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## THE PHOENIX FROM THE *ASH*: PROVING DISCRIMINATION BY COMPARATORS

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### ABSTRACT

*Hidden beneath judicial and scholarly obsession with formal proof structures for individual disparate treatment cases is a simpler, more direct method of establishing discrimination. Taking the “disparate treatment” label seriously, I argue that “comparator” proof requires merely that the plaintiff identify a similarly situated person of another race or the opposite sex who was treated more favorably than plaintiff. Such proof is increasingly driving litigation in the lower courts, which suggests that comparators should be moved to center stage in the antidiscrimination project. However, like other efforts, the comparator approach risks falling victim to the general hostility of the courts to discrimination claims. While the Supreme Court in *Ash v. Tyson Foods, Inc.* rejected an extreme “slap in the face” rule regarding relative qualifications of plaintiff and a comparator, *Ash* left in place a network of other circuit court rules that collectively seem to require each comparator to be the almost-twin of the plaintiff before more favorable treatment of him is a sufficient basis for the trier of fact to infer discrimination. The Court’s latest decision, *Sprint/United Management Co. v. Mendelsohn*, casts further doubt on the inflexible rule-orientation of many lower courts, requiring instead a holistic and contextual assessment of evidence. Nevertheless, fundamental judicial hostility remains intact.*

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*This negative view derives from common judicial perceptions that randomness, and even irrational, factors are more likely explanations for workplace disparities than is discrimination. Thus, only when those factors are ruled out by an almost-twin comparator will the courts permit the inference of discrimination. Absent evidence to the contrary, the courts may be justified in relying on their perceptions of the relative probability of discrimination as opposed to other explanations to determine when a jury question is created. These “legislative facts” are traditionally within the purview of the courts.*

*Nevertheless, this Article contends that plaintiffs can counteract judicial perceptions, and create a jury issue, by introducing evidence both of the prevalence of discrimination generally and, more central to my thesis, by introducing expert testimony regarding comparators. Drawing on such sources as trade usage in contracts and professional standards of care in torts, this Article argues that a more objective standard should be substituted for current judicial worldviews. It recommends assessing the comparability of proffered comparators not by judicial instinct but rather by expert testimony about whether other employers would treat such individuals comparably to plaintiff.*

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## INTRODUCTION

Hidden beneath judicial and scholarly obsession with formal proof structures for individual disparate treatment cases is a simpler, more direct method of establishing discrimination. Like earlier efforts, however, this “comparator” approach threatens to fall victim to the conventional wisdom about analyzing discrimination cases, the hostility of the courts to discrimination claims generally, and a fundamentally flawed approach of the plaintiffs’ bar to litigating these cases. The purpose of this Article, therefore, is to identify the growing reality of comparator proof, put to one side the substantial jurisprudence and scholarship about competing proof struc-

tures, and propose a way to neutralize judicial hostility by expanding the kind of proof deployed.

The reality on the ground is that discrimination cases today increasingly turn not on whether the plaintiff has proven her prima facie case or established that the “legitimate nondiscriminatory reason” is a pretext for discrimination (although the courts continue to invoke the *McDonnell Douglas* mantra), but rather on whether the plaintiff has identified a suitable “comparator” who was treated more favorably than she. If the comparator is sufficiently similar, that evidence alone is sufficient to permit—but not require—a jury to infer discrimination from the different treatment. Even a somewhat less perfect comparator may, together with other evidence, allow for such an inference.

The term comparator is not my invention, but rather is being increasingly used by courts to describe someone whose treatment by the employer may be an adequate basis for inferring discrimination against the plaintiff.<sup>1</sup> But the courts also use a wide variety of other terms to express essentially the same concept. Sometimes, for example, they speak of identifying others who are “similarly situated” to the plaintiff.<sup>2</sup> In the context of challenges alleging failures to promote, the issue is often framed as whether the plaintiff is “better qualified” than her successful competitor.<sup>3</sup> Where a discharge is concerned, courts often look to whether the plaintiff was replaced by someone of a different race or sex,<sup>4</sup> and even where the termi-

1. The term first appeared in *Spaulding v. University of Washington*, No. C74091M, 1981 U.S. Dist. LEXIS 17951, at \*18 (W.D. Wash. Dec. 17, 1981), *aff'd*, 740 F.2d 686 (9th Cir. 1984), *overruled in part on other grounds by* *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc), a comparable worth case, where the plaintiff tried to compare classes of jobs. Shortly thereafter, the Ninth Circuit used the term in an Equal Pay Act case where the question was whether individuals could be compared with the plaintiff for purposes of determining whether the work they performed was “equal” to plaintiff’s work. *See* *Hein v. Or. Coll. of Educ.*, 718 F.2d 910 (9th Cir. 1983). “Comparator” still does not frequently appear in Title VII cases, but its use is growing. *See, e.g.*, *Steward v. Sears, Roebuck & Co.*, 231 F. App’x 201, 209 (3d Cir. 2007). A search in Lexis-Nexis’s “Federal & State Cases, Combined” database (“comparator w/p discriminat!”) reveals that, prior to 1990, the term comparator appeared linked to the term discrimination only 21 times. However, from 2000 until the end of 2008, it appeared 1,113 times.

2. *E.g.*, *Walker v. Ohio Dep’t of Rehab. & Corr.*, 241 F. App’x 261, 265 (6th Cir. 2007); *see also* *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 884 (9th Cir. 2007) (union found to have discriminated on the basis of gender in providing more aggressive representation of two men than it did of two women when the men were “similarly situated in all material respects”).

3. *E.g.*, *Mathis v. Wachovia Bank*, 255 F. App’x 425, 430 (11th Cir. 2007) (“Mathis has not shown that she was qualified for the FSR position or that she was equally qualified or more qualified than Piper for the FCM position.”); *Amie v. El Paso Indep. Sch. Dist.*, 253 F. App’x 447, 453 (5th Cir. 2007) (discussing “relative qualifications” of plaintiff and his successful competitor); *Brown v. Ill. Dep’t of Natural Res.*, 499 F.3d 675, 683 (7th Cir. 2007) (plaintiff not more qualified than successful competitor); *see also* *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 162 (1982) (Burger, C.J., concurring) (stating that the success of a disparate treatment claim for failure to promote “depends on evaluation of the comparative qualifications of the applicants for promotion to field inspector and on analysis of the credibility of the reasons for the promotion decisions provided by those who made the decisions”).

4. *See, e.g.*, *Wright v. Southland Corp.*, 187 F.3d 1287, 1291 (11th Cir. 1999) (stating that, as

nation occurs as a result of a reduction in force, the courts often focus on the qualifications of those retained to determine if there is anything discriminatory about a plaintiff's termination.<sup>5</sup> Still another occasional formulation is "unequal treatment."<sup>6</sup>

These cases are typically framed in terms of the traditional *McDonnell Douglas* proof structure.<sup>7</sup> Thus, sometimes the presence or absence of a comparator is assessed by the court in determining whether plaintiff has made out her prima facie case; in other instances, it arises in deciding if the plaintiff can establish pretext. Whatever the terminology and however it fits into existing proof structures, cases increasingly turn on whether the plaintiff's proposed comparator(s) is sufficiently similar to her to justify—with or without other evidence—the ultimate inference of discrimination.

This phenomenon, though scarcely invisible, has received little attention<sup>8</sup> despite the Supreme Court's decision in *Ash v. Tyson Foods, Inc.*,<sup>9</sup> which should have propelled the issue to center stage. At issue in *Ash* was a particularly egregious effort by one circuit to limit comparator proof. The Eleventh Circuit had, apparently in all seriousness, held that a plaintiff can use her asserted superior qualifications relative to those of a comparator to prove discrimination only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face."<sup>10</sup> The Supreme Court's per curiam opinion in *Ash* rejected the Eleventh Circuit's grudging approach to comparative evidence,<sup>11</sup> but it did so grudgingly.

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part of her prima facie case, plaintiff must establish that "she was replaced by a male (or that males with similar qualifications were retained)"; see also *infra* notes 48–52 and accompanying text.

5. See, e.g., *Webb v. Level 3 Commc'ns, LLC*, 167 F. App'x 725, 731 (10th Cir. 2006) (where plaintiff failed to prove lesser qualifications or performance of younger individuals who were retained).

6. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("'Discrimination' is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX] a broad reach."); see also *Harris v. Hays*, 452 F.3d 714, 721 (8th Cir. 2006) ("[T]he essence of the prima facie test was still unequal treatment of minorities versus non-minorities.").

7. See *infra* text accompanying notes 29–33.

8. The major exception is Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 859–61 (2002), which surveys the circuits dealing with the concept. See also Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459 (2008).

9. 546 U.S. 454 (2006).

10. *Id.* at 456–57 (quoting *Ash v. Tyson Foods, Inc.*, 129 F. App'x 529, 533 (11th Cir. 2005)). The test apparently originated in *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993). As articulated by the Eleventh Circuit in *Ash*, the "slap in the face rule" applied to whether the defendant's claim that it had promoted a better qualified white was a pretext for discrimination. See *Ash*, 129 F. App'x at 533. We will see that comparative qualifications can also arise in connection with whether plaintiff has established a prima facie case. See *infra* note 70.

11. The Court in *Ash* also held that the Eleventh Circuit had committed error in apparently refusing to give weight to evidence showing that the supervisor in question had referred to each of the plaintiffs as "boy." The Court of Appeals had held that, "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone

The two plaintiffs in *Ash* had won a jury verdict below, but the trial judge had nonetheless granted judgment as a matter of law against them; the Eleventh Circuit had affirmed as to one plaintiff, Ash, on the ground that he had not adduced sufficient evidence to show pretext because the court was not slapped in the face by his arguably superior qualifications. The Supreme Court reversed, stressing that its prior decisions had stated that “qualifications evidence may suffice, at least in some circumstances, to show pretext.”<sup>12</sup> It cited to one case where the Court had said that a plaintiff’s proof that he was better qualified than his successful competitor could prove pretext<sup>13</sup> and another where the Court had said that the plaintiff’s proof that the employer “misjudged the qualifications of the applicants . . . may be probative of whether the employer’s reasons are pretexts for discrimination.”<sup>14</sup>

Not surprisingly, the Court then wrote that “[t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.”<sup>15</sup> Although “slap in the face” was too restrictive, the Court failed to take the opportunity to announce the appropriate standard, noting, “[t]his is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications. . . . It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results.”<sup>16</sup>

In this regard, *Ash* is a profoundly unsatisfying opinion. On the most obvious level, its approval of comparator evidence in the abstract was counterbalanced by an explicit refusal to announce the appropriate standard, the effect of which was exacerbated by the Court’s repeated stress that its holding did not necessarily mean that judgment as a matter of law against Ash should be reversed—“The judgment of the Court of Appeals, and the trial court rulings it affirmed, may be correct in the final analysis.”<sup>17</sup> Indeed, it is possible to read the opinion as simply chastising the

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is not evidence of discrimination.” *Ash*, 129 F. App’x at 533 (citation omitted). However, the Supreme Court disagreed that “the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.” *Ash*, 546 U.S. at 456.

12. *Id.* at 457.

13. *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 187–88 (1989), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 101, 105 Stat. 1071, 1072 (1991) (codified as amended at 42 U.S.C. § 1981(b) (2000))).

14. *Id.* (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981)).

15. *Id.*

16. *Id.* at 458.

17. *Id.* at 456. At another point, the Court wrote: “Today’s decision, furthermore, should not be read to hold that petitioners’ evidence necessarily showed pretext. The District Court concluded oth-

Eleventh Circuit's purple prose in formulating a silly legal standard, a puzzling exercise for a Court with other pressing concerns and a limited docket.<sup>18</sup> On remand, the Eleventh Circuit reached the same result as it had before, however this time using a less restrictive test.<sup>19</sup>

At a deeper level, *Ash* is unsatisfying because it delves so superficially into the role of comparator proof in Title VII cases. *Ash* is the Supreme Court's first encounter with the fundamental problem of proof of discrimination since *Desert Palace, Inc. v. Costa*.<sup>20</sup> In *Desert Palace*, the Court held that "sufficient evidence" that discrimination was "a motivating factor" in an employment decision established a violation, and that "direct evidence" was not necessary in order to prove that discrimination was "a motivating factor."<sup>21</sup> *Desert Palace* explicitly restricted the entire *McDonnell Douglas* proof structure, and, in the view of many commentators, eliminated it.<sup>22</sup> *Ash* is itself perfectly consistent with *McDonnell Douglas* since the question before the Court was the role of comparator proof in the pretext stage of *McDonnell Douglas* analysis. But the opinion is unsatisfying not merely because it fails to further define the line between *McDonnell Douglas* cases and *Desert Palace* cases,<sup>23</sup> but, more important for present purposes, because it failed to meaningfully confront the role of comparator proof even in a *McDonnell Douglas* setting. *Ash*, then, suggests that the Court appreciates the increasing importance of comparator evidence but lacks a coherent theory of how such evidence should be assessed. Under this reading, *Ash* is both a rebuke to the lower courts' overly restrictive view of comparative evidence and a signal that a more coherent approach needs to be developed.

Nor is *Ash* alone in this regard. To considerable fanfare, the Supreme Court granted certiorari in a case that raised a different kind of comparator question. Derogatorily labeled "me too" cases, the issue in *Sprint/United Management Co. v. Mendelsohn*<sup>24</sup> was the admissibility of evidence of age discrimination against workers who were not under the supervision of the individual who allegedly discriminated against the plaintiff. Expected to illuminate how discrimination cases are litigated under both the Age Discrimination in Employment Act and Title VII, *Mendelsohn* ended up re-

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erwise." *Id.* at 458.

18. See Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1167 n.114 (2006) (discussing the caseload of the Supreme Court during the relevant period).

19. *Ash v. Tyson Foods, Inc.*, 190 F. App'x 924, 927 (11th Cir. 2006) (applying a reasonable person exercising "impartial judgment" standard (quoting *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004))).

20. 539 U.S. 90 (2003).

21. *Id.* at 101.

22. See *infra* note 81 and accompanying text.

23. Considering the proof of discriminatory comments by the defendant in *Ash*, it is not apparent why the case was treated below as a *McDonnell Douglas* case rather than a *Desert Palace* one.

24. 128 S. Ct. 1140 (2008).

solving only who should decide the issue rather than giving guidance on how the issue should be resolved. The Court unanimously concluded that, so long as no per se rule of admissibility or inadmissibility was applied, the trial court had discretion to admit or deny such evidence.<sup>25</sup> If anything, *Mendelsohn* provides less guidance than *Ash* on an issue important to the antidiscrimination project, although both might be read to suggest that courts should stop treating discrimination cases as needing special evidentiary rules rather than treating them as any other kind of fact finding.

In any event, this Article begins the task that the Court has thus far avoided, suggesting a more commonsensical approach to discrimination claims—one that reframes proof in terms of the underlying substantive law rather than focusing on special evidentiary rules or proof structures. It concludes: (1) a simpler, more direct way to approach most discrimination cases is for the plaintiff to identify a comparator(s) who is sufficiently similar that the inference of discrimination may be drawn by a jury merely from the existence of the comparator. No presumption is required by this approach; (2) while comparator proof can be fit into traditional *McDonnell Douglas* analysis (and the lower courts typically do so), it should be recognized as an alternative method of proof, which is more consistent with the Court's more holistic approach to proving discrimination under *Desert Palace*; (3) as the Eleventh Circuit's "slap in the face rule" indicates, the lower courts recognize the centrality of comparator proof but have not yet developed the tools to assess it effectively. Left largely to their own devices, judges have looked to their own worldviews to develop a series of rules that limit comparator evidence to individuals who are very close comparators indeed—what I describe as the "almost twin" approach; (4) *Mendelsohn* opens the way for a less rule-bound approach to comparator proof; but for real change to occur, the courts must be provided with the kind of evidence that will allow a more holistic assessment of whether discrimination is sufficiently likely in given fact scenarios to send a case to the jury; (5) given judge and jury roles, this can be achieved only by a two-fold reform. First, courts must substitute a more objective standard for current judicial worldviews about when an individual is sufficiently similar to the plaintiff to allow the jury to infer discrimination from a difference in treatment. Second, plaintiffs should adduce—and courts should admit—expert testimony about whether other employers would treat the proffered comparators comparably.

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25. See *infra* text accompanying notes 102–116.

