PROBATIVE "WEIGHT": RETHINKING EVIDENTIARY STANDARDS IN TITLE VII SEX DISCRIMINATION CASES

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I. INTRODUCTION

Various forms of prejudice and bias plague the labor market in the United States, skewing opportunities for qualified people to attain the jobs they desire. Title VII was designed to eliminate some of those barriers by creating a law that prohibits employers from discriminating against applicants based on race, color, religion, sex, or national origin. In 1964, when this legislation was passed, discrimination against protected classes was unconcealed. Since then, forms of employment discrimination have transformed into subvert—even unconscious—prejudice and bias, often clothed in legal forms of subjectivity in hiring. When addressing sex discrimination, we must therefore acknowledge its more subtle and insidious forms and take a searching look at what it means to discriminate against an applicant based on sex. For women, sex discrimination occurs when an employer makes a negative employment decision based on stereotypes of an ideal woman's role, place, personality, or figure. In this Article, I will argue that statistical and historical data linking illegal gender stereotyping to weight-based employment discrimination should give rise to an inference of sex discrimination when an employment decision is based on a woman's weight.[1]

Employers currently have discretion to hire, promote, or fire an employee based on an unprotected trait, including weight.[2] In a world where weight

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1. Because the current statistics and historical data generally show that women are impacted by weight discrimination to a greater extent, I use the female plaintiff's experience with weight-sex discrimination as a model for my proposal. The evidentiary inference I propose, however, creates a gender neutral model and would therefore be available to any Title VII plaintiff claiming sex discrimination who could show statistical and historical evidence linking weight-based discrimination to illegal sex classifications or stereotypes where one sex is treated differently than the other.

2. Jennifer Fowler-Hermes, *The Beauty and the Beast in the Workplace: Appearance-Based Discrimination Claims Under EEO Laws*, FLA. B. J., Apr. 2001, at 32, 33 ("Dress codes, grooming requirements, or other appearance-based policies are permitted under discrimination law as long as they are enforced even-handedly.").

discrimination is obvious in many facets of life,[3] it is no surprise that legal scholars have explored adjusting or expanding our current notions of anti-discrimination law in order to address weight discrimination through the law. Specifically, advocates have focused on employment discrimination as a starting place for change. Generally, scholars and advocates have called for expansions of current federal anti-discrimination laws such as the Americans with Disabilities Act[4] and Title VII of the Civil Rights Act of 1964,[5] or implementation of state and local appearance and weight discrimination protections.[6] For the most part, scholars have disfavored connecting weight-based discrimination to a protected class (such as sex) in federal anti-discrimination claims, deeming this approach less useful and more difficult to prove than other strategies.[7] I will argue, however, that since women statistically face a significantly disproportionate amount of weight discrimination in employment, and since such empirical data generally stems from historical views of an ideal woman's figure, evidence of weight discrimination should have probative influence in a Title VII sex discrimination claim.[8]

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3. For a more detailed description of the history of weight prejudice and the social psychology studies showing such discrimination, *see* Elizabeth E. Theran, *"Free to be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law,* 11 CORNELL J.L. & PUB. POL'Y 113, 152 (2001) ("One thing is absolutely clear: There are deeply entrenched cultural stereotypes, prejudices, and biases surrounding weight and fat in this country. . . Extensive research in this area since the 1960s has revealed consistent evidence of the stigmatization of the overweight at practically every stage of life, in every area of functioning.") (emphasis omitted).

4. *See* Jeffrey Garcia, *Weight-Based Discrimination and the Americans with Disabilities Act: Is There an End in Sight?*, 13 HOFSTRA LAB. L.J. 209 (1995); Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25 (1997). *See also* Milena D. O'Hara, *"Please Weight to be Seated": Recognizing Obesity as a Disability to Prevent Discrimination in Public Accommodations*, 17 WHITTIER L. REV. 895 (1996).

5. *See* Paula B. Stolker, *Weigh My Job Performance, Not My Body: Extending Title VII to Weight-Based Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 223 (1992); Theran, *supra* note 3.

6. *See* Elizabeth M. Adamitis, *Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment*, 75 WASH. L. REV. 195 (2000) (arguing that States should adopt appearance discrimination employment statutes); Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57 (2002); Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity,* OBESITY RESEARCH, Dec. 2001, at 788, 798.

