people outside the preferred group is admissible when it shows that discrimination against the plaintiff is "more probable or less probable than [it would appear to be] without the evidence."[101]

*Rauh* and *Abramson* illustrate the logical foundation for admitting evidence of discrimination against victims from groups other than that of the plaintiff in discrimination for stories. In both cases, the plaintiff's story said that the employer preferred a certain group. To prove this theory, each plaintiff offered evidence about the treatment of people outside the preferred group. This evidence was relevant even when it concerned persons who were members of atomized groups different from the plaintiff's.

## IV. THE STEREOTYPING STORY AND RELEVANT EVIDENCE

Like discrimination for claims, cases of discrimination by stereotyping involve a preferred group. Stereotyping can describe at least two ways in which an employer treats members of a preferred group differently.[102] In *biased evaluation* stereotyping, an employer makes an initial evaluation of an individual's qualifications based on his perception of whether that person is a member of a certain group. An example would be the manager at Backstreets who presumes that an older man and a young woman are not strong enough to be bouncers because neither is a young man.[103] In *biased interpre-*

98. No. 88-0833, 1990 U.S. Dist. LEXIS 10010 (D.D.C. 1990).

99. Opposition to Defendants' Motion in Limine at 2, Rauh v. Coyne (D.D.C. 1989) (No. 88-0833).

100. *Id.* at 2-3.

101. *Id.* at 3 (citing FED. R. EVID. 401).

102. Some also describe a generalization which is accurate, but which is thought unworthy of weight, or "normatively wrong," as a stereotype. I am grateful to Rachel Moran for this insight. We could also use the term "stereotyper" to describe the employer who attempts to please prejudiced customers or clients by catering to their biases. *See* Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc) (customer preferences for certain kinds of female employees may not be considered by airlines), *cert. dismissed*, 460 U.S. 1074 (1983); *cf.* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). This note considers neither of these types of stereotyping explicitly.

103. Madeline Morris, *Stereotypic Alchemy: Transformative Stereotypes and Antidiscrimination Law*, 7 YALE L. & POL'Y REV. 251, 258-59 (1989) (student author) (distinguishing biased interpretations from biased evaluations); *see* text accompanying note 6 *supra* (hypothetical case of Backstreets bar denying bouncer jobs to Steve, a champion kickboxer who happens to be forty-five years old, and Mary, a judo instructor and part-time alligator wrestler who happens to be a woman).

*tation* stereotyping, a pattern of behavior is interpreted through stereotypic expectations.[104] Recall that partners at Jean's law firm may accept self-confident and assertive behavior in the preferred group of white Christian straight males, but may label it uppity, pushy, or bitchy in blacks, Jews, or lesbians and gays. As these hypothetical cases suggest, biased evaluations and biased interpretations are sometimes the means by which a conscious preference for discrimination operates. As the opinions in *Price Waterhouse* suggest, we might also think of discrimination by stereotyping as a form of negligence, or what I call semiconscious discrimination.

### A. *Stereotyping Stories After* Price Waterhouse

In *Price Waterhouse*,[105] the Supreme Court established that an employer can be held accountable for stereotyping that infects a subjective decision-making process.[106] The district court found that Price Waterhouse discriminated against Hopkins in part because the firm failed "to make partners sensitive to the dangers [of stereotyping], to discourage comments tainted by sexism, or to investigate comments to determine whether they were influenced by stereotypes."[107] The court reasoned, in a sense, that liability attaches when an employer designs a defective process for evaluating employees. A plurality of four justices explicitly accepted this premise,[108] and only three of the justices in dissent criticized this theory of liability.[109] The Court made clear that the principles of *Price Waterhouse* also apply to challenges to discrimination based on race, religion, or national origin under Title VII and other federal antidiscrimination laws.[110] The plurality and Justice O'Connor, who wrote separately, reached this same result, though with seemingly distinguishable views on how consciously stereotyping operates.

Justice O'Connor suggests in her concurring opinion that stereotyping may simply be a means by which fully conscious discrimination operates. She asks us to imagine Ann Hopkins sitting outside the room where partnership decisions are made:

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104. *See id.* at 258-59.