## I. INDIVIDUAL DISPARATE TREATMENT

*Ash* and *Mendelsohn*, like the vast majority of discrimination claims in federal court, were individual disparate treatment cases. As the name suggests, a violation under this theory requires an employer to treat an individual differently than it treats (or at least would treat) another person of a different race—or, for that matter, religion, national origin, or the opposite sex. Critically, the difference in treatment must be intentional; that is, the employer must be motivated by the victim's status as, say, an African American.<sup>26</sup>

This follows from the fact that Title VII does not lay down any substantive workplace standards; rather, it merely requires equality.<sup>27</sup> All employees are to be treated the same—but only to the extent that treating any employee differently than another employee on a prohibited ground is prohibited. Some would qualify this statement by interpolating the words “similarly situated” between “another” and “employee.” But a moment's thought reveals that “similarly situated” is not a requirement of the statute but rather a way of determining whether a difference in treatment is race-based.<sup>28</sup> The notion of “similarly situated” is, of course, central to the thrust of this Article—when comparators are sufficiently alike, differences in treatment are probative of discrimination.

What seems like a simple concept has generated enormous complications. The dominant proof structure takes its name from *McDonnell Douglas Corp. v. Green*,<sup>29</sup> although it evolved over a number of Supreme Court decisions. As is well known, *McDonnell Douglas* lays out a three-step process, with the third step typically being determinative. The plaintiff must first prove a prima facie case of discrimination.<sup>30</sup> If she succeeds, the employer can avoid liability only by carrying a burden of production of putting into evidence a “legitimate, nondiscriminatory reason” for the

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26. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“‘Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”).

27. See 42 U.S.C. § 2000e-2(a) (2000) (“It shall be unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . .”); cf. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (“‘Discrimination’ is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave [Title IX] a broad reach.”).

28. A compensation policy that preferred male employees over females violated the law, regardless of whether every male employee was similarly situated to a corresponding female. See *City of L.A., Dep't of Water & Power v. Manhart*, 461 U.S. 951 (1983) (invalidating policy that required women to contribute more to retirement plans than men because of their greater longevity).

29. 411 U.S. 792 (1973).

30. See *id.* at 802.

challenged decision.<sup>31</sup> Finally, if the defendant carries that burden, the plaintiff, in order to prevail, must show that that reason was a pretext, not merely in the sense that it was not the real reason, but also in the sense that the real reason was discrimination.<sup>32</sup> However, proof that the reason is pretextual in the first sense will usually be sufficient to allow, but not require, the further conclusion that it is a pretext for discrimination.<sup>33</sup>

*McDonnell Douglas* is sometimes described as single motive/circumstantial evidence and is contrasted with what are typically called “mixed motives” cases. *Price Waterhouse v. Hopkins*<sup>34</sup> introduced an alternative proof structure for such cases. As originally formulated in that decision, a plaintiff who produced “direct evidence” that discriminatory intent was “a substantial factor” in an employment decision<sup>35</sup> shifted the burden of persuasion to the defendant to avoid liability by proving that it would have made the same decision even if the prohibited consideration were absent. *Price Waterhouse* was in turn modified by the Civil Rights Act of 1991, which added § 703(m) to Title VII. This provision codified (in a considerably altered form) the *Price Waterhouse* approach.<sup>36</sup> As the

31. *Id.* This “requirement” flows from the fact that, should the defendant fail to carry its burden, judgment for the plaintiff must follow from proof of the prima facie case. *See* Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (“Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.”).

32. *See McDonnell Douglas*, 411 U.S. at 802; *see also* St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (“[A] reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.”) (emphases omitted).

33. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000) (“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party’s dishonesty about a material fact as ‘affirmative evidence of guilt.’ Moreover, once the employer’s justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision . . . . This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury’s finding of liability.” (citations omitted) (quoting *Wright v. West*, 505 U.S. 277, 296 (1992))).

34. 490 U.S. 228 (1989).

35. *Id.* at 276 (O’Connor, J., concurring). *Price Waterhouse* was decided by a plurality with separate concurrences by Justices O’Connor and White. It was generally accepted that Justice O’Connor’s opinion, being the narrowest opinion upon which five justices agreed, stated the holding of the case. *See* *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, when there is no opinion for a majority of the Court, the holding is to be ascertained by looking to the narrowest ground upon which five members agree). A more detailed explication of the analysis is found in Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 931–32 (2005). *McDonnell Douglas* was generally viewed as requiring proof that discrimination was at least a “determinative” factor—a but-for cause of the adverse employment action challenged. *Price Waterhouse*, 490 U.S. at 262–66. *Price Waterhouse* reduced the level of causation to “substantial factor,” and, as we will see, the 1991 Civil Rights Act reduced the level to “motivating factor.” *See generally* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006).

36. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m) (2000)) (“[A]n unlawful employment practice is established when the complaining party

*Desert Palace* Court wrote, to establish a jury question of a § 703(m) violation, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”<sup>37</sup> Notably, there is no requirement of “direct evidence” for such proof, as in *Price Waterhouse*.<sup>38</sup> Should the jury find a motivating factor, liability follows, although the defendant may nevertheless limit plaintiff’s recovery by carrying the burden of persuasion that it would have made the same decision even had the motivating factor not been present.<sup>39</sup>

There is considerable scholarly dispute regarding the rationale for the *McDonnell Douglas* approach<sup>40</sup> and the effect of *Desert Palace* on that approach. At the very least, *Desert Palace* intrudes into what was previously *McDonnell Douglas* territory, and some argue that its logic means that *McDonnell Douglas* has been replaced by a new, largely unstructured “sufficient evidence” standard.<sup>41</sup> This Article, however, does not enter into that debate. Rather, it isolates an increasingly common kind of proof—comparators—and explores both how comparators are currently viewed by the courts and how such proof can be deployed more effectively.

We have seen that discrimination is at root a difference in treatment.<sup>42</sup> Accordingly, whatever the proof structure, a violation occurs when an

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demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). The word “demonstrates” is defined to mean “meets the burdens of production and persuasion.” 42 U.S.C. § 2000e(m) (2000).

37. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

38. The “direct evidence” requirement was always incoherent. *See generally* Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118–19, 1130–31 (1991).

39. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2000) (providing that, when “an individual proves a violation under section 2000e-2(m),” an employer who demonstrates that it “would have taken the same action in the absence of the impermissible motivating factor,” is not liable for damages or subject to “an order requiring any admission, reinstatement, hiring, promotion, or payment,” but may be subject to declaratory or injunctive relief and “attorney’s fees and costs”).

40. The three competing views are the “process of elimination” justification, Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1894 (2004); the pure causation explanation, Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 116, 121 (2007); and the “knockout” rule, Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 38–62 (2005).

41. *See* Sullivan, *supra* note 35, at 936–38 (arguing that *Desert Palace*, while perhaps reframing the inquiry in individual disparate treatment cases, is not likely to lead to greater success for plaintiffs).

42. While disparate impact discrimination can be found despite equality of treatment, *see generally* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004), individual disparate treatment can rarely be established absent a baseline established by the employer’s treatment of members of the opposite sex or a different race. In theory, equal treatment could be imposed for discriminatory reasons, but it is hard to imagine proving that without some sort of admission by the employer. One example might be the desegregation of The Citadel. Women cadets were subjected to the same haircuts as males. While the failure of The Citadel

employer is motivated by a prohibited consideration to treat plaintiff differently than another worker—someone who did not share plaintiff’s protected trait.<sup>43</sup> This suggests that the first step in most discrimination cases<sup>44</sup> is for plaintiff to identify an individual of another race (or the opposite sex, etc.) who was treated more favorably than she—a “comparator.”

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to “accommodate” women’s probable stronger preferences for retaining longer hair might have stemmed from the hostility of the school to admitting them in the first place, it is hard to expect a court to find this without an admission. *See* *Faulkner v. Jones*, 51 F.3d 440, 443 n.1 (4th Cir. 1995) (reporting that district court had denied a female plaintiff seeking admission to The Citadel exemption from buzz cut rules). The Citadel now permits longer hair for female cadets, Kimberly M. Schuld, *Rethinking Educational Equity: Sometimes, Different Can Be an Acceptable Substitute for Equal*, 1999 U. CHI. LEGAL F. 461, 489, apparently without claims by male cadets of reverse discrimination. For a detailed discussion of *Faulkner v. Jones*, see Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68 (2002).

43. This is not to say that comparator proof is the only way to establish a violation.

44. The discussion below is limited to discrimination under Title VII. Where sex discrimination is concerned, the Equal Pay Act can also come into play, although under that law discrimination in compensation is actionable only if the comparator is doing “equal work.” *See, e.g.*, *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 699 (7th Cir. 2003) (“Although Dr. Cullen and Dr. Quillen have different educational credentials, the comparison at this juncture is between positions, not individuals.”). *See generally* 2 CHARLES A. SULLIVAN & LAUREN M. WALTER, EMPLOYMENT DISCRIMINATION LAW & PRACTICE, ch. 7.08 (4th ed. 2008). While the equal work requirement renders the EPA far narrower than Title VII, *see* *County of Wash. v. Gunther*, 452 U.S. 161, 179–81 (1981) (women may sue for sex discrimination in compensation under Title VII even if their jobs are not “equal” to preferred male workers within the meaning of the EPA), the Equal Pay Act provides plaintiffs with advantages in its proof structure, *see* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 659 (2007) (Ginsburg, J., dissenting) (“The key distinction is that Title VII requires a showing of intent. In practical effect, ‘if the trier of fact is in equipoise about whether the wage differential is motivated by gender discrimination,’ Title VII compels a verdict for the employer, while the EPA compels a verdict for the plaintiff.”) (quoting 2 CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 7.08[F][3] (3d ed. 2002)).

The relationship between the Equal Pay Act’s statute of limitations and the limitations period under Title VII is more complicated. The EPA has a two- or three-year limitations period (depending on whether the violation is “willful”). 29 U.S.C. § 255 (2006); *Ledbetter*, 550 U.S. at 658, n.8 (Ginsburg, J., dissenting). As for Title VII, the majority’s reading of Title VII in *Ledbetter* effectively confined the period to 180 or 300 days (depending on whether the violation occurred in a state with a fair employment practices agency) measured from the compensation decision at issue, not from its manifestation in any particular paycheck. *See* *Ledbetter*, 550 U.S. at 623–25 (majority opinion). On Jan. 29, 2009, however, President Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, which amends Title VII (and other antidiscrimination laws) to provide that

an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)(3)(A)). This amendment, therefore, removes any statute of limitations for violations that affect compensation, although the new law does limit backpay recovery to two years prior to the charge filing. § 3 (to be codified at 42 U.S.C. § 2000e-5(e)(3)(B)). It seems clear that the amendment will apply to all claims, even those extinguished by the *Ledbetter* decision, with the exception of those for which a final judgment has been entered. *See* Posting of Charles A. Sullivan to WORKPLACE PROF BLOG, *Sullivan on Ledbetter Act Retroactivity*, [http://lawprofessors.typepad.com/laborprof\\_blog/2009/02/sullivan-on-t-1.html](http://lawprofessors.typepad.com/laborprof_blog/2009/02/sullivan-on-t-1.html) (Feb. 9, 2009).

Once a comparator is identified, the plaintiff would argue that the reason for the more favorable treatment is in fact the prohibited characteristic and might try to adduce proof beyond the mere existence of that person to establish that the employer's motivation for the difference was that characteristic. For example, the plaintiff might introduce admissions of the defendant that the factor in question (race in our example) was viewed negatively by the decision maker. The plaintiff might also adduce other comparators to strengthen the inference of employer discrimination that a particular comparator evoked. In response, the defendant might seek to explain why the supposed comparator was different than plaintiff or to proffer other comparators (either individuals in plaintiff's class who were treated better than plaintiff or other individuals of the different class who were treated worse than the comparator plaintiff proffers). When the dust settles, the question would be whether a trier of fact could (or does) determine that the treatment at issue was discriminatory.

This may seem pretty straightforward, but, as my sketch of the *McDonnell Douglas-Price Waterhouse-Desert Palace* authority indicates, Title VII proof structures have a far more tortuous history, at least in terms of formal analysis. Without trying to plumb all the depths of this history, this Article turns in Part II to an examination of where comparators fit into the present formal conceptions of proof of discrimination. Part III then considers why comparator proof has not played a more explicit role in employment discrimination law, and Part IV examines how the circuit courts actually deal with such proof. Part V then maps out a better way of proving discrimination through comparators.

## II. COMPARATORS IN THE *MCDONNELL DOUGLAS* DISPENSATION

Despite *Price Waterhouse* and *Desert Palace*, the overwhelming majority of individual disparate treatment cases are still litigated under the *McDonnell Douglas* proof structure, and, despite the term "disparate treatment," the notion of a comparator is still not prominent in the Supreme Court's articulations of that structure. As we have seen, *McDonnell Douglas* establishes a three-step process: plaintiff's proof of a prima facie case, defendant's putting into evidence a "legitimate nondiscriminatory reason," and plaintiff's proof that that reason was a pretext for discrimination.

With respect to the prima facie case, the original *McDonnell Douglas* formulation was so fact-specific that it has applied to almost no actual cases.<sup>45</sup> As framed, it described only a failure to hire situation, and then only

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45. To make out a prima facie case of race discrimination, the plaintiff must establish: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was re-

when the position remained vacant rather than, as will almost always be true, being filled by a competitor within a relatively short time. However, the *McDonnell Douglas* prima facie case was soon rationalized by the Court as requiring merely that a minority member or woman was denied an employment opportunity in circumstances where the most obvious innocent explanations, such as plaintiff's lack of qualifications or the absence of an opening, are inapplicable.<sup>46</sup> This naturally led to a focus away from comparators.

*McDonnell Douglas*, however, had explicitly invited the lower courts to adapt its prima facie case to workplace situations differing from the anomalous failure to hire it addressed.<sup>47</sup> Such an adaptation was at issue in the Supreme Court's ADEA decision in *O'Connor v. Consolidated Coin Caterers Corp.*<sup>48</sup> Since the *McDonnell Douglas* specification of the prima facie case is inapplicable by its terms to discriminatory discharges, some lower courts had required the prima facie case to include proof of replacement by someone outside her protected class. Under the ADEA, that meant that some courts required a plaintiff to show that he was replaced by someone under age forty. A replacement is, of course, one kind of a comparator. The Court, while rejecting this particular rule, affirmed the relevance of comparators: the relevant showing was that the plaintiff had been replaced by someone substantially younger (whether or not below forty). The age discrepancy requirement was explained as providing "a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a 'legally mandatory, rebuttable presumption.'"<sup>49</sup> Inferring age discrimination when the replacement was substantially younger than the plaintiff is much more significant than whether the person is younger than forty.

It is possible to read *O'Connor* for its negative implication: that a proper comparator—a replacement—*is* necessary for a prima facie case of discharge, but the lower courts focused instead on the rule the Court rejected—plaintiffs had to identify a comparator outside the protected class.

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jected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

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

46. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981) ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."); *see also* *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.").

47. *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

48. 517 U.S. 308 (1996).

49. *Id.* at 311–12 (quoting *Burdine*, 450 U.S. at 254 n.7).

Further, they applied the no-replacement rule to race and sex cases,<sup>50</sup> holding that, while proof of replacement by a person outside plaintiff's class might be sufficient in a discharge case to establish a prima facie case, it was not necessary.<sup>51</sup> Some cases looked to the *McDonnell Douglas* rationale to reject any requirement of proof of a replacement: since such proof had no relationship to eliminating the most common nondiscriminatory bases for a decision, it was not necessary to a prima facie case.<sup>52</sup> Resistance to requiring proof of a comparator might also have been due to the perception explored below, that identifying appropriate comparators is a very difficult task because workers differ from each other along so many axes.<sup>53</sup> Thus, it will usually be possible to question the appropriateness of any comparator the plaintiff proffers, and there were those who thought this controversy inappropriate, at least for the prima facie case.<sup>54</sup> In any event, the lower courts have pretty clearly rejected comparator proof as necessary.<sup>55</sup>

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50. *Id.* at 312.

51. *See, e.g.,* McGinnis v. Union Pac. R.R., 496 F.3d 868, 874 n.2 (8th Cir. 2007) (“[T]he district court erred when it required McGinnis to show he was replaced by someone from the opposite sex to establish a prima facie case.”); Pivrotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d Cir. 1999) (joining seven of the eight federal courts of appeals to have addressed the question in holding that “a plaintiff need not prove, as part of her prima facie case, that she was replaced by someone outside of the relevant class”); *see also* Vincent v. Brewer Co., 514 F.3d 489, 491 (6th Cir. 2007) (“[A] plaintiff who can prove that she was replaced by a member of the opposite sex need not show that she possesses qualifications similar to those of her replacement.”). *See generally* Lidge, *supra* note 8, at 836 n.20 (collecting cases).