7. *See* Kristen, *supra* note 6, at 108 ("local and state laws directed at eliminating weight discrimination may be more useful than a national approach because such laws provide greater opportunity for consensus building"); Theran, *supra* note 3, at 136 (arguing that current anti-discrimination laws have arbitrarily chosen to regulate certain categories of people). *Cf.* Adamitis, *supra* note 6, at 212. Adamitis notes:

> Although some appearance claims might fall within the scope of Title VII, the ADA, or the ADEA, the vast majority of appearance-discrimination claims are not actionable. Furthermore, even where a connection to a protected category can be argued, many claims likely will fail because they actually involve discrimination based on appearance, as opposed to a characteristic related to the existing category. *Id.*

8. By analogy to its treatment of discrimination under the Age Discrimination in Employment Act, a plaintiff may be precluded from arguing that sex discrimination has occurred where the motivating factor is something other than the plaintiff's sex, even when empirically correlated with

In Part II of this article, I will describe and survey the current state of overweight and obesity in the United States, with a focus on female-specific data. In Part III, I will explore gender stereotyping in the United States, particularly regarding the ideal female form and social attitudes toward women's weight. I will also explore the incidences of weight discrimination and argue that societal stereotypes make women more vulnerable to weight discrimination than men, particularly in lower weight ranges. In Part IV, I will look at the legislative history and use of Title VII, focusing on its purpose of eliminating negative stereotypes. I will argue that Title VII was designed to address and dispel negative stereotypes of protected classes, including weight-based sex discrimination. Finally, in Part V, I will discuss ways in which lawyers can utilize Title VII in its current state by establishing a connection between sex stereotyping and weight discrimination. Specifically, I will argue that the connection is sufficient to establish a permissible inference allowing jurors to consider the interplay between sex and weight discrimination in making their liability decisions. This section will offer a three-prong evidentiary model for weight-sex discrimination, wherein a plaintiff: (1) puts forth evidence of weight discrimination in her specific employment context; (2) introduces expert witness evidence that details the statistics of weight-sex discrimination and makes the link between weight discrimination and Title VII sex discrimination; and (3) introduces a permissible inference model jury instruction informing jurors that, as a matter of law, they may choose to find sex discrimination if they find weight discrimination.

Where overweight women disproportionately face negative employment decisions—are denied jobs, promotions, or access to clients for example—we must acknowledge that this discrimination is an outgrowth of outmoded and unhealthy attitudes about what constitutes an acceptable woman. Hence, we must recognize that discrimination against women based on weight falls squarely within the protections of Title VII.

II.
AN OVERVIEW OF OVERWEIGHT AND OBESITY

In order to discuss the prevalence of overweight and obesity and the prejudice against overweight and obese Americans, it is first necessary to define these terms. The Centers for Disease Control and Prevention (CDC) defines overweight as a body mass index (BMI)—a measure expressing the ratio of weight-to-height—between 25.0–29.9 and obesity as a BMI greater than or equal

sex. *Cf.* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (finding that firing an elderly employee to prevent his pension benefits from vesting did not violate the Age Discrimination in Employment Act because the decision was not actually motivated by the protected trait). This article, however, argues that because weight discrimination is rooted in illegal sex stereotypes, an adverse employment decision based on a woman's weight is essentially both weight *and* sex discrimination, and therefore, actionable under Title VII.

to 30.0.[9] To calculate BMI, divide weight, in pounds, by the square of height, in inches, and then multiply by 704.5.[10] Regarding weight discrimination, it is unreasonable to think that an employer calculates an applicant's body mass index before making an employment decision. Instead, it is more likely that the employer makes a visual assessment of the applicant's weight and follows his or her internal stereotypes and biases. The figures, however, offer a good starting point for discussion of the general number of people categorized as overweight or obese and thus at a higher risk for weight discrimination.

For the past several decades, there has been a marked increase in overweight and obesity in the United States,[11] which sends a warning flag to all facets of American society about the physical dangers associated with excess weight. The CDC notes a dramatic rise in overweight and obesity in the last twenty years. Specifically, the CDC notes that in 1991, only four states reported obesity rates of 15 to 19%, with no state reporting a rate in excess of 20%. In 2002, however, those numbers rose to twenty and twenty-nine states, respectively, with an additional one state reporting obesity prevalence rates exceeding 25%.[12] In addition to concern by government-sponsored organizations such as the CDC and the Office of the Surgeon General, medical organizations such as the American Heart Association are increasingly aware of diseases associated with overweight and obesity, and news outlet CNN reported that a majority of Americans over twenty-five years old are overweight.[13] Major colleges and universities have dedicated millions of hours and dollars to overweight and obesity research, creating departments such as the University of Pittsburgh's Obesity/Nutrition Research Center, University of Alabama Obesity Research Center, and UCLA School of Medicine Obesity Center, to name just a few. Yet despite this widespread concern, public health advocates still consider obesity—the second leading cause of preventable death in the United States—a "neglected public health problem."[14]

Both men and women in all adult age groups suffer from overweight and obesity, and an estimated 64% of United States adults are either overweight or obese.[15] The prevalence of overweight is higher for men than women

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9. American Obesity Association, *AOA Fact Sheet: What is Obesity?*, http://www.obesity.org/subs/fastfacts/obesity_what2.shtml (last visited Mar. 30, 2006) [hereinafter *What is Obesity*].