105. 109 S. Ct. 1775 (1989).

106. *See* note 40 *supra*.

107. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1119 (D.D.C. 1985) *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 1775 (1989).

108. *Price Waterhouse*, 109 S. Ct. at 1794 n.16 (plurality opinion).

109. *Id.* at 1806-14 (Kennedy, J., dissenting).

110. *Id.* at 1787 n.9. The Court's decision on stereotyping almost certainly reaches the interpretation of other antidiscrimination statutes, including the Age Discrimination in Employment Act, 42 U.S.C. §§ 6101-6107 (1988). Price Waterhouse, 109 S. Ct. at 1812 (Kennedy, J., dissenting). Courts have already interpreted the decision as applicable to these other statutes, *see e.g.*, Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989) (applying *Price Waterhouse* to age discrimination case); Grant v. Hazelett Strip-Casting Corp., 880 F.2d 1564, 1569 (2d Cir. 1989) (court noted that company's justifications for employment decision reflect "age stereotypes, such as the belief that older workers are less productive"); *cf.* Aloqaili v. National Hous. Corp., No. 3-89CV7090, 1990 U.S. Dist. LEXIS 10408 (N.D. Ohio Apr. 20, 1990) (order denying defendant's motion for summary judgment in case alleging stereotyping of religion, national origin, and race of Islamic Palestinian in house discrimination case).

> As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.[111]

Under this interpretation, then, many stereotyping claims can be recast as discrimination for claims and analyzed as described earlier.[112]

Alternatively, the *Price Waterhouse* plurality appears to conceive of discrimination by stereotyping as a lack of due care in preventing stereotyping from infecting the employment decisionmaking process. "In saying that gender played a motivating part in an employment decision," Justice Brennan wrote for the plurality, "we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a *truthful* response, one of those reasons would be that the applicant or employee was a woman."[113] Justice Brennan leaves unclear whether that "truthful" response would reflect a fully conscious discriminatory motivation or would merely be an accurate description given by the employer after reconsidering his actions and discovering his discriminatory intent. This explanation in effect defines stereotyping as *semiconscious* discrimination in that it presupposes a discriminator who is conscious enough to identify the consequences of stereotyping if asked to explain his actions, but is not conscious of his discriminatory motivation unless asked. Either version of liability for stereotyping, the plurality's or Justice O'Connor's, is consistent with a generalized conception of discrimination, but the distinction might prove fruitful to those interested in breaking down the Court's reluctance to recognize anything but conscious discrimination.[114]

### B. *Relevant Evidence and Stereotyping Stories*

Evidence of generalized discrimination may help judges and juries[115] to reach conclusions about stereotyping stories. It might show that stereotyping entered an evaluation or interpretation process,[116] thereby putting the employer on notice that he should have taken steps to root out stereotyping and to view and review applicants or employees more carefully. The exact scope of relevance will not turn on the stereotyping of members of the plaintiff's atomized group, but on the nature of the plaintiff's stereotyping story.

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111. *Price Waterhouse,* 109 S. Ct. at 1802 (O'Connor, J., concurring) (emphasis in original).

112. *See* text accompanying notes 88-101 *supra.*

113. *Price Waterhouse,* 109 S. Ct. at 1790 (plurality opinion) (emphasis added).

114. *See, e.g.,* Lawrence, *supra* note 42, at 322 (noting judicial reluctance to recognize unconscious racism).

115. *See* note 62 *supra* (Title VII ordinarily tried to a judge, but sometimes tried to a jury where the suit includes legal claims under other laws).

116. Stereotyping will often occur in subjective evaluations that are not themselves illegal, but that may be scrutinized for evidence of discrimination. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990-91 (1988).

1. *Biased interpretations.*

In *Price Waterhouse*, Ann Hopkins alleged that Price Waterhouse discriminated against her because she did not conform to the traditional perception of women as passive. Accordingly, she introduced evidence of how the firm treated other women employees who happened to defy expectations of women.[117] One also could have looked at how the firm treated others besides women who seemed to defy stereotypical expectations, such as blacks labeled "uppity" or Jews labeled "pushy" for being assertive. Analytically, the discriminator's preferred group would consist of people who could be assertive without being negatively evaluated. From that perspective, those who find any of their assertiveness negatively evaluated, such as blacks, Jews, and women in this example, are members of a single group of those outside the preferred group of the discriminator.