52. *See, e.g.,* Pivrotto, 191 F.3d at 353 (“Requiring that a gender-discrimination plaintiff prove she was replaced by a man, as the District Court instructed the jury here, eliminates no common, lawful reasons for the discharge.”); *see also* Lidge, *supra* note 8, at 855–59.

53. *See infra* text accompanying notes 88–90.

54. *See, e.g.,* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 645 (2000) (“[I]t is very difficult for plaintiffs to demonstrate that they are more qualified than the candidate selected by the employer. Employers normally hire and promote on the basis of multiple criteria. As a result, an employer can always point to at least one criterion, which it claims is critical to the position, on which the plaintiff is weaker than the candidate selected.”); Lidge, *supra* note 8, at 859–61.

55. Perhaps the most obvious example is that, to the extent that qualifications are to be judged for the prima facie case, it was “minimum qualifications,” not qualifications as compared to other workers. The latter enter the picture in the pretext analysis if the employer, as was typically true, claimed to have hired a better qualified person. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 218 n.18 (1989) (Brennan, J., concurring) (“The Court of Appeals mistakenly held that the instruction requiring petitioner to prove her superior qualifications [at the pretext stage] was necessary in order to protect the employer’s right to choose among equally well-qualified applicants.”), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 101, 105 Stat. 1071, 1072 (1991) (codified as amended at 42 U.S.C. § 1981(b) (2000)); *see also* De La Cruz v. New York City Human Res. Admin. Dep’t of Social Servs., 82 F.3d 16, 21 (2d Cir. 1996); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 768 (2005) (“[T]o make out a prima facie case, an employee must show that she met the objective or minimum qualifications for the position in question. She is not required to show that she met her employer’s subjective standards. It is the employer’s burden to raise these subjective standards in response to the plaintiff’s prima facie case.”).

This unanimity, however, conceals the extent to which the lower courts have permitted comparator proof, whether in the prima facie case or at the pretext stage. With respect to the prima facie case, two formulations came to dominate the lower courts' articulations of the requirements of the prima facie case.<sup>56</sup> One is generalized, and the other particularized to the discharge situation. The generalized formulation is strikingly tautological:

Ordinarily, a plaintiff must first establish a prima facie case of discrimination by showing that (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class.<sup>57</sup>

The best that can be said for this “inference-from-circumstances” test<sup>58</sup> is that it provides literally no guidance; the worst that can be said for it is that it is internally inconsistent. After all, if plaintiff can adduce evidence of circumstances giving rise to an inference of discrimination, as the fourth prong requires, it is not so clear what work the other three elements do.<sup>59</sup> Nevertheless, this formulation is common.<sup>60</sup>

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56. Other formulations occasionally appear, but most are variations on the themes described in the text.

57. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 216 (2d Cir. 2005); *accord* *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996).

58. The inference-from-circumstances test is drawn from *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), but it is used there to describe the entire prima facie case, not a final prong.

59. In fact, they do little work in any event. The first and third prongs are easily satisfied. Prong one is satisfied because Title VII protects members of all races and both sexes. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–79 (1976) (whites protected from race discrimination). The third prong—the “adverse employment action” prong—requires the plaintiff to establish the requisite harm, and, while it has become a term of art, the complications it entails relate less to the prima facie case than to what conduct violates the statute in the first place. *See* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1151–54 (1998) (critiquing restrictive views of what constitutes an adverse action as both counterintuitive and contrary to the generally broad notion of terms and conditions of employment). *See generally* 1 SULLIVAN & WALTER, *supra* note 44, § 2.02.

Prong two, which requires proof of either qualifications (in the hiring situation) or satisfactory performance of the job (in the situation where current workers suffer an adverse employment action) does have significance but generally means merely minimum, objective qualifications, *see supra* note 55, or satisfactory performance, and therefore does not require probing analysis of employer decision making by comparing plaintiff with other applicants or employees. *See, e.g.*, *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1007 (8th Cir. 2005).

60. As of Feb. 7, 2009, a search in LexisNexis's Federal and State Cases combined database revealed that the phrase “under circumstances giving rise to an inference of discrimination” appears in both reported and unreported cases a total of 1,704 times. Nearly half the time—803 instances—these cases also use some version of “compare,” usually, but not always, in describing what we have labeled a “comparator.”

What is striking about the cases employing this formulation is how often the “circumstance” in question is some kind of comparator proof,<sup>61</sup> although other bases for inferring discrimination are sometimes used.<sup>62</sup> Indeed, the “circumstances” language may have been chosen precisely to avoid elevating comparators into the prima facie case. Further, if courts using this inference-from-circumstances test do not look to comparators for the prima facie case, they typically look to them at the pretext stage in order to draw the ultimate inference of discrimination. We will see that, at whatever stage the question is considered, the absence of a comparator is often fatal to a claim.<sup>63</sup>

The second common formulation of the prima facie case is more tailored to the most common discrimination claim—discharge.<sup>64</sup> The prima facie case of discrimination may be proven by showing: “(1) membership in a protected class; (2) satisfactory job performance; (3) termination from employment or other adverse employment action; and (4) the ultimate filling of the position with an individual who is not a member of the protected class.”<sup>65</sup> This version of the prima facie case is typically framed as an alternative to the “inference-from-circumstances” approach; thus, a plaintiff can make out her prima facie case either way.<sup>66</sup> Viewed by itself, however, this formulation incorporates only the broadest version of comparator—replacement by someone outside the plaintiff’s class. There is no requirement that the plaintiff compare herself to anyone in terms of qualifications or performance.<sup>67</sup> Again, however, we will see that the comparator

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61. See *infra* note 68.

62. These include admissions by employers, for example. See, e.g., *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 530 (6th Cir. 2007).

63. See *infra* text accompanying note 72.

64. In the early days of Title VII, hiring cases were quite common, and the first Supreme Court cases involving individual disparate treatment all involved hiring or promotion, including *McDonnell Douglas*, *Burdine*, and *Furnco*. In the last few decades, discharge cases have predominated—*Desert Palace*, *Reeves*, and *Hicks*. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 16 (1996) (“[T]he largest percentage of claims related to individuals who claimed they had been unlawfully terminated, which accounted for 53.4% of all claims. Only 17.8% of the EEOC cases involved claims for discriminatory hiring.”) (footnotes omitted). The explanation is typically framed in terms both of the endowment effect—the tendency of people to value what they have more highly than what they would pay to get it, see Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1275–79 (2003)—and information asymmetries—the absence of information by individuals who have not been hired about the decision-making process that resulted in their rejection, see Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 496–97 (2002).

65. *Farias v. Instructional Sys., Inc.*, 259 F.3d 91, 98 (2d Cir. 2001).

66. See *id.* (“Alternatively, the fourth prong of the prima facie case may be satisfied if the plaintiff can demonstrate that the discharge or adverse employment action occurred under circumstances giving rise to an inference of discrimination on the basis of plaintiff’s membership in that class.”)

67. A variation on this particularized formulation is applicable to “reductions in force,” that is, situations in which the employer is downsizing. In such cases, the justification for laying off the plaintiff is apparent on its face—the employer is laying off a number of workers to cut costs—and there is, by definition, no replacement. Accordingly, the plaintiff is required to show something more than just loss of position while doing satisfactory work, and this is usually framed in terms of proving that

plays a critical role in the ultimate question of discrimination *vel non*, and the closer the comparator, the more difficult it will be for the defendant to assert a legitimate nondiscriminatory reason and the easier it will be for a plaintiff to prove pretext.

In short, neither of the common lower court formulations of the *prima facie* case explicitly requires evidence of a comparator, although the “inference-from-circumstances” permits it, and the replacement with a non-class member version requires proof that some person of a different race or the opposite sex was favored.<sup>68</sup>

There is a third formulation of the *prima facie* case, however, which does explicitly require comparators. In disparate discipline cases, the plaintiff usually has admittedly engaged in misconduct but claims he was punished more severely than others who committed the same or a similar infraction.<sup>69</sup> As might be expected, comparators are central to the *prima facie* case in these situations. Plaintiff must show: “‘1) that he belongs to a protected class under Title VII; 2) that he was qualified for the job; and 3) that a similarly situated employee engaged in the same or similar misconduct but did not receive similar discipline.’”<sup>70</sup> We will explore these cases in more detail shortly.<sup>71</sup>

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someone outside the protected class was retained. *See, e.g.,* Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 693 (7th Cir. 2000) (“[W]e require a plaintiff to demonstrate that other similarly situated employees who were not members of the protected class were treated more favorably.”). Again, there is no requirement that the plaintiff compare herself to any given individual in terms of qualifications or performance. Of course, such a comparison, as well as the pattern of who was retained and who was laid off, may be important for the ultimate finding of discrimination, but the *prima facie* case requires merely that the plaintiff identify someone outside his protected class who was kept on. *See* Parisis G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 EMP. RTS. & EMP. POL’Y J. 263, 281–83 (2002) (classifying court decisions treating reductions in force).

68. In contrast to this statement, Professor Lidge asserts that six circuits *require* that plaintiffs identify a comparator as part of their *prima facie* case and that three more circuits have case law going both ways. Lidge, *supra* note 8, at 849. Some of these cases involve disparate discipline and are treated in Part IV of this Article. *See infra* text beginning at note 95. Putting these aside, it would be more accurate to say that these circuits *permit* a plaintiff to prove a *prima facie* case by virtue of a comparator. Some of the cases Professor Lidge cites do in fact speak of a *prima facie* case as including the requirement of a similarly situated individual, but it is reasonably clear that the courts are simply using one of a number of alternative formulations of the *prima facie* case. For example, while he cites several Seventh Circuit cases as requiring a comparator, *see* Lidge, *supra* note 8, at 845 n.77 (citing Spearman v. Ford Motor Co., 231 F.3d 1080, 1087 (7th Cir. 2000)), Professor Lidge elsewhere cites authority from that circuit that does not frame the *prima facie* case in this fashion. *See* Lidge, *supra* note 8, at 836 n.20 (citing Leffel v. Valley Fin. Servs., 113 F.3d 787, 794 (7th Cir. 1997) (“Evidence of disparate treatment is certainly one of the most obvious ways to raise an inference of discrimination absent direct proof of discriminatory animus. It should not be understood as the only means of doing so, however. . . . All that is necessary is that there be evidence reasonably suggesting that the employer would not have taken adverse action against the plaintiff had she not been disabled and everything else had remained the same.”)).

69. Indeed, whether the plaintiff’s actions are considered “misconduct” in the workplace may well depend on whether they are tolerated or very lightly sanctioned for other workers.

70. Nicholas v. Bd. of Trs., 251 F. App’x 637, 642 (11th Cir. 2007) (quoting Alexander v. Fulton County, 207 F.3d 1303, 1336 (11th Cir. 2000)); *see also* Memberu v. Allright Parking Sys., Inc., 93 F. App’x 603, 610 (5th Cir. 2004) (showing that a similarly situated white employee was treated

Even putting the disparate discipline cases aside, the absence of a comparator in the other formal articulations of the prima facie case should not obscure the fact that plaintiffs tend to lose when they cannot point to a comparator, either because some courts require such proof for a prima facie case or, more commonly, because the court tends to find comparators critical for pretext proof.<sup>72</sup> In nearly every case in which the plaintiff has lost out to a competitor,<sup>73</sup> the employer will claim that the competitor is different—typically better qualified than the plaintiff—in order to carry its burden of production of a “legitimate nondiscriminatory reason.” Although “qualifications” can include factors like seniority that do not necessarily have much to do with merit as that term is used in other contexts, the ultimate finding of discrimination will typically turn on whether the person is superior along one of these qualifications axes or, at least, whether the employer was reasonable in so concluding. Indeed, a conclusion by the trier of fact that a comparator could *not* be reasonably thought to be superior to a plaintiff goes a long way towards finding the defendant to have discriminated.

In light of this, many if not most cases claiming individual disparate treatment can be reframed much more simply than the various proof struc-

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more favorably than plaintiff was an element of a prima facie case of disparate discipline).

71. See *infra* text accompanying notes 95–99. Most cases resolved against plaintiffs before trial find or assume a prima facie case but find no sufficient basis for a reasonable jury to decide that the employer’s nondiscriminatory reason is a pretext for discrimination. Given this reality, one circuit has viewed the establishment vel non of a prima facie case as “a largely unnecessary sideshow.” Brady v. Office of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008). The court went on:

Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—and *should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*. Rather, in considering an employer’s motion for summary judgment or judgment as a matter of law in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer’s asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?

*Id.*

72. See, e.g., Riley v. Emory Univ., 136 F. App’x 264, 266–67 (11th Cir. 2005) (employee lost because no similarly situated employee identified); Beamon v. Marshall & Ilsley Trust Co., 411 F.3d 854, 863 (7th Cir. 2005) (employee failed to establish a prima facie case because he did not present evidence that white employees were treated any better); Fakete v. Aetna, Inc., 308 F.3d 335, 340 n.6 (3d Cir. 2002) (ADEA plaintiff who did not provide evidence that a similarly situated younger employee was granted the transfer request sought by plaintiff failed to establish a prima facie case of age discrimination); Cronquist v. City of Minneapolis, 237 F.3d 920, 926 (8th Cir. 2001) (plaintiff could not identify another employee who was similarly situated with respect to her allegedly harsher discipline); Evans v. Techs. Applications & Serv. Co., 80 F.3d 954, 960 (4th Cir. 1996) (“Evans simply has failed to demonstrate that she was more qualified than [the comparator for a promotion] and thus more deserving of the duties.”).

73. The most common scenarios will be hiring, promotions, or raises, but even a reduction in force where a member of another group is kept in place of plaintiff can be viewed as a competitive scenario.

tures—Is there an individual of another group who has been treated better than plaintiff, and, if so, is there reason to believe that the basis of that preference was group membership? This framing does not downplay non-comparative evidence such as admissions by the employer or its agents, but even such admissions are likely to be relevant mainly in the context of plaintiff’s use of comparators.<sup>74</sup> Nor does it require abandoning the *McDonnell Douglas* proof structures that avoid comparators. It merely suggests that, in many cases, there is a simpler way of proceeding.

### III. OBSTACLES TO MOVING TO COMPARATOR PROOF

It is fair to ask why, if comparator evidence is such an obvious way to prove discrimination, the courts have not been more explicit in focusing on it. To some extent, the answer lies in the history of the proof structures we have explored, particularly the happenstance that *McDonnell Douglas* articulated its prima facie case in terms of an almost nonexistent fact scenario.<sup>75</sup> Perhaps among other potential benefits, *Desert Palace* can facilitate a move away from the artificial proof structures that have confined Title VII law.<sup>76</sup> That case, it will be recalled, held that to establish a jury question of a Title VII violation “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”<sup>77</sup>

This formulation may not seem significant to those not steeped in Title VII proof structures: after all, what cause of action does not require “sufficient evidence” of the elements of the claim to get to the jury? But *Desert Palace* does not merely reject proof of a stronger, determinative-factor version of causation.<sup>78</sup> It also offers the opportunity to take a more commonsensical approach to proof of individual disparate treatment by shifting from *McDonnell Douglas* proof structures to framing the inquiry in terms of whether plaintiff can identify a favored comparator.<sup>79</sup> Such a

74. One can imagine a case in which the plaintiff prevails as a result of what used to be called “direct evidence” under *Price Waterhouse*, wholly without a showing that any comparator existed.

75. See *supra* text accompanying notes 45–46.

76. Even were *Desert Palace* to become the dominant analysis for Title VII cases, however, it may not be applicable to the Age Discrimination in Employment Act since that statute lacks the language, added by the 1991 Amendments to Title VII, upon which *Desert Palace* is based. See *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 361 (8th Cir.), cert. granted, 129 S. Ct. 680 (2008); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.2 (4th Cir. 2004). But see *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312–13 (5th Cir. 2004).

77. *Desert Palace, Inc. v. Costa*, 539 U. S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m) (2000)).