10. *Id.*

11. Centers for Disease Control and Prevention, Division of Nutrition and Physical Activity, *Overweight and Obesity: Obesity Trends*, http://www.cdc.gov/nccdphp/dnpa/obesity/trend/maps/index.htm (last visited Aug. 31, 2005).

12. *Id.*

13. CNN.COM, *Poll: Most Americans Older than 25 are Overweight*, Mar. 5, 2002, http://www.cnn.com/2002/HEALTH/03/05/obesity.poll/?related.

14. American Obesity Association, *AOA Fact Sheet: Obesity in the U.S.*, http://www.obesity.org/subs/fastfacts/obesityUS.shtml (last visited Aug. 7, 2005) [hereinafter *Obesity in the U.S.*].

15. Centers for Disease Control and Prevention, Division of Nutrition and Physical Activity,

(67 to 62%), whereas the prevalence of obesity is higher for women than men (34 to 28%).[16] Although the "ideal female form"[17] in our society is emphatically slender, more than half of all adult women in the United States are considered overweight and approximately one-third are considered obese, an increase of approximately eleven and eight percentage points, respectively, over the last decade.[18] Even in the face of pervasive weight discrimination, overweight and obesity remain common issues in the female population. As I will show in the following sections, because gender stereotypes have placed weight restrictions on women to a greater degree than men, the law should protect overweight and obese women from employment discrimination, specifically through Title VII.

III.
STEREOTYPING THE FEMALE FORM: A GENDER BIAS

In this section, I will take a brief look at the ways in which the female form has been scrutinized in American society. This topic has inspired hundreds of articles, books, and areas of study, and is both too broad and too complicated to address fully in this paper.[19] Yet, I cannot overlook it completely. My theories about weight-based discrimination as evidence of sex discrimination rest on the premise that our society places labels and requirements on women, making us believe that women are supposed to act a certain way, and more specifically, to look a certain way. As noted by psychologists, a woman's physical appearance may set off "cues" that operate to "activat[e] gender stereotypes"—for example, that a fat woman is a lazy worker—which influence and may account for "the pervasiveness of gender stereotyping."[20] The essence of sex discrimination is the making of an employment decision based on gender stereotypes. When an employer chooses or declines to hire, promote, or fire a female employee based either on preconceptions about a woman's ideal physical appearance or on stereotypes of overweight and obese women, that employment decision constitutes sex discrimination. As Part IV of this article will show, this is

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Overweight and Obesity: Frequently Asked Questions (data in reliance on National Health and Nutrition Examination Survey 1999–2000), http://www.cdc.gov/nccdphp/dnpa/obesity/faq.htm (last visited Aug. 31, 2005).

16. *Obesity in the U.S., supra* note 14.

17. *See infra* text accompanying notes 19–42.

18. American Obesity Association, *AOA Fact Sheet: Women and Obesity,* http://www.obesity.org/subs/fastfacts/obesity_women.shtml (last visited Aug. 31, 2005) [hereinafter *Women and Obesity*].

19. For a more in-depth look at female stereotyping and female body image, see SARAH GROGAN, BODY IMAGE: UNDERSTANDING BODY DISSATISFACTION IN MEN, WOMEN AND CHILDREN (1999) and SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY (1993).

20. Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 670–71 (1999) (citations omitted).

precisely the kind of discrimination that Title VII was designed to prohibit. Therefore, what follows is a brief description of the way that society's view of an ideal body image has shaped a thin, often unattainable female form and the ways in which that stereotype has created a weight-sex discrimination problem in employment. This discrimination problem is evidenced by statistical studies, which will later be used to support an inference that evidence of weight discrimination is evidence of Title VII-prohibited sex discrimination.

A. From Thin To Thinner: A Brief Survey of Female Weight Control

Society has not always been obsessed with a thin female form. More than one hundred years ago, a shapely female form was considered beautiful. In the last six decades, however, a thinner, less shapely female has become the beautiful and desirous body type. This is evident in the female forms that define beauty in our society—cover models, actresses, and women in advertisements. Over the past few decades, *Playboy* centerfolds have become thinner[21] and from 1954–1978 Miss America winners "grew [one] inch taller and [five pounds] thinner."[22] While we can argue that those women represent a small subset of our female population, research demonstrates that the desire to be thin is not concentrated in models and actresses. While the average woman in America is 5'4" and weighs 140 pounds and the average model in America is 5'11" and weighs 117 pounds,[23] it appears from the following dieting studies and statistics that society believes women should strive for the model form. Approximately one in three children (46% of nine- to eleven-year-olds),[24] more than one in three high school students (59% of females and 29% of males),[25] and one in three adults (45% of women and 25% of men)[26] diet on any given day. While diet-obsession exists in both males and females, it is much more prevalent in females at all ages. And while both men and women are overweight and obese,[27] there is a social reason, steeped in stereotypes, that explains why women are more concerned with their weight and feel more pressure to diet to correct figure "flaws" than men. Terry Poulton, author of *No Fat Chicks: How Big Business Profits by Making Women Hate Their Bodies—And How to Fight Back*, points to startling findings, including one study wherein almost