If Price Waterhouse generally tended to evaluate poorly those who did not conform to traditional expectations, then one might be better convinced that Hopkins was a victim of discrimination because she did not conform to expectations. One can imagine at least two kinds of people, those who do not conform to others' expectations of how they should behave—stereotype-transcending individuals—and those who act as expected—stereotype-conforming individuals. At Price Waterhouse, assertive women would be stereotype-transcending, and quiet, reserved women would be stereotype-conforming. For the purpose of assessing this stereotyping claim, it would not make sense to compare Hopkins with stereotype-conforming individuals merely because they happened to share her gender. Evidence that an employer treated stereotype-conforming women well would support Hopkins's claim that it treated stereotype-transcending individuals worse. If Hopkins also made a discrimination-against claim, then evidence of treatment of all members of her atomized group would be relevant.[118]

Evidence of how an employer treats members of the plaintiff's atomized group might also be complicated in stereotypes of appropriate behavior for members of particular atomized groups, such as the "act like a woman" expectation. In Hopkins's case, some Price Waterhouse partners acted as if they sincerely thought she was overly aggressive. Imagine a different explanation a partner might give: "Goddamn Ann, she's certainly got the stuff to be a partner, but I don't like working with women who don't act like women. Sure she's got to be a bit rougher to get business, but she doesn't need to leave the eye liner at the Clinique counter." Again, one would not look at stereotype-conforming women, those who dressed in traditionally feminine ways or who talked in particularly feminine ways, and so on, for such evidence would not be probative of discrimination against stereotype-transcending women. One might, however, begin to look at others besides

117. *See* notes 55-58 *supra* and accompanying text (descriptions of allegations by Hopkins).

118. Plaintiffs may argue multiple theories of liability. This may be appropriate in the discrimination area because one may well be the victim of several kinds of discrimination. *See* note 16 *supra.*

women who transcend gender stereotypes, such as men who acted less like men "should" act, perhaps by walking or dressing in less stereotypically masculine ways. Dressing or walking in these ways might often be associated with gay men, but the relevance of stereotype-transcending men who "act" like women depends not on the sexual orientation of the men, but on the traditional association of certain traits with gender. Recall how quickly a partner at Jean's firm told her that she didn't have to act like a lesbian if she wasn't one.[119] Those who transcended traditional gender stereotypes would be part of a similar group. Many of those persons, like Hopkins, might be labeled gay or lesbian. Evidence of such treatment would be relevant because they transcended gender stereotypes, regardless of whether they happen to be gay or lesbian.[120]

Biased interpretations of sexuality and promiscuity further show how a particular story of discrimination shapes relevant comparisons. Recall from the hypothetical at the beginning of this note that Liz works for an employer who wants employees to reflect traditional moral values.[121] Liz might claim that this apparently neutral policy results in discrimination against certain people because their sexual behavior is more likely to be evaluated negatively by being labeled promiscuous. If Liz contends that the morality policy is not applied consistently, she may state a claim following *Price Waterhouse* if she can show that those who evaluated her tended to label her behavior immoral based on little evidence or based on evidence of behavior not considered objectionable in males thought to be straight.[122] Liz might claim that people

119. *See* text accompanying notes 2-3 *supra*.