78. See *supra* note 35.

79. See *Alexander v. Fulton County*, 207 F.3d 1303, 1333 (11th Cir. 2000) (upholding a charge to the jury that it could find discrimination where “another similarly situated employee, who is not a member of the protected group, was not treated in a similar manner;” although the phrase “similarly

shift need not wholly replace *McDonnell Douglas* proof structures, which can remain available should a plaintiff choose to use them. But comparator proof should become the dominant approach and would eliminate much of the confusion that arises from current formulations by focusing attention on what Title VII would seem to demand—the identification of discrimination in terms of disparate treatment of minorities (and women) as compared to whites (and males).<sup>80</sup>

But *Desert Palace* aside,<sup>81</sup> comparator proof plays an important, if not always explicit, role in *McDonnell Douglas* cases, and it would not seem difficult for the circuits to agree that comparator proof could supplement, if not largely replace, current formulations. Indeed, we have seen that it has already done so in disparate discipline cases.<sup>82</sup> Why then, hasn't it happened? One obvious reason for the failure of comparator proof to more explicitly supplement *McDonnell Douglas* proof structures is the doctrinal argument that such proof is just a riff on the *McDonnell Douglas* mantra—the comparator functions as the prima facie case, requiring the employer to put forth some reason why the comparator, although similar enough to prima facie suggest discrimination, is in fact different on some basis other than his race. This would leave the plaintiff to show that this difference is pretext.

The doctrinal response is straightforward: the comparator *is* the proof of pretext. That is, a sufficiently similar comparator should allow the jury

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situated” is “susceptible to manipulation, . . . [it] is the correct term of art in employment discrimination law”).

80. Comparators are an explicit part of proof of discrimination in the United Kingdom. See *Igen Ltd. v. Wong*, [2005] I.C.R. 931, [2005] 3 All E.R. 812 (comparators, at least hypothetical ones, are required, *inter alia*, under the Sex Discrimination Act which speaks in terms of treating a woman “less favourably than he treats or would treat a man”) (quoting Sex Discrimination Act 1975, 2008, c. 65 pt. I, § 1, (Eng.)).

81. There is a continuing debate about the overall effect of *Desert Palace*. Although it explicitly eliminated the direct evidence threshold to “motivating factor” analysis in mixed motives cases, it expressly reserved the question of its effect in other contexts. See *Desert Palace*, 539 U.S. at 94 n.1 (“This case does not require us to decide when, if ever, § 107 [of the Civil Rights Act of 1991] applies outside of the mixed-motive context.”). And the lower federal courts have generally read the case as leaving *McDonnell Douglas* cases untouched. *E.g.*, *Suits v. Heil Co.*, 192 F. App'x 399, 408 (6th Cir. 2006) (stating that *Desert Palace* does not modify *McDonnell Douglas*); *Sallis v. Univ. of Minn.*, 408 F.3d 470, 475 (8th Cir. 2005) (holding *Desert Palace* inapplicable when employer gave legitimate reasons for not hiring the plaintiff and the plaintiff failed to show that the reasons were pretextual).

In contrast to the courts, most commentators read *Desert Palace* as destroying *McDonnell Douglas*. Their argument is essentially that, with the direct evidence threshold to motivating factor analysis now gone, every case is a potential mix of legitimate and illegitimate motives which ought to be assessed as such. See, e.g., Zimmer, *supra* note 40; see also Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102–03 (2004); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1576–77 (2005); William R. Corbett, *McDonnell Douglas, 1973–2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212–13 (2003); Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004). But see Kaminshine, *supra* note 40, at 35–36 (arguing for retaining a distinction between pretext and mixed motive cases).

82. See *supra* text accompanying notes 69–70; *infra* text accompanying notes 95–99.

to draw the inference of discrimination—even though the jury might instead credit whatever nonracial explanations the defendant may avow. The degree of similarity, and the plausibility of the supposed differences as bases for decision, can factor into the ultimate determination.

A second and more serious objection to moving to comparators as the primary method of proving discrimination is that such proof is subject to the same problems that confront almost all methods of proving individual disparate treatment—the end result is few cases going to juries and even fewer verdicts being rendered or withstanding review.<sup>83</sup> This is true despite a widespread scholarly consensus that discrimination remains prevalent in the American workplace.<sup>84</sup> We have seen that the federal courts

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83. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 931 (2006) (“[R]ace and national origin plaintiffs . . . fare worse than gender plaintiffs and employment discrimination plaintiffs in general.”); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch., Research Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373> (finding higher summary judgment rates for employment discrimination cases than other kinds of cases); see also Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 552 (2003) (“[A]ppellate courts reverse plaintiffs’ wins below far more often than defendants’ wins.”); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516–17 (2003) (study in California showing “discrimination cases are hardest to win when brought by non-whites (and particularly black women) alleging race discrimination, women alleging sex discrimination (except for sexual harassment), and women over forty alleging age discrimination”); Michael Selmi, *Why are Employment Discrimination Cases so Hard to Win?*, 61 LA. L. REV. 555, 560 (2001) (showing that insurance defendants are far more likely to lose than employers in federal employment discrimination suits). But see Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 117, 144 (2007) (showing that settlement outcomes reveal that employment discrimination litigation results in a mean recovery of \$54,651, which means that plaintiffs achieve “a reasonable degree of plaintiff success” when measured against their lost wages).

84. Proof of the continuing prevalence of discrimination takes three main forms beyond the anecdotal. The first is statistical—for example, a showing of lower representation of women and minorities in workplaces than their qualifications would suggest. See ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, *THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999* (2002), available at [http://www.eeo1.com/1999\\_NR/1999\\_nr.htm](http://www.eeo1.com/1999_NR/1999_nr.htm); Alfred W. Blumrosen & Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for Our Oldest Problem*, 37 U. MICH. J.L. REFORM 681, 685–92 (2004); see also Alan Schwarz, *Study of N.B.A. Sees Racial Bias in Calling Fouls*, N.Y. TIMES, May 2, 2007, at A1 (citing an unreleased study of 13 seasons of NBA games and 600,000 fouls and concluding both that white referees called fouls at a greater rate against black players than against white players and that there was a corresponding, although lower, bias for black officials and white players). There is speculation that the dramatic disparity between the results of the 2008 New Hampshire Democratic primary and the pre-election polling, which was on target for the Republican primary, reflected the unwillingness of those polled to admit to voting against an African American, then-Senator Barack Obama. This is in contrast with the 2008 Iowa results, where the caucus system meant that all votes were public. See Gregory S. Parks & Jeffrey J. Rachlinski, *A Better Metric: The Role of Unconscious Race & Gender Bias in the 2008 Presidential Race* 56–58 (Cornell Legal Studies, Research Paper No. 08-007, 2008), available at <http://ssrn.com/abstract=1102704>. But see Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 1022 (2008) [hereinafter Wax, *The Discriminating Mind*] (arguing that nonracial influences must be excluded more precisely from statistical studies than is typically done); Andrew Kohut, *Getting It Wrong*, N.Y. TIMES, Jan. 10, 2008, at A31, (providing an alternative

deal with comparator evidence every day—whether at the prima facie case stage or in pretext analysis—and, as the “slap in the face rule” illustrates, their use of such evidence to date offers little hope that merely tinkering with the system will achieve much in the way of change. In short, for comparator proof to result in real reform will require not only acceptance of it as a viable substitute method of proving discrimination but also reconsideration of what constitutes a comparator. *Ash*’s rejection of the most extremely limited approach was only a first step—and a half-step at that—

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reason for the primary polling inconsistencies).

The second is the effort to identify pervasive implicit bias—for example, cognitive dysfunctions that work to the disadvantage of minorities and women. *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1036 (2006) (arguing that because stereotypes “function[] not as consciously held beliefs but as implicit expectancies, [they] can cause a decision maker to discriminate against members of a stereotyped group” without being aware of her bias); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995) (arguing that cognitive psychology reveals that stereotyping by race and gender is an “unintended consequence” of the necessity for humans to categorize their sensory perceptions in order to make sense of the world); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105 (2002) (reporting results from some 600,000 tests which confirm a much larger implicit preference among whites for whites than their explicit preferences); *see also* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL’Y J. 459, 465–67 (2003) (noting inconsistencies in the terms used in discussing cognitive bias and suggesting a taxonomy).

The third, perhaps the most persuasive but the least extensive, are field experiments that show that employers actually discriminate, although they cannot tell us whether the discrimination is the result of conscious impulses or less conscious stereotypes. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1011–12 (2004) (reporting that when identical resumes were sent to employers, those containing non-African-American-sounding names received more favorable treatment); MARGERY AUSTIN TURNER, MICHAEL FIX & RAYMOND J. STRUYK, OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING 2, 11 (1991) (reporting that in 20% of 476 hiring audits conducted in 1990, the white applicant was able to advance farther through the hiring process than his equally qualified black counterpart, and that where disparate treatment occurs, it is three times more likely to favor the white applicant than to favor the black applicant); Marc Bendick, Jr. et al, *Measuring Employment Discrimination Through Controlled Experiments*, 23 REV. BLACK POL. ECON. 25, 38–42 (1994) (similar study reaching similar results); *see also* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004) (collecting research showing biased behavior in employment situations).

All three of these approaches have their critics. Part of the critique goes to whether some of the evidence shows real-world effects. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 34 (1992); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1028–30 (2006). Other critics take a more normative approach, arguing that even if the social science establishes real world consequences, at least the cognitive bias causes lie beyond what the law can or should deal with. *See* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1226 (1999) [hereinafter Wax, *Discrimination as Accident*]. *But see* Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 479–80 (2007) (rejecting these arguments as resting on “normative assumptions about what kinds of discrimination the law should seek to prevent and punish”); Michael Selmi, Response, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (responding to Wax, *Discrimination as Accident, supra*). As this debate suggests, there is some question about whether the antidiscrimination laws, as currently framed, declare unlawful all of the phenomena the social scientists are exploring.

since the Court passed up the opportunity to make some meaningful change in this area.

A focus on comparators has the potential to make the entire discrimination project more sensible, and thus, any significant step in this direction requires a better approach to comparators. The next part undertakes a more detailed review of current circuit court treatment of comparators before the Article turns to sketching a better approach in Part V.

#### IV. CURRENT CIRCUIT VIEWS OF COMPARATORS

As we have seen, the lower courts have encountered comparators at two stages of the *McDonnell Douglas* analysis: establishing the plaintiff's prima facie case and proving pretext when the employer has put into evidence a legitimate nondiscriminatory reason. And they have encountered comparators both in what might be called "normal" discrimination cases and in cases charging discriminatory discipline. While the latter are not analytically different from the former, the fact that there is typically a discrete act of misconduct at issue makes the use of comparators who have been guilty of similar misconduct especially compelling,<sup>85</sup> and exploring the current use of comparators should start there.

In its only case involving allegedly disparate discipline, the Supreme Court suggested that only a rough equivalence of offenses was sufficient to draw the inference of discrimination. In *McDonald v. Santa Fe Trail Transportation Co.*,<sup>86</sup> three workers were charged with theft of sixty gallons of antifreeze. While all three seemed to be equally guilty, the two whites were discharged while the African American was retained. After holding that whites could sue for race discrimination under both Title VII and § 1981, the Court wrote:

Precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against [the employer] of *comparable seriousness* . . . were nevertheless retained . . .' is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext.<sup>87</sup>

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85. We have seen that some courts frame the prima facie case in disparate discipline situations this way. See *supra* note 70.

86. 427 U.S. 273 (1976).

87. *Id.* at 283 n.11 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)). The use of the word "plead" might suggest more proof is required, but the Court was clearer in a later case. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him

In contrast to this relatively relaxed approach, the circuits have been skeptical of any such rough equivalence, both in terms of the offenses involved (the focus of the *Santa Fe* Court) and of the kinds of employees who are appropriately viewed as comparators. Their approach is illustrated by a recent Tenth Circuit opinion, *Timmerman v. U. S. Bank, N.A.*,<sup>88</sup> which affirmed summary judgment for the defendant. The court not only rejected other evidence tending to show discrimination against older females, but it also found that plaintiff's dismissal for reversing overdraft charges totaling \$1,099 for her co-workers was not comparable to three other instances in which workers were given less discipline or not disciplined at all for the similar conduct. While acknowledging that disparate discipline was actionable when plaintiff was similarly situated to a comparator, the court wrote:

"Sometimes apparently irrational differences in treatment between different employees that cannot be explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, or that the events occurred at different times when the company's attitudes toward certain infractions were different, or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, or even that the less severely sanctioned employee may be more valuable to the company for nondiscriminatory reasons than is the other employee. Other times, no rational explanation for the differential treatment . . . may be offered other than the inevitability that human relationships cannot be structured with mathematical precision, and even that explanation does not compel the conclusion that the defendant was acting with a secret, illegal discriminatory motive."<sup>89</sup>

It concluded, "Hence, it is up to the plaintiff to establish not only that differential treatment occurred, but also to rule out nondiscriminatory explanations for the differential treatment."<sup>90</sup>

This passage is, on one level, unobjectionable—differences in treatment must be race- or sex-premised to be actionable, and plaintiff has the burden of showing the underlying intent. Further, such differences do not compel an inference of discrimination "as a matter of law," if only be-

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to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.").

88. 483 F.3d 1106 (10th Cir. 2007).

89. *Id.* at 1120-21 (quoting *EEOC v. Flasher Co.*, 986 F.2d 1312, 1320 (10th Cir. 1992)).

90. *Id.* at 1121.

cause the jury can credit the defendant's denial of impermissible motivation, no matter how strong the inferential evidence. Finally, random, and even irrational, factors may explain sex-correlated decisions.

However, *Timmerman* is profoundly wrong on two counts. First, it states as a matter of law what would be more appropriately viewed as an argument to the jury. The possibility of nongender explanations does not exclude the possibility of a gender explanation, and juries are, within broad limits, supposed to weigh competing explanations. Second, the strong suggestion is that differences in treatment, even irrational ones, are so common as to not justify an inference of discrimination when the disadvantaged person is a woman, African American, or other minority. Contrary to the court, the plaintiff need not "rule out" nondiscriminatory explanations but need only offer sufficient proof by which a jury could infer discrimination was more likely than such explanations. Indeed, the last sentence in the extract might suggest that differences in treatment are never enough to justify a jury finding discrimination. That is, of course, as incorrect as the notion that the passage seeks to rebut—that differences in treatment necessarily reflect intent to discriminate.

In short, the question is not *whether* differences in treatment can suffice, it is *when* they will. Indeed, the passage is a remarkable indictment of American capitalism coming from courts who often celebrate its efficiency: differences in discipline, even irrational ones, are so common that no inferences can be drawn from them—except the obvious that employers very often have no rhyme or reason for what they are doing. *Timmerman* is, unfortunately, not alone in taking such a hostile approach: the "slap in the face rule" originated from such perceptions.

Whatever objections one might have to the tone of cases such as *Timmerman*, the rules that the lower courts have developed are even more problematic. *Timmerman* itself is reminiscent of the now-discredited "pretext-plus" rule, under which proof of pretext was not sufficient to allow a jury to infer discrimination;<sup>91</sup> rather, the plaintiff was also required to show additional evidence of discrimination. While "pretext-plus," like the "slap in the face" rule, was rejected by the Supreme Court,<sup>92</sup> the *Timmerman* analysis suggests the continuing tendency of courts to require more

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91. See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 88–89 (1991). *Timmerman* quotes *EEOC v. Flasher*, which embraced the pretext-plus rule and therefore has been superseded in that regard. See *Flasher*, 986 F.2d at 1321. Nevertheless, the attitude requiring more direct proof of intent in order to exclude irrational factors seems to play a significant role in the courts' approach to comparator questions.

92. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000). See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1185 (2003); Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539 (2001); Zimmer, *supra* note 40, at 1904–09.

direct proof of discrimination before a case can go to the jury. Even more indicative of this is the web of rules that the circuits evolved regarding comparators. Despite the serious question as to whether this whole approach is consistent with the Supreme Court's instructions as to how to apply *McDonnell Douglas*,<sup>93</sup> the courts continue to develop rules that find most comparator proof insufficient to create a jury question.<sup>94</sup>

They do this largely by finding comparators to be different along any of a number of axes.<sup>95</sup> Indeed, it would not be an exaggeration to say that the courts seem to require the comparator to be the almost-twin of the plaintiff before the comparison is sufficiently probative. For example, (again focusing on the discriminatory discipline setting) the Fifth Circuit recently summarized its doctrine as requiring a plaintiff challenging her discipline for misconduct to show that her infraction was "nearly identical" to that of members of a different group who were treated more leniently.<sup>96</sup> This has been criticized as inconsistent with the Supreme Court's approach to racial discrimination in the context of peremptory challenges to jurors.<sup>97</sup> Nevertheless, courts outside the Fifth Circuit have used the

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93. Perhaps the most striking aspect of many of these cases is the courts' willingness to continue to compartmentalize various aspects of plaintiff's proof to find that none is sufficient. This is directly contrary to the holistic approach to evaluating evidence of discrimination that the Court required in *Reeves*. See Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592-600 (2001). In *Timmerman*, for example, the court *seriatim* rejected evidence of a pattern of conduct, evidence that plaintiff was denied normal procedures, and evidence of three favored comparators, without at any point looking at all these pieces of evidence together. See *Timmerman v. U. S. Bank, N.A.*, 483 F.3d 1106, 1114-19 (10th Cir. 2007).

94. It is possible that this rule-orientation is a remnant of the days when jury trials were not available in Title VII cases. As originally enacted, Title VII relief, including backpay recovery, was viewed as equitable. See *Curtis v. Loether*, 415 U.S. 189, 196-97 (1974) (noting, without approving, that "the courts of appeals have held that jury trial is not required in an action for reinstatement and backpay" under Title VII). The Civil Rights Act of 1991 instituted both compensatory and punitive damages, and the concomitant right to backpay. See 2 SULLIVAN & WALTER, *supra* note 44, at § 13.02.

95. See *supra* notes 53-54 and accompanying text; see also Lidge, *supra* note 8, at 863-64 ("There are three main distinctions courts draw in deciding that the plaintiff and a comparator are not similarly situated: (1) the fact that the plaintiff and comparator had different supervisors; (2) the fact that the two employees had different responsibilities or job titles; and (3) the fact that they were punished for different conduct.").

96. See *Perez v. Tex. Dep't of Criminal Justice*, 395 F.3d 206, 213 (5th Cir. 2004) ("In instructing, without more, that the employees' underlying misconduct must be comparably serious, the district court erroneously suggested that comparably serious misconduct was by itself enough to make employees similarly situated. A correctly worded instruction would have made clear that the jury must find the employees' circumstances to have been nearly identical in order to find them similarly situated."); *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001); see also *Edwards v. Grand Casinos of Miss., Inc.*, 145 F. App'x 946 (5th Cir. 2005). In *Edwards*, the plaintiff could not show that the comparator was given preferential treatment in "nearly identical circumstances" because although both were charged with "job abandonment" for leaving during an overtime shift, the comparator "was not also cited for poor job performance, as Edwards was. Moreover, Lowe did not act in an insubordinate manner by directly rebuking authority as he left his shift." *Id.* at 948.

97. *Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not

same language,<sup>98</sup> and other courts have used similar, if slightly less demanding, standards, requiring the comparator to “be similarly situated in all material respects.”<sup>99</sup>

In finding individuals not similarly situated for purposes of disparate discipline, whether or not requiring near-identity, the lower courts have developed a number of other rules whose main common theme seems to be to prevent comparisons from having much power. Because they are framed as rules of law, not merely aids to inference, they effectively preclude suits pitched mainly on comparators. Perhaps the most well-established of such rules is that a comparator must have the same supervisor who disciplined the plaintiff,<sup>100</sup> a rule that is predicated on the notion

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products of a set of cookie cutters.”). In *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 710 (6th Cir. 2006), that court concluded that the *Miller-El* reasoning “applies with equal force to the employment-discrimination context.” *Id.* at 710 (citing *Miller-El*, 545 U.S. at 247 n.6). In its most recent decision dealing with racially premised peremptory challenges, the Court also took a relaxed approach to comparators. Although it found a number of bases to hold that the verdict was compromised by the prosecutor’s use of challenges, one factor was a comparison between white jurors who were not excused and a black juror who was excused. See *Snyder v. Louisiana*, 128 S. Ct. 1203, 1208–16 (2008); see also Posting of Charles A. Sullivan to WORKPLACE PROF BLOG, *Sullivan on Possible Implications of Snyder v. Louisiana for Employment Discrimination Law*, [http://lawprofessors.typepad.com/labor\\_prof\\_blog/2008/03/guest-commentar.html](http://lawprofessors.typepad.com/labor_prof_blog/2008/03/guest-commentar.html) (Mar. 31, 2008).

98. *E.g.*, *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999) (“We require that the quantity and quality of the comparator’s misconduct be nearly identical to prevent courts from second-guessing employers’ reasonable decisions and confusing apples with oranges.”). *But see Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) (“[W]e hold that, in cases involving alleged racial bias in the application of discipline for violation of work rules, the plaintiff . . . [may show] that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.”). Other panels in the Eleventh Circuit have recognized a tension between the “nearly identical” standard and the “similar misconduct” rule. *E.g.*, *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1290 (11th Cir. 2003) (not having to choose between them because neither standard was satisfied.).

99. *See, e.g.*, *McGuinness v. Lincoln Hall*, 263 F.3d 49, 54 (2d Cir. 2001) (“[P]laintiff is not obligated to show disparate treatment of an *identically* situated employee” since to establish a prima facie case “it is sufficient that the employee to whom plaintiff points be similarly situated in all material respects.”); *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (“To be ‘similarly situated,’ the individuals with whom Shumway attempts to compare herself must be similarly situated in all material respects.”); *see also Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008) (“To satisfy the similarly-situated requirement, a plaintiff must demonstrate that the comparable employee is similar ‘in all of the *relevant* aspects.’” (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998))). The opinions are rarely clear about what makes a respect “material,” which would seem the heart of the inquiry.

100. *See, e.g.*, *Green v. New Mexico*, 420 F.3d 1189, 1194–95 (10th Cir. 2005) (finding that one worker was not similarly situated to plaintiff when they did not share the same supervisor, and he was not a probationary employee like plaintiff); *Gilmore v. AT&T*, 319 F.3d 1042, 1046 (8th Cir. 2003) (“[A]nother individual was not similarly situated because his discipline was not administered by the same supervisors who administered Gilmore’s discipline.”); *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 305 (5th Cir. 2000) (“Most importantly, the decision-makers who disciplined [plaintiff] differed from those who were charged with deciding what action to take against [the asserted similarly situated individual].”).

A few cases have been more permissive, requiring the same chain of command but not the same immediate supervisor. *E.g.*, *McMillan v. Castro*, 405 F.3d 405, 414 (6th Cir. 2005) (“[I]t probably would have been more appropriate for the district court to instruct the jury that, in order to be considered similarly situated, [plaintiff] and [comparator] must have dealt with the same ultimate

that the intent of the individual actor is the focus of concern of the anti-discrimination statutes.<sup>101</sup>

The Supreme Court has recently rejected an analogous approach. Although the Court acted in a different context, its decision suggests that the entire rule structure that the courts of appeals have built is problematic. *Sprint/United Management Co. v. Mendelsohn*<sup>102</sup> involved a reduction in force in which plaintiff wanted to call as witnesses five other older workers who claimed that they were also discriminated against in the downsizing because of their age. Defendant objected because none of the other potential witnesses worked under the same supervisor as the plaintiff. The trial court excluded the testimony, and the jury found for the defendant. The Tenth Circuit granted the plaintiff a new trial because it read the district court's exclusion of testimony by the five witnesses-to-be based on the erroneous view that admission of evidence of discrimination by other supervisors—so-called “me too” evidence—was categorically inadmissible. The Supreme Court reversed the Tenth Circuit because it was unclear whether the district court's exclusion of the evidence was categorical or contextual. The proper approach was to ask the district court to clarify the basis of its ruling. The unanimous Court, however, did state that a rule of per se inadmissibility would be error, although it counterbalanced that by equally disapproving a rule of per se admissibility:

The question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. . . . Rules 401 and 403 do

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decision-maker, rather than the same supervisor.”); *Anderson v. WBMG-42*, 253 F.3d 561, 567 n.3 (11th Cir. 2001) (finding that different managers is not critical when plaintiff was in the same chain of command as the comparator).

101. The courts clearly are concerned only with whether the plaintiff's supervisor was motivated by discrimination. They reason that the fact that a putative comparator was treated better by another supervisor has little direct bearing on this question. By hypothesis, had the comparator worked for the same supervisor as plaintiff, he would have been treated the same.

This approach has been challenged as being inconsistent with how decision making occurs in the modern workplace. See Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 365–68 (2008). It has also been questioned on the grounds that courts too readily assume that the plaintiff had a tougher supervisor when they should permit the finder of fact to choose between that alternative and the possibility that the plaintiff's supervisor is departing from employer norms for discriminatory reasons. See Lidge, *supra* note 8, at 865.

102. 128 S. Ct. 1140 (2008).

not make such evidence *per se* admissible or *per se* inadmissible

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Rule 401 defines relevancy,<sup>104</sup> and Rule 403 permits even relevant evidence to be excluded if its probative value is outweighed by considerations such as the dangers of prejudice or confusion.<sup>105</sup> Thus, *Mendelsohn* offers little guidance on the question of admissibility and basically commits the question to the district court, so long as the court exercises its discretion contextually.<sup>106</sup>

*Mendelsohn* is obviously considerably different than the comparator question addressed in this Article. Not only did the issue involve admissibility rather than sufficiency of the evidence, but the issue was not whether an employee from a different class and who was better treated by another supervisor could be considered a proper comparator in a plaintiff's case; rather it was whether another supervisor's discriminatory action towards a member of plaintiff's class was admissible in the plaintiff's case.<sup>107</sup> Nevertheless, the unanimous opinion is supportive of the theme of this Article—that rule structures about comparators ought to give way to a more holistic consideration of whether a defendant's treatment of the putative comparator is a sufficient basis for a jury to find pretext.

Another rule that the lower courts had developed prior to *Mendelsohn* held that individuals with multiple infractions are simply not comparators for individuals with one infraction.<sup>108</sup> Relatedly, two persons are not simi-

103. *Id.* at 1147.

104. FED. R. EVID. 401 (“‘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.”).

105. FED. R. EVID. 403 (“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.”).

106. See Paul M. Secunda, Response, *The Many Mendelsohn “Me Too” Missteps: An Alliterative Response to Professor Rubinstein*, 102 NW. U. L. REV. COLLOQUY 374, 380–81 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/19/LRColl2008n19Secunda.pdf>. But see Mitchell H. Rubinstein, *Sprint/United Management Co. v. Mendelsohn: The Supreme Court Appears to Have Punted on the Admissibility of “Me Too” Evidence of Discrimination. But Did It?*, 102 NW. U. L. REV. COLLOQUY 264, 266–67 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/11/>.

107. *Mendelsohn*, 128 S. Ct. at 1143.

108. E.g., *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253 (11th Cir. 2001). In *Silvera*, although there were other differentiating factors, and both individuals “were arrested in the 1970’s for lewd assault on a child, Silvera [had] three additional arrests for violent assaults. The fact that Silvera had multiple arrests is by itself sufficient to establish that he is not similarly situated to Ritter.” *Id.* at 1259; see also *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 851 (8th Cir. 2005) (finding that two employees were not similarly situated: “[W]hile Rodgers and Nichols violated the same bank policy, the degree and frequency of Rodgers’s violations differed significantly from that of Nichols’s single violation.”); *Cooley v. Great S. Wood Preserving*, 138 F. App’x. 149, 157–59 (11th Cir. 2005) (finding that Oliveira was not a proper comparator because he “reported within 48 hours all of the speeding tickets that he received” while Great Southern Wood believed that the plaintiff “twice failed

larly situated when, although both engaged in wrongdoing, one was less culpable than the other because the conduct was not of “comparable seriousness”<sup>109</sup> or because one’s guilt was less clear.<sup>110</sup> For example, in *Kendrick v. Penske Transportation Services, Inc.*,<sup>111</sup> the plaintiff claimed not only that he was innocent of the claimed assault of pushing his supervisor to the ground, but also that the employer imposed lesser discipline on comparators. The court rejected as comparators certain “nonminority employees” who had cursed their supervisors because this conduct “did not violate work rules of comparable seriousness” to the plaintiff’s claimed assault.<sup>112</sup> More dramatically, the court in *Kendrick* refused to find a comparator in a white worker who had threatened a co-worker with assault and then arguably threatened his supervisor with physical violence.<sup>113</sup> Ironically, the notion that conduct has to be of comparable seriousness has led courts to find no comparator when arguably the employer punished the plaintiff for conduct that was far less blameworthy than the

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to report within 48 hours a speeding ticket and that he had received two speeding tickets within 12 months”); *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003) (finding that while three putative comparators “were similarly situated because they committed serious violations involving obscenity and/or physical abuse and were treated more favorably because they were not terminated,” they were not, as was plaintiff, subject to a “last chance” agreement; further, none amassed a record of misconduct comparable to plaintiff’s); *Mauil v. Div. of State Police*, 39 F. App’x 769, 773 (3d Cir. 2002) (“[N]one of the white Troopers had nearly as extensive disciplinary records as Mauil. In addition, no others were on probation at the time of their respective infractions.”).

109. *E.g.*, *Russell v. City of Kansas City*, 414 F.3d 863, 868 (8th Cir. 2005); *see also Harrison v. Metro. Gov’t*, 80 F.3d 1107, 1115 (6th Cir. 1996) (finding that the comparator must “‘have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it’” (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992))), *abrogated on other grounds as recognized by Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999). *But see Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000) (comparators must be assessed in terms of: “(1) whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness. In other words, there should be an ‘objectively identifiable basis for comparability.’” (citation omitted) (quoting *Cherry v. AT&T*, 47 F.3d 225, 229 (7th Cir. 1995))).

110. A variation on this occurs where, although the infraction may be identical, the disfavored employee admitted the violation and the favored employee did not, leaving the employer with some doubt as to guilt. *See, e.g.*, *Abel v. Dubberly*, 210 F.3d 1334, 1339 (11th Cir. 2000) (overturning a jury verdict for a white plaintiff, the court noted: “Whereas Abel has always freely admitted having taken \$10.00 from the cash register, the other employee has never confessed to taking county funds for personal use; at worst, the would-be comparator has admitted to temporarily misplacing funds.”) (footnote omitted).

111. 220 F.3d 1220 (10th Cir. 2000).

112. *Id.* at 1232; *see also Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 811 (8th Cir. 2005) (finding that two truck drivers who had similar unreported damage to their vehicles were not comparators when the black driver lied in his report and the white driver merely failed to report the damage).

113. *See Kendrick*, 220 F.3d at 1233. The *Kendrick* court found several distinguishing features: First, the plaintiff was believed to have had physical contact with the person he threatened, while the comparator was not. Second, the union supported a lighter punishment for the comparator and vouched for him. Third, the employer took severe disciplinary action against the comparator, although less than against plaintiff. Fourth, the comparator incident occurred a year and a half after the decision to terminate Kendrick. *See id.* at 1233–34.

comparator: that person's conduct was not similar enough precisely because it was worse.<sup>114</sup>

Another apparent rule precludes comparisons between individuals in different levels of jobs, ironically going both ways. The Tenth Circuit, for example, has held a supervisor not to be similarly situated to a subordinate both when the employer disciplined the supervisor more harshly because his position required him to act more responsibly,<sup>115</sup> and when the lower level worker was disciplined more harshly presumably because supervisors are entitled to more leeway.<sup>116</sup>

Yet another rule distinguishes on the basis of seniority. In a disparate discipline case, for example, the Fifth Circuit found that older workers subject to lesser discipline than plaintiff were not comparators since they were closer to retirement and the employer might therefore have justifiably favored them.<sup>117</sup> Similarly, when comparing job qualifications, courts

114. See, e.g., *Roy v. Broward Sheriff's Office*, 160 F. App'x 873, 876 (11th Cir. 2005). In *Roy*, the court rejected two potential comparators for plaintiff Roy, who had engaged in traffic stops of a woman for personal reasons. The first was an officer Mora:

[Mora's] misconduct took place in the course of his employment while he was attempting to subdue an inmate during a cell check. It consisted of excessive physical force, while Roy's misconduct did not relate to dealing with an inmate or using force. Mora's misconduct was related to his law enforcement duty, whereas Roy's misconduct was purely personal.

*Id.* In other cases, courts have found precisely the opposite, that physical abuse—like Mora's—is sufficiently worse to not be comparable to verbal abuse. See, e.g., *Kendrick*, 220 F.3d at 1233–34; see also *Hogan v. Conn. Judicial Branch*, 64 F. App'x 256, 258 (2d Cir. 2003).

The second rejected comparator in *Roy* was a Sergeant Topping:

Topping's misconduct, a traffic incident, is not sufficiently similar because he was not wearing his uniform, was in a private vehicle, and his misconduct related to directing subordinates to expedite various law enforcement actions that a private citizen would have been unable to accomplish. Most of Topping's misconduct involved making inappropriate demands on subordinates within the police department. Roy, on the other hand, exerted his authority over a foreigner visiting from Sweden. Moreover, Topping's misuse of authority had at least some relation to law enforcement purposes. Roy acknowledges that he had no law enforcement purpose when he pulled Eriksson over. Topping's other instance of misconduct, sexually harassing a coworker, is completely dissimilar. Topping is not similarly situated to Roy.