120. Similarly, Hopkins's mannerisms and style might be associated with lesbians, but this does not limit relevant evidence to treatment of lesbians. Still, it may be helpful to know how known gays and lesbians are treated, since those whose sexual orientation is not publicly known may be evaluated differently, proving that stereotyping is at work. Two men might be equally effeminate, for instance, but people might evaluate one as more effeminate after learning he was gay. One may transcend gender roles, as Hopkins does, and be labeled gay or lesbian, and then in turn be thought to have even more of the disapproved qualities that triggered the initial labeling. *See, e.g.*, DEBORAH L. RHODE, JUSTICE AND GENDER 141 (1989) ("Prejudice against 'effeminate' men and 'unfeminine' women grows out of the same gender-role assumptions that have limited opportunities for all individuals, irrespective of their sexual preference."); Mary E. Hotvedt, *Introduction to Life Adaptations*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 215, 216 (W. Paul, J. Weinrich, J. Gonsiorek & M. Hotvedt eds. 1982) (discussing myth that "feminine" men and "masculine" women must be homosexual); Jonathan Alter, *Degrees of Discomfort*, NEWSWEEK, Mar. 12, 1990, at 27 (quoting psychiatrist Dr. Richard Isay that "hatred of homosexuals appears to be secondary in our society to the fear and hatred of what is perceived as being 'feminine' in other men and in oneself"); Goleman, *supra* note 32, at C11, col. 2 (quoting Isay that "[h]omophobia has much to do with the stereotype perception of gays as feminine: the more feminine a gay man appears, the more hostility he evokes in other men"). Much violence against "gays" occurs against heterosexuals perceived as gay. "Many victims of anti-gay violence are people mistakenly perceived as gay. 'It reinforces rigid sex roles. . . . Men are afraid to touch other men and both men and women avoid gestures and clothing they're afraid will be labeled gay.' " Joan Smith, *A Gay Basher Asks: Why?*, San Francisco Examiner, June 7, 1989 (quoting psychologist Gregory M. Herek), *reprinted in* GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, *supra* note 28, § 6.1.

121. *See* text accompanying notes 4-5 *supra*.

122. A difficulty with stereotypes is that they not only distort evidence, but also may destroy it. A discriminator may presume bad traits or behavior in the disfavored group, but never look for that trait or behavior in the favored group. For example, a man who arrives late in the morning might be thought the victim of traffic; a woman, someone who spent the night out.

tend to view heterosexual men's romantic and sexual liaisons as natural and those of women and gay men as "promiscuous" or "slutty."[123] If Liz were black, moreover, she might find that the relevant distorting stereotype was not that of non-heterosexuals or non-males, but of blacks or black women. Stereotypes of blacks have long included notions of their sexuality as promiscuous,[124] but black women especially have been victimized by a stereotype of free sexuality that is distinct from, though related to, that of black men.[125] If Liz felt that her employer accepted the stereotype of black women without necessarily accepting other stereotypes of sexuality, then she might emphasize the treatment of other black women. Similarly, if Liz alleged that the firm was motivated by semiconscious discriminatory intent, then she might claim that the employer would have responded to other forms of stereotyping but not to stereotyping against her narrow group, either out of conscious animus or insensitivity.

2. *Biased evaluations.*

In biased evaluation claims, the relevance of evidence depends on both the characteristic evaluated and the group favored by the presumption of this valued characteristic. As the hypothetical about Steve's bouncer application illustrates,[126] biased evaluations of a person's physical abilities will often reflect a set of stereotypes that disadvantage members of several atomized groups. Both older people and women may have their physical strength underrated, or presumed inadequate, simply because of age or gender. One way to conceive of this bias is to analogize it to "preference for" discrimination. For example, a discriminator might think that only men of a certain age are strong enough to perform certain tasks. Steve might know that Backstreets discriminated against him by not considering his individual qualifications. He can claim "age" discrimination, but he might allege "strength" stereotyping as well: Backstreets presumed that only young men are strong enough to be bouncers. In that case, evidence of how Backstreets treated all persons other than young men, whether they were old men or women of any age, would be relevant evidence of generalized discrimination by stereotypes of physical strength.

These examples of discriminatory stereotyping are not meant to be exhaustive. Rather, they illustrate general guidelines for evaluating the relevance of discrimination against others to discrimination against a plaintiff in a particular case. Those victimized by discriminatory stereotyping are the victims of processes that operate not by identifying individuals, nor necessar-

123. *Cf.* ANDREW HOLLERAN, GROUND ZERO 113 (1988) ("If a young man is promiscuous, we say he is *sowing his oats*; if a young woman is promiscuous, we say she is a *slut*; if a homosexual of any age is promiscuous, we say he is a *neurotic example of low self-esteem*.") (emphasis in original).

124. On the association of blackness and sexuality in Western thought, see SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY 109-27 (1985).

125. *See, e.g.*, Harris, *supra* note 10, at 599 & n.85 (rape law seldom used to protect black women even after Civil War because black women were considered promiscuous).

126. *See* text accompanying note 6 *supra*.

ily by animus against members of a particular atomized group. Instead, these processes either overlook their victims' qualifications by presuming that only members of some preferred group have desirable characteristics, or distort their victims' behavior by calling the same behavior one thing when done by members of a preferred group and another when done by those outside of that preferred group. Those victimized by biased interpretations contend that similar behavior is interpreted more favorably for those in a preferred group. Evidence of stereotyping of anyone outside that preferred group is relevant to the case of any and all plaintiffs who are also outside the preferred group, even if the other victims were stereotyped in ways that differ from the stereotyping of the plaintiff in a particular case. Victims of biased evaluations claim that they have been treated as members of a group rather than evaluated as individuals. Further, they allege that the employer is more likely to credit members of a preferred group with the presence of a valued characteristic. Both biased interpretations and biased evaluations, then, often presuppose a preferred group. The similarity in structure to discrimination for claims[127] suggests that stereotyping claims should be treated analogously to allow for the introduction of evidence that is not limited to acts of discrimination against other victims of the plaintiff's particular atomized group.

## V. ERADICATING DISCRIMINATION

### A. *The Transformative Potential of Theories of Generalized Discrimination*

This note has shown that greater attention to generalized aspects of discrimination will better identify when an employer intended to discriminate. The goal of antidiscrimination law, however, is not solely to remedy harm to particular victims, but also to eradicate discrimination so that individuals are treated consistently.[128] Recognizing generalized discrimination may bring us closer to a world without discrimination by lessening the prejudice of individuals and by transforming the United States into a more tolerant and accepting nation.[129] That transformative power comes from the ways in which recognition of generalized discrimination can make people more sensitive to discrimination against individuals from different groups, help civil rights organizations work together, and refocus scholarly debate.

Recognition and appreciation of generalized discrimination may make

127. *See* notes 88-101 *supra* and accompanying text.

128. *See* notes 7 (consistency principle) & 39 (current doctrine's focus on "fairness to individuals") *supra* and accompanying texts.

129. This note does not presume that the only barrier to coalitions of persons outside traditionally preferred groups is the pervasiveness of atomized discrimination in the law and its effect on how millions of nonlawyers view themselves and the sources of discrimination in society. A full explanation would be well beyond the scope of this note, but would likely include perceptions of discrimination remedies, such as the perception of affirmative action as a limited good. Such perceptions may not reflect the rich range of alternatives. *See generally* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) (criticizing adversarial model of negotiation that presumes limited goods).

changed ideas and consciousness itself important. To some, unfortunately, the suggestion that ideas from victims of discrimination can change society seems an indulgence of ivory tower academics.

> The most significant aspect of Black oppression seems to be what is believed *about* Black Americans, not what Black Americans believe. Black people are boxed in largely because there is a consensus among many whites that the oppression of Blacks is legitimate. This is where consensus and coercion can be understood together: ideology convinces one group that the coercive domination of another is legitimate. It matters little whether the coerced group rejects the dominant ideology and can offer a competing conception of the world . . . .[130]

Crenshaw's criticism makes great sense when one considers that scholars now examine victims one group at a time. If one looks only at, say, blacks, then views of individual blacks may not matter because blacks together may constitute a minority of the population with little power.

Once one looks at all the atomized groups outside of traditionally preferred groups as one larger group, then the beliefs of the oppressed take on new potential. A generalized notion of discrimination includes all victims of discrimination—all those treated as members of a group rather than as individuals, and all those outside a traditionally preferred group. As Pat Williams has insightfully noted, the term "minority" is a misnomer since "if one adds up all the shades of yellow, red and brown which the term sweeps over, we are in fact not."[131] Moreover, the term is a misnomer when one adds to actual victims of discrimination those people who feel special empathy and alliance with victims of discrimination. "The men and women who protest most violently," Judith Shklar has noted, "do not have to suffer from a personal sense of injustice. One might say they become surrogate victims."[132] Of course, one might distinguish between having numbers of people and having political power.[133] The numbers of victims and surrogate victims are sufficiently large, however, to attach at least some importance to their views and actions in a political system that is at least periodically majoritarian. It

130. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358-59 (1988).

131. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987); *cf.* Randall Samborn, *Many Americans Find Bias at Work*, Nat'l L.J., July 16, 1990, at 1, col. 1 (25% of Americans surveyed reported they had experienced job discrimination at some point).

I do not mean to implicate Williams too far. She does treat separately the victims of color discrimination and notes that " '[o]ppressed persons' is rather more inclusive than I really mean . . . ." Williams, *supra*, at 404 n.4. This note often mentions people who happen to be women, or gay, or Jews, or nonwhite, or of other than Northern European descent because such persons have so frequently found themselves objects of discrimination in the United States. This, however, does not imply that only such persons are discriminated against, *see, e.g.*, JOHN STEINBECK, GRAPES OF WRATH (1939) (discrimination against white males because of their being from Oklahoma), nor that only such persons may be harmed by discrimination, *see* N. Morrison Torrey, *Indirect Discrimination Under Title VII: Expanding Male Standing to Sue for Injuries Received as a Result of Employer Discrimination Against Females*, 64 WASH. L. REV. 365 (1989).

132. Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1150 (1989).

133. I am grateful to Mark Kelman for pointing out to me the distinction between the share of the population and the share of power.

may then make sense that the atomized conception of discrimination limits the potential for different victims to work together and indeed may be one of the "main constraints upon making social life more bearable."[134]

Seeing discrimination as generalized may make social life more bearable by making more victims of discrimination treat more decently those who, once perceived as members of "other" atomized groups, have also been victims of discrimination. As Judy Scales-Trent has written, "[T]he early steps in group formation occur when individuals become aware that they are being treated differently by society, and that this definition is based on the group definition."[135] By understanding generalized discrimination, members of otherwise different groups may recognize themselves as part of a larger group defined by exclusion from preferred groups.

These individuals themselves could go far to make a more decent workplace and society. Those who view discrimination generally would see all discrimination as like that they suffered, and they might be less likely themselves to discriminate against people from "other" atomized groups. Those who might once have distinguished between the atomized discrimination against themselves and discrimination against some other set of victims might find it more difficult to separate their plights. For example, Jews who suffered from atomized discrimination, I hope, would be less likely to discriminate against others, including non-Jews. There would remain those who would discriminate against other victims of generalized discrimination, just as there remain those victims of atomized discrimination who discriminate against other victims of the same atomized discrimination—blacks against blacks, women against women.[136]

Individuals could develop such a sense of victimization from generalized discrimination, in part, from the different experiences they would encounter in a legal system that appreciated generalized discrimination. As others have recognized, the success of any given victim of discrimination may grow by her working with persons outside her traditional (atomized) group, such as women's litigation efforts combining with male plaintiffs.[137] Imagine emerging litigation scenarios where attorneys and courts recognized generalized discrimination more often. When Jean, introduced earlier in this note,[138] realizes that her firm's partnership system distorts assertiveness, she will look to the experience of other individuals similarly victimized, persons who might happen to be blacks, Jews, actual or perceived lesbians—anyone harmed by the discriminatory stereotyping that infects the firm's evaluation process. Jean's lawyers might readily find themselves working with lawyers representing organizations of blacks, Jews, and lesbians. Attorneys for dis-

134. Gordon, *supra* note 26, at 291.

135. Scales-Trent, *supra* note 10, at 14 n.23.

136. Castaneda v. Partida, 430 U.S. 482, 499-500 (1977).

137. "[F]eminist endeavors, to realize their full potential, must deeply involve members of both sexes." Ruth Bader Ginsburg & Barbara Fagg, *Some Reflections on the Feminist Legal Thought of the 1970's*, 1989 U. CHI. LEGAL F. 9, 17.