*Roy*, 160 F. App'x at 876.

115. See *Mitchell v. City of Wichita*, 140 F. App'x 767, 780 (10th Cir. 2005) (“Unless the other employees are subject to the same responsibilities, expectations, and discipline, the comparison to the disciplinary action taken against them does not support the inference that race is the reason for the disparity in treatment.”). *But see* *Lathem v. Dep't of Children & Youth Servs.*, 172 F.3d 786, 793 (11th Cir. 1999) (upholding a jury verdict of sex discrimination when a female secretary was fired for a relationship with juveniles in the care of the agency while a male employee was merely transferred: “The relevant inquiry is not whether the employees hold the same job titles, but whether the employer subjected them to different employment policies.”).

116. See *Jones v. Denver Post Corp.*, 203 F.3d 748, 753 (10th Cir. 2000) (finding that although both the plaintiff and her comparator used the employer's phones to conduct outside business, “the comparison Jones makes between himself and Canino is not legally relevant. Canino was one of Jones's supervisors and therefore cannot be deemed similarly situated in a disciplinary matter such as this one.”); see also *Holbrook v. Reno*, 196 F.3d 255, 261–62 (D.C. Cir. 1999) (supervisor who committed same offense as trainee and was disciplined more lightly was not an appropriate comparator).

117. See *Ramon v. Cont'l Airlines Inc.*, 153 F. App'x 257, 259–60 (5th Cir. 2005) (finding that although all were guilty of the same misconduct, “Ramon was younger and not as close to being

have tended to find differences in experience sufficient to prevent a proposed comparator from being similarly situated to the plaintiff even if both meet the stated qualifications.<sup>118</sup>

Finally, there is the question of time. The courts in disparate discipline cases have frequently refused to find a fact question of discrimination when the conduct of the plaintiff's proffered comparator was too distant in time from the plaintiff's own misconduct.<sup>119</sup>

Outside the disparate discipline context, the courts have a less developed rule structure, but nevertheless frequently find individuals not to be comparators. Thus, a white who ran deficits for two months was not similarly situated to an African American who ran deficits for four months.<sup>120</sup> And a white with the same job duties, the same sales quota, and the same supervisor as the terminated African-American plaintiff was not similarly situated to him because plaintiff had a unique compensation arrangement and his co-worker's overall sales performance was superior.<sup>121</sup>

The point is not, of course, that all these cases are necessarily incorrectly decided. It may well be that many of the putative comparators were not suitable—at least in the sense that the better treatment of the comparator, standing alone, would not be sufficient to allow the trier of fact to infer discrimination. But the circuit courts' searches for the perfect comparator—the almost-twin of the plaintiff—in both disparate discipline and

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eligible for retirement as were Arbaney and Lakey . . . . These differences between Ramon's situation and that of her comparators justified the differential treatment, and Ramon cannot demonstrate that she was 'similarly situated' to them.") (footnote omitted); *see also* Nelson v. Gen. Elec. Co., 2 F. App'x 425, 431 (6th Cir. 2001) (holding that younger employee not similarly situated to older employee who committed similar infraction and was allowed to remain on job for a few extra months and obtain retirement eligibility).

118. *E.g.*, White v. Columbus Metro. Hous. Auth., 429 F.3d 232, 243–44 (6th Cir. 2005) (putative comparator's greater amount and quality of experience meant that the two were not similarly situated); Bio v. Fed. Express Corp., 424 F.3d 593, 597–98 (7th Cir. 2005) (although two employees held the same position and reported to the same supervisor, they were not "directly comparable" because of a considerable experience gap; the more experienced plaintiff was appropriately disciplined for conduct that the alleged comparator also engaged in while he was still learning how to perform his duties); Green v. New Mexico, 420 F.3d 1189, 1195 (10th Cir. 2005) (one worker was not similarly situated to plaintiff because he had greater seniority than plaintiff in the position in question and was not a probationary employee like plaintiff); *Ramon*, 153 F. App'x at 259–60 (fired plaintiff was not similarly situated to more senior worker involved in the same misconduct who was allowed to work until he was eligible for retirement precisely because of their different retirement-eligibility); Ajayi v. Aramark Bus. Servs., Inc., 336 F.3d 520, 532 (7th Cir. 2003) (plaintiff was not similarly situated to a predecessor employee who did not have the same job description; even if they were held to different performance standards, the other employee's greater seniority and the different conditions during which both worked precluded a comparison).

119. *E.g.*, Iuorno v. DuPont Pharms. Co., 129 F. App'x 637, 641 n.6 (2d Cir. 2005) (one of the reasons a proffered comparator was inadequate was that his misconduct occurred four years prior to plaintiff's); Rathbun v. Autozone, Inc., 361 F.3d 62, 76 (1st Cir. 2004) (plaintiff and "her putative congeners were not applying for the same openings at the same times; the speedier promotions occurred between eight and twenty-one months after the appellant's promotion to PSM") (emphasis omitted).

120. *See* Maxfield v. Cintas Corp. No. 2, 427 F.3d 544, 550 (8th Cir. 2005).

121. *See* Brummett v. Sinclair Broad. Group, Inc., 414 F.3d 686, 693–94 (7th Cir. 2005).

“normal” individual disparate treatment cases establish this Article’s underlying theme: *favoring a sufficiently similar person is an adequate basis for inferring discrimination*. The courts recognize this principle, but apply it far too grudgingly. The real question is when the putative comparator is similar enough to justify the inference, and it is here that the circuits seem hopelessly lost.

It may be that *Mendelsohn* will lead to a less rule-oriented approach to comparators—requiring a more holistic approach not merely to the admission of evidence but also to the assessment of a plaintiff’s case. But the troubling aspect of the networks of rules developed by the circuits on comparators prior to *Mendelsohn* is not their complexity, but the lack of any coherent rationale. A more contextual approach alone is not likely to solve that problem. To the extent a rationale is present, it can be drawn from the initial quotation in *Timmerman*: “apparently irrational differences” are explained by differences in supervisors, in timing, in individual circumstances, relative culpability, value to the company, or, failing all else, “the inevitability that human relationships cannot be structured with mathematical precision.”<sup>122</sup>

All of which may be true, but who decides that question, and what metric is used? The answers seem to be all too frequently that the courts decide and that they do so using their own sense of how employers in America function—or dysfunction.

## V. A BETTER ANSWER

The ultimate basis for the elaborate legal rules the courts have developed must be the belief that random fluctuations are more likely than discrimination in the American workplace, and thus any differences are more likely attributable to a host of rational and irrational factors than they are to an intent to discriminate.<sup>123</sup> This reality raises two questions. The first is the obvious—Are the courts invading the province of the jury in deciding whether a particular putative comparator is indicative of discrimination? Contrary to some critiques of the judicial role,<sup>124</sup> I conclude that the courts are within their power in making these decisions. Indeed, so long as courts stand as gatekeepers to the ultimate fact finder, they necessarily have to determine whether a reasonable jury could find the fact at issue from the

122. *Timmerman v. U. S. Bank, N.A.*, 483 F.3d 1106, 1120–21 (10th Cir. 2007) (quoting *EEOC v. Flasher Co.*, 986 F.2d 1312, 1320 (10th Cir. 1992)).

123. This is a not a new observation. Professor Deborah Calloway articulated it more than a decade ago. See Deborah A. Calloway, *St. Mary’s Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 1008–09 (1994) (arguing that the Supreme Court had revised its underlying assumption about the pervasiveness of discrimination).

124. See Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 230–42 (1993).

available evidence. My argument, however, is that the decisions they are actually making are predicated on a wrong metric. Rather than looking solely to the judge's own worldviews and experiences, whose accuracy might be legitimately questioned, the appropriate metric should be the reasonableness of the discrepancy in treatment in terms of industry practices. This metric should guide judges in the first instance in deciding when cases involving comparators should go to the jury and should guide jurors in the final analysis in deciding whether the more favorable treatment of a comparator justifies the ultimate inference of discrimination.

### A. Judges, Juries, and Legislative Facts

With respect to the appropriate roles of judge and jury, it is undeniable that a jury should often decide whether favoring a white comparator is indicative of discrimination or a kind of random fluctuation that might occur without race being involved. The court opinions we have canvassed effectively demonstrate that comparing two workers is highly contextual, with multiple factors other than race, sex, or age potentially causing any given discrepancy. That seems a reason to entrust the determination to juries as a matter of fact rather than judges as a matter of law. On the other hand, the notion of comparator necessarily suggests sufficient similarity to infer discrimination, and the courts' role is to ensure that comparators are similar enough to justify sending the case to the jury. Thus, the typical opinion explicitly or implicitly references the "reasonable jury" as unable to infer discrimination from a particular comparator.<sup>125</sup>

Reaching such a conclusion, however, demands a metric—a baseline for how different a putative comparator can be from the plaintiff and still serve as a basis (by himself or with other evidence) to infer that the plaintiff was the victim of discrimination. In short, it requires some sense of the relative frequency of discrimination as compared with random differences in treatment of employees. Although the willingness of courts to issue and affirm summary judgment against plaintiffs in employment discrimination suits has often been criticized,<sup>126</sup> the problem is not the role of the courts per se, but the accuracy of the metric they use.<sup>127</sup> The ultimate

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125. *E.g.*, *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1121 (10th Cir. 2007) ("With no admissible evidence that [two comparators] were interviewed as suspects [as opposed to witnesses], no reasonable jury could conclude that they were similarly situated."); *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1291 (10th Cir. 2007).

126. *See generally* McGinley, *supra* note 124; Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103 (2005); Oppenheimer, *supra* note 83, at 553–66 (exploring reasons for lack of success of plaintiffs in discrimination suits).

127. An example of the appropriate metric in another area of the law is the Supreme Court's anti-trust jurisprudence looking to economic theory to formulate legal rules. Most recently, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), looking to commentators arguing that parallel conduct by competitors is probable without any conspiracy among them, held that stating a claim of conspiracy

explanation for the circuit courts' approaches to comparators, as well as much else in employment discrimination cases, is their apparent perception (some would say, ideology) that discrimination is so much less frequent than random fluctuations of human behavior that a jury would not be reasonable in inferring discrimination unless the plaintiff and her comparator are very close indeed. Thus, it is only by excluding the vast majority of random influences that one could even be allowed to conclude that discrimination was the more likely explanation for a decision than the influence of one of the remaining random factors.

While such a conclusion is undeniably fact-based, it draws on the traditional power of the courts to find what has been called "legislative facts."<sup>128</sup> In contrast to adjudicative facts, which are the province of juries, legislative facts are found by the courts in law making by drawing on, for lack of a better word, common-sense notions of how the world works.<sup>129</sup> So long as the courts continue their gatekeeper role of deciding whether a reasonable jury could find discrimination from a particular state of facts,<sup>130</sup>

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requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

*Id.* at 556.

128. 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.03, at 353 (1958) ("When a court or an agency develops law or policy, it is acting legislatively . . . and the facts which inform the tribunal's legislative judgment are called legislative facts."); see also Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 8-9 (1988) ("[Premise facts] are facts that explicitly or implicitly serve as premises used to decide issues of law. The term premise facts is not limited to those about which society is in agreement. . . . [A]fter a court or legislative body decides on the premise facts, they are premise facts even if many people believe the asserted factual premises do not justify the legal decision.") (emphases omitted) (footnote omitted).

129. See generally Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011 (1990) (responding to Peggy C. Davis, "There Is a Book Out . . .": *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987)); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 114 (1988). A striking example of putting such knowledge to work in the law is Charles Black's recitation of the facts about segregation as it operated in the South in *The Lawfulness of the Segregation Decisions*:

I have stated all these points shortly because they are matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world. A court may advise itself of them as it advises itself of the facts that we are a "religious people," that the country is more industrialized than in Jefferson's day, that children are the natural objects of fathers' bounty, that criminal sanctions are commonly thought to deter, that steel is a basic commodity in our economy, that the imputation of unchastity is harmful to a woman. Such judgments, made on such a basis, are in the foundations of all law, decisional as well as statutory; it would be the most unneutral of principles, improvised *ad hoc*, to require that a court faced with the present problem refuse to note a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—or the other equally plain fact that such treatment is hurtful to human beings.

Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 426-27 (1960).

130. But see Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

some sense of the relative frequency of discrimination and other rational and irrational factors in the American workplace is essential.<sup>131</sup>

The problem, in short, is not that the courts are making such judgments. So long as courts stand in a gatekeeper role, such judgments are unavoidable. Rather, it is the judgments that they are making, or more accurately, the basis upon which they are making those judgments. And, if we do not like the judgments judges are making, and we can't replace the judges, the solution would seem to be to change the basis upon which judgments are being made.

Judicial law making on comparators is predicated upon the notion that discrimination is relatively rare, relative to other factors. This is problematic to begin with, but even more troublesome is when courts seem to go further and conclude that discrimination is rare even relative to seemingly irrational factors. In addition, since the courts are applying this approach to all the cases before them, their color-blind baseline governs a huge variety of workplaces and across the spectrum of racial and sexual interactions. So viewed, the best that can be said for the courts' approach is that it is a bright-line rule that is likely to be misapplied in some indeterminate subset of cases. And, given the empirical research about the continued vitality of discrimination, at least of the cognitive bias variety,<sup>132</sup> the worst that can be said about this approach is that it is profoundly misguided as a general matter because the courts have an incorrect view of the relative probabilities of the respective phenomena.<sup>133</sup>

### *B. Changing Judicial Perceptions*

“Legislative fact finding” of the kind at issue here is reached by a kind of judicial notice, but not the very constrained variety applicable to notice of adjudicative facts.<sup>134</sup> The Advisory Committee for the Federal Rules of

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131. It is a commonplace premise of evidence law that the law is structured in terms of judicial perceptions of probability. *See* Woolhandler, *supra* note 129, at 120 (citing EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 343, at 968–69 (3d ed. 1984)).

132. *See supra* note 84.

133. This Article does not attempt to resolve the simmering question of whether intent to discriminate requires a conscious intent or whether “unconscious discrimination” is also illegal when it causes an adverse employment action. Those, like Professor Kreiger, who view cognitive bias as sufficient, rest their position on the causation language of the antidiscrimination statutes, *see* Krieger, *supra* note 84, at 1168, which simply require a harm to have been “because of” race, sex or other prohibited characteristic. *E.g.*, 42 U.S.C. § 2000e-2(a)(1) (2000) (declaring it unlawful, *inter alia*, to refuse or to discharge any individual “because of such individual’s race, color, religion, sex, or national origin”). Although some raise normative and practical problems with making cognitive bias discrimination illegal, *see, e.g.*, Wax, *Discrimination as Accident*, *supra* note 84, at 1226–31, some of the same commentators recognize that the inferential method of proving discrimination necessarily masks whether the employer is acting from conscious or unconscious motives. *E.g.*, Wax, *The Discriminating Mind*, *supra* note 84, at 1004–05. That is to say, the fact finder infers discrimination from evidence, including comparators, which may reflect conscious actions or more subtle discrimination.

134. *See* FED. R. EVID. 201(a) (“This rule governs only judicial notice of adjudicative facts.”).

Evidence explicitly acknowledged a wide range of judicial power in this regard: the court should be able to “find” legislative facts in the same way it finds domestic law,<sup>135</sup> which basically includes all written or published sources, whether or not referenced by the parties. Indeed, since judges can look to their own life experiences, they are not limited to written material. Although some have argued for more formal constraints on this process,<sup>136</sup> there has been no success along these lines.

While the courts’ determination of legislative facts is not subject to formal substantive constraints, the parties may attempt to influence such findings by evidence and citations. The Advisory Committee explicitly references the right to introduce evidence even of legislative facts, and the famous Brandeis brief<sup>137</sup> and its successors<sup>138</sup> demonstrate that legislative facts are often proffered in ways that track the offering of domestic law: citations to various authorities rather than evidentiary proof. One commentator concludes that, “[W]hen lawyers perceive that a particular showing will affect the outcome in a case, they tend to make such a showing, which courts tend to receive.”<sup>139</sup>

Thus, judicial perceptions of the relative frequency of discrimination and other factors are susceptible to influence by the parties who can seek to prove legislative facts in a variety of ways. I have elsewhere suggested that one of the failures of the plaintiffs’ bar has been in educating the judiciary about the dynamics of discrimination in America in the new century.<sup>140</sup> I repeat the prescription there, which is for the use of expert wit-

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135. The Advisory Committee’s note states:

“In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present. . . . [T]he parties do no more than to assist; they control no part of the process.”