138. *See* text accompanying notes 2-3 *supra*.

crimination victims who might have once concentrated their research and pre-trial discovery on some narrow atomized group would have an incentive to find out about discrimination against members of "other" groups because it would help them to establish an employer's discriminatory motivation against their own clients. In the years of litigation that might follow, these lawyers and organizations might find themselves sharing information and support, both professional and personal.

Such sharing between different organizations working on behalf of victims of discrimination could inform academics and make their work more enriching to practitioners, researchers, and lawmakers. Scholars and commentators could look more carefully at the stories that cases reveal and organize casebooks and treatises along more meaningful lines. Reconsider the injustices first encountered in the prologue. Today a woman at an advertising firm labeled "too shy" for Madison Avenue might find her case listed in reporters under sex discrimination and pigeonholed by academics into "gender." An Asian man, like Mike Ueda,[139] at that same Madison Avenue firm might be labeled "too rigid" or "too reticent," but find his case listed under national origin discrimination and pigeonholed under ethnicity. Imagine a different world. Legal editors and scholars could instead think that both individuals suffered from Stereotypes of Assertiveness and list their cases together in reporters and analyze them in tandem in journals and treatises. When Liz was fired for "getting around,"[140] her attorneys could look to Stereotypes of Promiscuity and find distortions of private lives, some involving other women, and perhaps some involving men who happened to be gay.[141] So, too, might Mary and Steve[142] find their rejection as bouncers listed under Stereotypes of Physical Strength. And in rethinking the reported cases of Professor Abramson[143] and aspiring hotel manager Ms. Rauh,[144] scholars might find a place for both cases under Preferences for White Males. From these new materials, oriented around a sensitivity to the many paths along which the many mutations of discrimination may afflict individuals, other attorneys and scholars may discover better ways to understand and combat discrimination.[145]

### B. *Generalized Discrimination as Dialogue*

I must repeat that this note aims, above all, at facilitating a dialogue on the ways in which different mutations of discrimination may share common aspects. I have chosen to write about what might be a highly individualistic conception of discrimination only because such a conception seems so fixed

139. *See* text accompanying note 1 *supra*.
140. *See* text accompanying note 4 *supra*.
141. *See* text accompanying notes 120-123 *supra* (biased evaluation of gay men and women labels their behavior objectionable when it would be acceptable if identified in a male thought to be straight).
142. *See* text accompanying note 6 *supra*.
143. *See* text accompanying notes 92-97 *supra*.
144. *See* text accompanying notes 98-101 *supra*.
145. *See* Delgado & Stefancic, *supra* note 27, at 219-20.

in the minds of the justices currently sitting on the Supreme Court. Had I written about the problem of hearsay in federal litigation, I might similarly have begun with the Federal Rules of Evidence, though any set of evidentiary rules may have particular defects in imagining the ideal and most reliable evidence. So, too, any particular take on generalized discrimination may falter in imagining the ideal of *non*-discrimination. The individualist ideal, that individuals be treated consistently, might be open to the criticism that it fails to explain discrimination or to eradicate discriminatory attitudes.[146] If the individualist ideal strives to reward individuals according to merit, then any particular idea of merit, be it test scores, beauty, or whatever, may itself be open to criticism. Other less individualist visions of non-discrimination may raise their own problems. Marx might have identified nondiscrimination as the need to emancipate all humans oppressed by capitalism so that they can develop their innately human capacities.[147] But Marx's explanation of innately human capacities might presuppose values that retard the full development of some individuals, such as its idealization of heterosexual relations[148] that may leave less room for women[149] and lesbians and gay men.[150] One may leave this note accepting the presence of generalized discrimination without adopting the particular individualist explanation and ideal explored here. One might well pursue an understanding of generalized discrimination informed by an ideal of nondiscrimination against groups, or against limitations on individuals to create their own groups.[151] One might

146. *See* SUZANNE PHARR, HOMOPHOBIA: A WEAPON OF SEXISM 64 (1988) ("Emphasis upon individual achievement feeds right into blaming those who don't succeed for their failure. It separates people rather than bringing them together to make change."). *See generally* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (individualist assumptions of liberalism cannot describe reality of politics); William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown,* 93 YALE L.J. 995 (1984) (criticizing perceived trend toward group entitlements rather than individual rights). The notion that groups can ever be more than collections of individuals is rejected by much liberal theory. *See, e.g.,* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle,* 90 HARV. L. REV. 1, 49 (1976) ("We grant rights to associations or treat them as fictitious persons only to protect the rights of their individual members and for other instrumental purposes.").