FED. R. EVID. 201 advisory committee’s note (alterations in original) (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270–71 (1944)). The Committee goes on to state:

This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. *It should, however leave open the possibility of introducing evidence through regular channels in appropriate situations.*

FED. R. EVID. 201 advisory committee’s note (emphasis added).

136. See Woolhandler, *supra* note 129, at 117–26 (exploring various proposals and defending the absence of formal constraints).

137. The Brandeis brief was a successful effort in *Muller v. Oregon*, 208 U.S. 412 (1908), to defend against constitutional challenge the rationality of a state law limiting the maximum hours women could work by marshalling a large amount of social science evidence. See Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. See generally Kathryn Abrams, *The Legal Subject in Exile*, 51 DUKE L.J. 27, 39–43 (2001) (exploring the approach taken by Louis Brandeis and others to expand the data considered by the courts).

138. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 489–90, 494–95 (1954).

139. Woolhandler, *supra* note 129, at 118.

140. Sullivan, *supra* note 35, at 998–1000.

nesses to educate judge and jury about the psychological mechanics of cognitive bias and its operation in the workplace, and the resultant pervasiveness of discrimination even in a world peopled by those who believe in equality.<sup>141</sup> However, the engrained worldviews of the courts are unlikely to be changed across the run of cases,<sup>142</sup> even by the skilled deployment of such evidence. Scholars have explored a variety of cognitive biases that give little hope that such a view, confirmed by the similar perspectives of so many other federal judges, will alter easily.<sup>143</sup>

Rather, a more focused kind of evidence is needed, a kind that comes closer to the usual adjudicative facts with which judges are so familiar. Put another way, plaintiffs' attorneys need to try to counter one judicial bias with another. Judges may believe that discrimination is rare, and they may, therefore, believe that random fluctuations are more likely in any given case to explain an anomaly. But that is in part because they are faced with little evidence going the other way and in part because they are functioning in their legislative fact-finding role. The solution is for plaintiffs to put into evidence information that such anomalies are rare and not tolerated in relevant professional communities. This would serve to directly confront the judicial worldviews. And it would do so in the context of a

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141. *Id.* at 950–51 (“[P]laintiffs must introduce evidence in disparate treatment cases about the prevalence of discrimination. Perhaps the most obvious use of such testimony is to remind or convince the jury that discrimination is still prevalent (at least given the particular employment context) and therefore, to convince jurors that discrimination in the case at hand is more likely than they might at first believe. More dramatically, the new cognitive bias scholarship suggests that plaintiffs must go much further to explain why discrimination is both prevalent and largely invisible. That is, they must deploy expert testimony to educate the jury about the continued operation of race animus, consciously held stereotypes, the more subtle operation results of racially slanted cognitive biases, and/or the effect of workplace dynamics and cultures in enabling these biases.”).

142. Not surprisingly, judges are all lawyers and tend to have been lawyers in large organizations (whether private law firms or government agencies), rarely doing much employment law work. When they did encounter such cases, it would typically have been as counsel for employers. *Cf.* Michael J. Songer, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 269–70 (2005) (“An important reason for the observed decline in successful disparate impact challenges is the simple fact that a higher percentage of cases are being decided by conservative judges, who are ideologically predisposed to favor employers in employment law disputes.”). It is not surprising that the cognitive biases that have been identified in other players in the workplace function here as well, perhaps with a vengeance. *See* Paula A. Monopoli, *Gender and Justice: Parity and the United States Supreme Court*, 8 GEO. J. GENDER & L. 43, 47–48 (2007) (“[T]he Constitutional and statutory silence on qualifications has left a vacuum that has been filled by de facto requirements that implicate cognitive biases and their resulting gender schemas. In recent nominations, the public discourse has revolved around two de facto requirements in particular. The process now seems to require that the candidate be: (1) a ‘brilliant’ graduate of an elite law school and (2) a sitting judge on a United States Circuit Court of Appeals. Of course, neither of these requirements was envisioned by the Framers as essential to a seat on the Court.”) (footnotes omitted). *See generally* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).

143. *See* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1196 (2004) (“Roughly, people will focus on or highlight evidence that tends to support their schemas, theories, and beliefs and ignore or downplay disconfirming facts. Doing otherwise would render their schemas vulnerable to frequent, perhaps constant, reevaluation, thus defeating one of their chief benefits.”) (footnote omitted).

different and powerful judicial schema—that juries, not judges, decide adjudicative facts.

### C. A “Practices of the Trade” Metric

This Article urges the use of a new metric for comparators requiring a different type of expertise. It seeks to prevent, or at least cut down on, judges applying their own perceptions of the relative frequency of discrimination *vis-à-vis* other factors—perceptions likely to have been shaped by the judges’ own experiences with all the biases that entails. Instead of asking judges to look into their life experiences, we should ask them to look at the actual practices of other employers. In other words, while the circuits have tended to list differences between plaintiff and proffered comparators and then apodictically declare them too great to be sufficient to infer discrimination, the better view is to ask whether *the differences are such that a reasonable employer is likely to look to them in making the decision in question.*

While some courts have resisted requiring too perfect a comparison between workers,<sup>144</sup> few have been very explicit about their metric. One articulated an objective test: “whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated,”<sup>145</sup> but it failed to follow through by indicating what that prudent person would look to. A few others have been more focused, speaking in terms of the “reasonable employer.” For example, *Chapman v. AI Transport*<sup>146</sup> rejected any effort by the plaintiff to prove pretext by questioning the wisdom of the employer’s “business judgment,”

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144. See, e.g., *Lynn v. Deaconess Med. Ctr.*, 160 F.3d 484, 488 (8th Cir. 1998) (“To show that employees are similarly situated, a plaintiff need only establish that he or she was treated differently than other employees whose violations were of ‘comparable seriousness.’ To require that employees always have to engage in the exact same offense as a prerequisite for finding them similarly situated would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination. Common sense as well as our case law dictate[s] that we reject such an approach. We think that Mohr’s sleeping on the job was at least comparable to, if not much more serious than, the misconduct alleged against Lynn. Under the circumstances, we find that Lynn and Mohr were similarly situated.”) (citation omitted); see also *Jackson v. FedEx Corporate Servs., Inc.*, 518 F.3d 388, 396–97 (6th Cir. 2008) (“The purpose of Title VII and Section 1981 are not served by an overly narrow application of the similarly situated standard. . . . The number of employees with whom Jackson could be compared for purposes of establishing a comparable is relatively small. Jackson held a unique position within the workgroup, as he was the only system administrator. The district court’s narrow definition of similarly situated effectively removed Jackson from the protective reach of the antidiscrimination laws. The district court’s finding that Jackson had no comparables from the six other employees in the PowerPad project deprived Jackson of any remedy to which he may be entitled under the law.”) (citation omitted).

145. *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 45 (1st Cir. 2004) (quoting *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 76 (1st Cir. 2004)).

146. 229 F.3d 1012 (11th Cir. 2000).

but only “[p]rovided that the proffered reason is one that might motivate a reasonable employer.”<sup>147</sup>

Perhaps more significantly, while declining to approve a standard, the *Ash* Court did note other standards applied by the circuit courts, two of which included something like the reasonable employer. Thus, the Court cited *Cooper v. Southern Co.*<sup>148</sup> which, while it repeated the slap in the face rule which the Court disapproved, had an alternative formulation that the Court cited as better: “disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.”<sup>149</sup> It also cited *Aka v. Washington Hospital Center*<sup>150</sup> as allowing the fact finder to infer pretext if “a reasonable employer would have found the plaintiff to be significantly better qualified for the job.”<sup>151</sup> Consistent with the approach it would later take in *Mendelsohn*,<sup>152</sup> the *Ash* Court suggested also that the comparator evidence may be influenced by the context in which it appears—“in this case the Court of Appeals qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence.”<sup>153</sup>

The Eleventh Circuit has since seized on the Court’s citation of *Cooper* to announce a “reasonable person[] in the exercise of impartial judgment” test.<sup>154</sup> While this seems less attuned to the proof process than the “reasonable employer” language of *Aka*, the tests seem very similar and consistent with what is urged here.

But the question remains what a “reasonable employer” might be. To begin, such a standard does *not* mean that the employer must be “reasona-

147. *Id.* at 1030; *see also* *Campbell v. England*, 234 F. App’x 183, 187 (5th Cir. 2007) (even if an engineering degree is unnecessary for the job in question, “the evidence remains insufficient to call into doubt Logsdon’s belief that a degreed engineer was preferable or to show that no reasonable employer would have preferred an engineering degree”); *Bender v. Hecht’s Dep’t Stores*, 455 F.3d 612, 627 (6th Cir. 2006) (“[Where] there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant’s qualifications must be so significantly better than the successful applicant’s qualifications that no reasonable employer would have chosen the latter applicant over the former.”); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1182 (7th Cir. 2002) (“[E]ven assuming that Millbrook was better qualified than Harris, his credentials were not clearly superior, and therefore a reasonable employer could have concluded that Harris was the better person for the job. Accordingly, a comparison of the relative qualifications of Millbrook and Harris is by itself not probative of pretext.”); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (fact finder may infer pretext if “a reasonable employer would have found the plaintiff to be significantly better qualified for the job”).

148. 390 F.3d 695 (11th Cir. 2004).

149. *Ash*, 546 U.S. at 457 (quoting *Cooper*, 390 F.3d at 732).

150. 156 F.3d 1284 (D.C. Cir. 1998) (en banc).

151. *Ash*, 546 U.S. at 458 (quoting *Aka*, 156 F.3d at 1294).

152. *See* *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008).

153. *Ash*, 546 U.S. at 458.

154. *Brooks v. County Comm’n*, 446 F.3d 1160, 1163 (11th Cir. 2006) (viewing the Court’s citation of *Cooper* as approving of the “no reasonable person, in the exercise of impartial judgment” test).

ble” to avoid violating the antidiscrimination statutes. The courts repeatedly remind us that courts do not sit as super-personnel departments,<sup>155</sup> and Judge Posner has been particularly graphic in stating that Title VII disparate treatment bars only discrimination on the prohibited grounds—not “whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational.”<sup>156</sup> But the fact that there is no duty to be reasonable does not mean that being unreasonable is not probative of discrimination—which is, after all, a kind of unreasonable conduct—at least in terms of current social norms.<sup>157</sup> Indeed, while irrationality is not a per se violation of the antidiscrimination laws, the continued judicial reiteration of the point obscures a critical qualification—the irrationality or idiosyncrasy of the reason for acting is a basis for inferring discrimination if, as seems plausible, employers tend to act “reasonably” for a host of reasons, including market pressures.

The notion that employers can be expected to act reasonably is supported both by the Supreme Court and theoretic literature. The Court in *Furnco Construction Corp. v. Waters*<sup>158</sup> viewed irrationality as evidence of discrimination. It viewed the *McDonnell Douglas* prima facie case as raising an inference of discrimination

only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.<sup>159</sup>

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155. *E.g.*, *Russell v. TG Mo. Corp.*, 340 F.3d 735, 746 (8th Cir. 2003) (“As we have said many times, we do not sit as a ‘super-personnel department’ with the power to second-guess employers’ business decisions.”). The Eighth Circuit is not alone. A LexisNexis search for “super-personnel department” in the “Federal Court Cases, Combined” database on January 30, 2009 yielded 1,898 results. *See also* *Derum & Engle*, *supra* note 92, at 1238–39 (noting that this analysis is tautological, but it reveals a judicial predisposition).

156. *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 418 (7th Cir. 2006) (“[T]he question [of proving pretext] is never whether the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason was his reason: not a good reason, but the true reason.”).

157. Discrimination is occasionally economically rational, at least if one ignores the fact that it is illegal and therefore risks sanctions. *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 *GEO. L.J.* 1619, 1631–39 (1991); *see also* EPSTEIN, *supra* note 84, at 59–78. Ironically enough, it is precisely in those situations where judges understand the rationality of discrimination that they are most likely to find it. *E.g.*, *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1560 (9th Cir. 1994) (“There was also evidence that another white male professor had stated that, given Japanese cultural prejudices, the PALS director should be male.”) (footnote omitted).

158. 438 U.S. 567 (1978).

159. *Id.* at 577 (citation omitted). Following *Furnco*, I use “irrational” to include all factors that do not seem to conduce to efficient operation of a particular firm. Unlike *Furnco*, however, I would try to

This perception obviously cannot be limited to the prima facie case. The academic literature as well argues that irrationality, such as discrimination, will tend to result in the firm in question losing out in the market.<sup>160</sup> This argument is frequently deployed to argue that discrimination is rare and disappearing, but it seems equally or more apt to inform courts' judgments that irrationality is relatively rare in the workplace, thus allowing an inference of discrimination when the employer in question departs too much from current business norms.

Not every departure from such norms is irrational or will be punished by the market. At any given time, an employer might be a trendsetter for a new approach to workplace practices that might be more efficient and rewarded by the market. But this is highly unlikely in most of the settings with which we are concerned and, in addition, such situations are usually those in which the employer does not have a clear policy in play. Rather, the cases in question are typically ones where the defendant has acted in ways that are at least in tension with its own practices. If, in addition, the employer's conduct is inconsistent with the norms established by a reasonable employer, the inference of discrimination ought to be permissible. And, in any event, the employer remains free to explain as nondiscriminatory any departure from normal standards.<sup>161</sup>

To be clear about the proposal, I am not suggesting that discrimination can be inferred merely by comparing *Employer A's* practices with *Employer B's* practices, or even with the practices of employers in *A's* industry. The notion that employers have a right to create their own norms and cultures, so long as they are not discriminatory, cuts too strongly against that. Rather, I am arguing only that, should an employee of *A*, say *A<sub>1</sub>*, argue that she has been treated worse than a comparator co-worker of a different race or the opposite sex, say *A<sub>2</sub>*, the courts should largely abandon their current structure of rules as to what constitutes a comparator and ask simply whether a reasonable employer would treat the cases the same or differently. If there is evidence from which the trier of fact could find that a reasonable employer would not do so, then the case should normally go to the jury. An inference of discrimination could be aided by other evidence, and I use the word "normally" to make clear that it is possible, even in such a situation, that other evidence might permit a court to still hold that no inference of discrimination is appropriate.

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put more content into the term by shifting focus from a means/ends analysis to a trade usage perspective, thus substituting "reasonableness" for "rationality."

160. See Strauss, *supra* note 157, at 1631–39. See generally Jacob E. Gersen, *Markets and Discrimination*, 82 N.Y.U. L. REV. 689 (2007) (exploring the various economic theories concerning discrimination).

161. Court decisions that require a comparator to be similar in "all material respects," may have been expressing some such notion, however obliquely, since they implicitly rely on some notion of what makes a similarity or difference "material."

This proposal, of course, turns on what is meant by a “reasonable” employer. I want to be clear that I am not proposing a hypothetical rational employer but rather using an objective standard of what real employers actually do. The courts have been busy inventing the hypothetical rational employer as a matter of law in deciding comparator cases, and they clearly believe that their construct makes many inconsistent, questionable, even irrational decisions. Focusing on real employer practices at least allows the possibility of a reality-corrective.

Admittedly, this approach is subject to the criticism that it reifies the status quo. A group that I label the new structuralists<sup>162</sup> is likely to be especially dissatisfied by my recommendation. However, rather than suggesting approval, it leaves current practices largely where it finds them. Further, there is at least the possibility of a ratcheting up on “best practices” as more employers adopt the approaches urged by the new structuralists. Finally, it seems more likely to be well received by the courts than more radical approaches since it leaves ample room for the bedrock judicial notion that employers ought to have the maximum freedom of action so long as they do not discriminate. Employers would be constrained only by the norms established by other employers; even then, they would be constrained only to the extent that they did not depart from such norms in relatively uniform ways; and even then, such departures, when they disadvantaged women and minorities, would at most allow the inference of discrimination, not require it.

The notion of reasonableness in terms of other market players is scarcely foreign to the law. It is a mainstay of the law of negligence, applicable not only in professional malpractice situations<sup>163</sup> but also where a

162. Such scholars see current employment practices as profoundly inadequate to the extent that they enable discrimination in the workplace. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 128 (2003); Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 644–50 (2005); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485–90 (2001). To the extent that my proposal would take current practices as a baseline, it would do little in the short run to address the problems that they identify.

163. See, e.g., *SeaRiver Mar., Inc. v. Indus. Med. Servs., Inc.*, 983 F. Supp. 1287, 1296 (N.D. Cal. 1997) (“A physician must exercise that degree of skill or care possessed by doctors in good standing practicing in the same locality under similar circumstances.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (2000) (“[A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.”); Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 677 (1998) (“The heart of a negligence case involving attorneys, like one involving physicians, is expert testimony regarding the standard of care in the professional community. With few exceptions, evidentiary rules require the plaintiff to proffer an expert familiar with the practice of attorneys in the defendant’s professional community to testify that the defendant deviated from that standard.”) (footnote omitted).

The notion that current practices of a particular business or profession should define the standard of care has, of course, been the subject of heated debate at least since Learned Hand rejected any absolute rule in *The T. J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). This Article does not argue that compliance with prevailing practices immunizes an employer from any claims of discrimination, but

trade establishes a standard of care.<sup>164</sup> Reasonableness assessed in terms of the relevant trade also plays a critical role in the law of contracts, most notably in the notion of trade usage. The legal realist position, in the form of Karl Llewellyn's approach to the Uniform Commercial Code, was precisely an effort to replace judicial views of how the commercial world worked with proof of actual commercial practices.<sup>165</sup> While parties remain free to reach any arrangement they wish, those who operate within a particular trade are held to trade usages if they do not clearly enough contract out from under them. Usage of the trade originated in Article 2 of the Uniform Commercial Code<sup>166</sup> for the sale of goods,<sup>167</sup> and was later generalized to all contracts by the Restatement (Second) of Contracts.<sup>168</sup>

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merely contends that violating such norms is probative of discrimination when the victim is a minority group member or a woman.

164. While the general "reasonable person" standard, RESTATEMENT (SECOND) OF TORTS § 283 (1965), does not focus on a particular community, cases in the trade or professional context look to professional norms. *Id.* § 299A ("Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.").

165. See Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 CONN. L. REV. 451, 454 (2006) ("Karl Llewellyn reversed course and re-elevated the importance of commercial practices in the rules of Article 2 of the Uniform Commercial Code . . . . Rather than imposing legal rules derived from logic or by a central planner, Llewellyn provided a statutory framework reflecting the legal realist philosophy that laws should reflect commercial realities.") (footnote omitted). *But see* Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 12–16 (2007) (questioning the success of the realist project in this regard).

166. U.C.C. § 1-303(c) (2007) provides that "[a] 'usage of trade' is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." Usages of trade become part of the agreement of the parties if the parties are both in the trade, *id.* § 1-303(d), unless the contract terms provide otherwise. *Id.* § 1-303(e) ("[T]he express terms of an agreement and any applicable . . . course of dealing or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable . . . express terms prevail over . . . usage of trade . . ."). See generally Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms," and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777, 779–782 (1986). In a number of instances, a trade usage has trumped what appeared to be fairly explicit contract terms. *E.g.*, *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 780 (9th Cir. 1981) (holding an express price term subject to a trade usage requiring "price protection" for contracts already let at the time of the price increase).

167. Usage of trade has been described as one of the major innovations of the Code in replacing individualism with group norms. See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 350 (1995) ("The rejection of individualism is apparent in the UCC's adoption of group norms as a principle of regulation and interpretation of contract terms. Group norms regulate contracts by setting the standard of 'good faith'; group practices define contract terms through the introduction of usage of trade 'to explain or supplement' the terms of a contract; and trade practices define the expected quality of the goods. Under the UCC, the individual merchant is always subject to the norms and usages of his trade group.") (footnotes omitted). *But see* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715 (1999) ("[U]sages of trade' and 'commercial standards,' as those terms are used by the Code, may not consistently exist, even in relatively close-knit merchant communities.").

168. RESTATEMENT (SECOND) OF CONTRACTS § 222 (1981) provides in part:

In both the tort and contract examples, the judge/jury roles are in line with the approach suggested by this Article.<sup>169</sup> Admittedly, neither the tort nor the contract example is perfectly attuned to the discrimination context, but both are suggestive. Both look to norms of the profession or business to set a baseline legal standard, and both allow for greater or lesser opt-out rights.<sup>170</sup> The use of the “reasonable employer” standard as a basis for inferring discrimination by an unreasonable employer is less restrictive than these standards because the employer is not formally bound to the standard but, at most, is required to explain its departure in nonracial (nongender) ways that will make sense to the finder of fact.

Nor is this approach foreign to discrimination law. When the Supreme Court rejected disparate impact or present-consequences-of-past-discrimination attacks on seniority systems,<sup>171</sup> such systems could be attacked only by showing that they were the result of intentional discrimination. In the course of that analysis, whether the system was “in accord with the industry practice” was an important consideration.<sup>172</sup>

Applying such an approach requires first identifying the relevant “reasonable employer.” While some practices may be reasonable (or unreasonable) for literally any employer, both the malpractice and trade usage

(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. . . .

. . . .

(3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.

*Id.*

169. With respect to trade usage, see, for example, *Nanakuli*, 664 F.2d at 780, *Keith v. River Consulting, Inc.*, 618 S.E.2d 302, 305 (S.C. Ct. App. 2005), and *Willis Mining, Inc. v. Noggle*, 509 S.E.2d 731 (Ga. Ct. App. 1998), in which the court stated: “The existence of trade usage, course of dealing and course of performance creating an exception to the rule requiring conspicuous written exclusion of warranties are questions of fact, and as such they are for the jury to determine.” *Id.* at 733. With respect to physician malpractice, see, for example, *Milano v. Freed*, 64 F.3d 91, 96 (2d Cir. 1995), and for attorney malpractice, see, for example, *Traub v. Washington*, 591 S.E.2d 382, 385–86 (Ga. Ct. App. 2003).

170. Even in torts, some negligence is disclaimable by a properly executed exculpatory clause. *E.g.*, Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 112 (1993) (“Tort law itself also may compromise the voluntariness of exculpatory agreements as a consequence of the law’s constricting effect on the available range of choices. Some courts are inclined to find that a signed exculpatory clause reflects true consent if the consumer could have chosen to refrain from engaging in a non-essential activity like skydiving. What distinguishes the skydiving consumer from consumers of other, more ‘essential’ goods and services, thus, is partly a function of the court’s perception of the relative importance of the activity in question.”) (footnotes omitted).

171. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 352–53 (1977); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557–58 (1977).

172. *Teamsters*, 431 U.S. at 356 (“The placing of line drivers in a separate bargaining unit from other employees is rational, in accord with the industry practice, and consistent with National Labor Relation Board precedents.”). In *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), the Court made clear that industry practice was one of “the factors that a district court might or should consider in making a finding of discriminatory intent,” not an independent requirement. *Id.* at 279 n.8.

examples suggest that a more focused inquiry on the relevant trade, business, or profession may be necessary. For example, while a college degree is an important credential for literally millions of jobs, there are millions more in which it is unimportant, and there is some intermediate class of position in which such a degree might be a greater or lesser “plus.”<sup>173</sup> Similarly, the entertainment industry, for example, might be expected to be considerably less demanding in “professionalism” than a large law firm (or, better, that the two industries will have very different standards of what it means to be professional). Further, regional variations are certainly possible, so that the reasonable employer might be one that operates in a particular section of the country.

This problem, however, has proved manageable in both the tort and contract settings. It is largely a question of whether the expert called to testify as to the relevant information can make a persuasive case that he or she can testify not only as to employer practices but has identified employers who are comparable with the defendant.<sup>174</sup> Indeed, related expertise is routinely used in employment lawsuits because defendants often call “employability” or “vocational” experts to establish the range of jobs a plaintiff may be able to perform in disability cases<sup>175</sup> or to establish that the plaintiff mitigated or failed to mitigate her damages.<sup>176</sup>

Of course, the devil is often in the details, and the question of who is an appropriate expert, and indeed, the parameters of any such expertise, remain to be resolved. Experts, sometimes called employment practices or management practices experts, are, not surprisingly, “experienced human resources managers, professors of industrial relations management, personnel administration, or attorneys”<sup>177</sup> who have been used sporadically over a range of employment-related cases and for a wide range of purposes,<sup>178</sup> with more or less success.<sup>179</sup>

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173. See generally Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269 (2006).

174. Cf. D. Michael Risinger, *Defining the “Task at Hand”: Non-Science Forensic Science After Kumho Tire Co. v. Carmichael*, 57 WASH. & LEE L. REV. 767, 773 (2000) (“[W]hat is clearly not consistent with *Kumho Tire* is any attempt to approach an issue of reliability globally. That is, reliability cannot be judged globally, ‘as drafted,’ but only specifically, ‘as applied.’”).

175. See *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992) (plaintiff might have established a substantial impairment to his livelihood by testimony of a vocational expert that he was precluded from performing a host of jobs).

176. See Carl Gann, *Vocational Experts in Employment Law Cases*, 11 J. LEGAL ECON., Winter 2001–2002, at 53, 62. See generally Howard C. Eglit, *Damages Mitigation Doctrine in the Statutory Anti-Discrimination Context: Mitigating Its Negative Impact*, 69 U. CIN. L. REV. 7 (2000).

177. John V. Jansonius & Andrew M. Gould, *Expert Witnesses in Employment Litigation: The Role of Reliability in Assessing Admissibility*, 50 BAYLOR L. REV. 267, 290 (1998).

178. *Id.*

179. Compare *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1180–82 (9th Cir. 2007) (certifying a class, based in part on expert testimony about the susceptibility of Wal-Mart practices to discrimination in implementation), with *Cook v. CTC Commc’ns Corp.*, No. 06-cv-58-JD, 2007 U.S. Dist.

The bottom line is that an expert may be able to testify that a putative comparator who was treated more favorably than plaintiff would not have been so treated by a reasonable employer, a kind of “standard of care” in the employment setting. That would be a basis for inferring discrimination if the plaintiff is of a different race (or sex) than the comparator.<sup>180</sup> Standing alone in light of such proof, such a comparator may be sufficient to permit, although not require, an inference of discrimination as the explanation for the difference in treatment. Of course, the employer will be able to respond with its own expert to the effect that discrepancies such as the one identified are common in the industry or trade, but the testimony of the plaintiff’s expert should be sufficient to survive summary judgment.

Of course, such evidence will rarely stand alone. As *Mendelsohn* makes clear, the admissibility of evidence depends on its context, and the grant of summary judgment or the ultimate finding with respect to discrimination will also depend not merely on one comparator plus expert witness but rather on what other evidence both sides are able to adduce. For example, there may be additional comparators. Needless to say, the plaintiff would like to multiply comparators in order to reinforce the inference that the prohibited consideration, not some random factor, explained the difference in treatment. Conversely, the defendant would like to adduce comparators who rebut such an inference. These can be either members of the plaintiff’s class who are treated better than their cross-racial comparators or members of the supposedly favored class who were treated worse than the comparator that the plaintiff adduced. For example, in a sex discrimination case, the plaintiff (Female<sub>1</sub>) might choose as a comparator Male<sub>1</sub>, who is paid more than she. The existence of Male<sub>2</sub>, Male<sub>3</sub>, and Male<sub>4</sub>—also paid more than she—would reinforce the inference of sex discrimination. On the other hand, should the defendant put into evidence Female<sub>2</sub>, who is paid as much as Male<sub>1</sub>, the inference of discrimination is less likely.<sup>181</sup> And putting into evidence Male<sub>5</sub>, who is paid less than Female<sub>1</sub> (plaintiff) would tend in the same direction.

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LEXIS 80849 (D.N.H. Oct. 15, 2007) (rejecting two employment practices experts).

180. One unsuccessful effort was *Campana v. City of Greenfield*, 164 F. Supp. 2d 1078 (E.D. Wis. 2001), *aff’d*, 38 F. App’x 339 (7th Cir. 2002), in which a vocational specialist’s report that two positions were very similar and should have received the same salaries was granted “some probative value” as to whether the employer’s valuation of the two positions was accurate, but it was held not sufficient to show discrimination in the employer’s valuing them differently. *See id.* at 1089. This is not to say that any such expert testimony is admissible. *See Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1086 (7th Cir. 1999) (finding supposed expert’s report inadmissible in part because the expert did not “study UPS’s personnel files to determine whether the handling of Huey’s situation departed from the firm’s norm in a way that might imply retaliation,” nor did he “attempt to reconstruct the underlying facts to determine whether UPS had a good explanation”).

181. *E.g.*, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1406 (10th Cir. 1997) (“Singular, unfavorable treatment of Aramburu might normally support an inference of some animus by Whitesell against him in the absence of a legitimate explanation. However, Aramburu’s own evidence shows that other minorities were employed in the shop on November 5, and unfavorable treatment of Aramburu does

This evidence can sometimes be statistical, as when one party shows that a group as a whole either is benefited or burdened by the practice at issue,<sup>182</sup> but the point here is not “statistical significance” but rather that the inference of discrimination drawn from the preferred treatment of Male<sub>1</sub> vs. Female<sub>1</sub> is weakened or negated by proof of Male<sub>2</sub> being treated less favorably than Male<sub>1</sub>, or Female<sub>2</sub> being treated more favorably than she.<sup>183</sup>

### CONCLUSION

This Article has demonstrated that underlying the current artificial proof structures for discrimination cases is a much simpler and more direct way to approach such proof. In the majority of cases, a plaintiff should identify a comparator who is sufficiently similar that the inference of discrimination may be drawn by a jury merely from the existence of such a person. While comparator proof can be fit into the traditional *McDonnell Douglas* proof structure, analysis would be facilitated if it were recognized as an alternative method of proof, a method which is more consistent with the Court’s more holistic approach to proving discrimination in cases such as *Desert Palace* and *Mendelsohn*.

As indicated by the Supreme Court’s recent decision in *Ash* to reject the Eleventh Circuit’s “slap in the face” rule, making comparator proof

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not support an inference of improper animus when other minorities are accorded the same treatment as the non-minority employees.”).

182. See, e.g., *Amos v. Tyson Foods, Inc.*, 153 F. App’x 637, 645 (11th Cir. 2005) (“The evidence shows, however, that more Hispanic workers were affected by the cuts in overtime than American workers. Accordingly, Amos and Saunders cannot show similarly situated employees outside their protected class who were being treated differently from them.”).

183. In *English v. Colo. Dep’t of Corr.*, 248 F.3d 1002 (10th Cir. 2001), the plaintiff argued that proof that females were treated similarly to the male plaintiff, even if one female had been treated more leniently, dispelled the inference of discrimination, stating:

A plaintiff “can not pick and choose a person [he] perceives is a valid comparator who was allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably than [he].” Rather, if the record establishes that a number of non-protected employees have found themselves in similar circumstances, the plaintiff must show that the employer had established a pattern of granting more favorable treatment to protected employees for the relevant infraction.

*Id.* at 1012 (alterations in original) (citation omitted) (quoting *Simpson v. Kay Jewelers*, 142 F.3d 639, 646–47 (3rd Cir. 1998)). See also *Crawford v. Ind. Harbor Belt R.R.*, 461 F.3d 844, 846 (7th Cir. 2006) (“[Requiring] closer and closer comparability between the plaintiff and the members of the comparison group . . . is a natural response to cherry-picking by plaintiffs . . . . If a plaintiff can make a prima facie case by finding just one or two male or nonminority workers who were treated worse than she, she should have to show that they really are comparable to her in every respect. But if as we believe cherry-picking is improper, the plaintiff should have to show only that the members of the comparison group are sufficiently comparable to her to suggest that she was singled out for worse treatment. Otherwise plaintiffs will be in a box: if they pick just members of the comparison group who are comparable in every respect, they will be accused of cherry-picking; but if they look for a representative sample, they will unavoidably include some who were not comparable in every respect, but merely broadly comparable.”) (citations omitted).

more central to proof of discrimination is not a panacea because the circuits tend to require comparators to be the “almost twin” of a plaintiff before an inference of discrimination can be drawn from the disparity of treatment. *Mendelsohn* opens the way for a less rule-bound approach to comparator proof, but real change requires the courts to be more receptive to such proof, and this can be achieved only by substituting a more objective standard for current judicial worldviews about when an individual is sufficiently similar to the plaintiff to allow the jury to infer discrimination from the difference in treatment. Plaintiffs, therefore, should adduce—and courts should admit—expert testimony about whether other employers would treat the proffered comparators comparably. If the testimony is that employers generally adhere to a different standard of care, that evidence should normally suffice to send the case to the jury.