147. *See* KARL MARX, *On the Jewish Question,* in SELECTED WRITINGS 57 (D. McLellan ed. 1977).

148.

> The immediate, natural, and necessary relationship of human being to human being is the relationship of man to woman. In this natural relationship of the sexes man's relationship to nature is immediately his relationship to man, and his relationship to man is immediately his relationship to nature, his own natural function. Thus, in this relationship is sensuously revealed and reduced to an observable fact how far for man his essence has become nature or nature has become man's human essence. Thus, from this relationship the whole cultural level of man can be judged.

Karl Marx, *Economic and Philosophical Manuscripts,* in K. MARX, *supra* note 147, at 88.

149. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 60-61 (1987) (heterosexuality cannot be natural and voluntary when social conditions make it compulsory).

150. *See* JULIAN MITCHELL, ANOTHER COUNTRY 94-95 (1982). In this play, a British public schoolboy who expresses his love for another boy more openly than his classmates do is persecuted and tells his friend, an avowed Marxist, "In your heart of hearts . . . in spite of your talk about equality and fraternity—you really believe that some people are better than others because of the way they make love." *Id.*

151. Discrimination might be wrong because it forces individuals to lead lives that are too highly particularized in violation of an anti-totalitarian principle, *see* Jed Rubenfeld, *The Right of*

also pursue theories of subordination that see members of various out-groups as excluded from real opportunities.[152]

I shall conclude not by enshrining my own answer to the content of generalized discrimination, but by returning to where I began this note. I took a trip to Europe, backpacking with two friends from high school, one of whom happened to be Jewish, like myself. My Jewish friend and I eventually made our way to the Nazi death camp at Dachau. We walked the grounds, walking through what remains of the crematorium, and eventually made our way to the museum. I lingered in front of a colorful poster.[153] It was a kind of matrix with different colors of triangles, some of them overlapping. Across the top of the poster went labels for the colors, including *homosexuell, asocial, emigrant,* and so on, with corresponding colored triangles—pink, black, blue, red. Down the side went more words, such as *Juden* with the famous yellow triangle. As the rows matched, each box would fill with a different insignia—a blue and yellow triangle for a Jewish emigrant; a pink and yellow triangle for a homosexual Jew. The bottom included additional markings, such as the special red triangle for Poles. In the lower right, the poster had a complete triangle and badge system, with German labels deciphering the insignia. Some eleven million people died in camps like these, some six million Jews. And each no doubt had many stories to tell. But to the guards there were these patches, products of a matrix that reduced each person to a few pieces of cloth. A friend later translated the title as "Characterizing Marks for Prisoners in Protective Custody." I have tried to understand what all those marks could have meant. This essay is my first attempt.

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*Privacy,* 102 HARV. L. REV. 737, 801 n.223 (1989), whether it forces racial purity through miscegenation laws, *id.* at 791-92, or gender of sexual partners through laws burdening gay men and lesbian women, *id.* at 799-802. *See also* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law As Sex Discrimination,* 98 YALE L.J. 145, 147 (1988) (student author) (miscegenation laws and sodomy laws violate equal protection because they support a "regime of caste that locks people into inferior social positions" by perpetuating white supremacy or imposing traditional gender roles).

152. Crenshaw has most powerfully described such a subordination perspective.

> Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual preference, age and or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who are *not* disadvantaged in any way reside.

Crenshaw, *supra* note 10, at 151. This perspective, too, raises difficult questions, such as the relative closeness to the ceiling; that is, the relative suffering of various victims. *See* Stephen L. Carter, *Loving the Messenger,* 1 YALE J.L. & HUMANITIES 312, 338 (1989) ("The tragic error comes in assuming that it makes a difference which one is the most horrible.").

153. The poster, without color, is in CONCENTRATION CAMP DACHAU: 1933-1945, at 58 (1978).