21. Korn, *supra* note 4, at 30–31 (citing David M. Garner et al., *Cultural Expectation of Thinness in Women*, 47 PSYCHOL. REP. 483, 484–85 (1980)).

22. Korn, *supra* note 4, at 31 (quoting Esther D. Rothblum, *The Stigma of Women's Weight: Social and Economic Realities*, 2 FEMINISM & PSYCHOL. 61, 68–69 (1992)) (brackets in original).

23. National Eating Disorders Association, *Statistics: Eating Disorders and their Precursors*, http://www.nationaleatingdisorders.org/p.asp?WebPage_ID=286&Profile_ID=41138 (last visited Mar. 24, 2006) [hereinafter *NEDA, Statistics*].

24. *Id.*

25. Centers for Disease Control and Prevention, *Youth Risk Behavior Surveillance—United States, 2003*, 53 Morbidity and Mortality Weekly Report SS05:1, June 9, 2000, http://www.cdc.gov/mmwr/preview/mmwrhtml/ss4905a1.htm.

26. *NEDA, Statistics*, *supra* note 23.

27. *See supra* text accompanying note 14.

30,000 women identified weight loss as so important that they would choose losing weight over the achievement of any other goal.[28] As many as ten million American women suffer from an eating disorder such as anorexia or bulimia, an additional twenty-five million suffer from binge eating disorders,[29] and 54% of eighteen- to twenty-four-year-old women in one survey indicated that they would prefer being run over by a truck to being very fat.[30] According to clinical psychologist Mary Pipher, young women who suffer from eating disorders are "oversocialized to the feminine role,"[31] and anorexia is a "metaphor" for a "young woman's statement that she will become what the culture asks of its women, which is that they be thin and nonthreatening."[32] Needless to say, the studies and anecdotes are widespread and disturbing.

This social obsession with weight is learned from a very young age. According to Kristen Harrison, children as young as five (kindergarten age) "negatively stereotype the obese and . . . choose a lean body as their personal ideal."[33] A commonly cited analyses found that "[s]chool-age children have shown a preference for pictures of average or thin children, as well as drawings of handicapped or disfigured children, over drawings of obese children."[34] This desire to be thin and surround oneself with other thin people follows children through adolescence and into adulthood. In fact, the weight-loss industry generates $30 billion per year,[35] and in one poll, more than one in ten married couples said that they would abort a child genetically predisposed to obesity.[36]

Although both men and women suffer adverse effects from obesity, it appears that body image stereotypes are stronger and more prevalent for women. Author Shelley Bovey writes:

> Being fat is about knowing it. It is about a round-the-clock awareness that the fat person's body overflows the strict boundaries imposed on it by Western social and cultural norms. To be a fat woman means to carry a double burden, for women are expected

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28. SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION 34 (2000).

29. National Eating Disorders Association, *Eating Disorders Information Index*, http://www.nationaleatingdisorders.org/p.asp?WebPage_ID=294 (last visited Aug. 31, 2005).

30. SOLOVAY, *supra* note 28, at 57.

31. MARY PIPHER, REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 170 (1994).

32. *Id.* at 175.

33. Kristen Harrison, *Television Viewing, Fat Stereotyping, Body Shape Standards, and Eating Disorder Symptomatology in Grade School Children*, 27 COMM. RES. 617, 618 (2000).

34. Scott Peterson, *Discrimination Against Overweight People: Can Society Still Get Away With It?* 30 GONZ. L. REV. 105, 108 (1994).

35. SOLOVAY, *supra* note 28, at 171.

36. Peterson, *supra* note 34, at 109 (citing Janet Weeks, *Activists Plan a 'No-Diet Day': Big and Healthy Aren't Mutually Exclusive, Say Some Obese People*, ST. LOUIS POST DISPATCH, May 2, 1994, at 4D).

> to conform to a more rigorous and stereo-typed aesthetic ideal than are men.[37]

This is evident in television and print advertising campaigns, where one scholar notes, "women are much more likely than men to serve a decorative function" as they "recline in seductive clothing, caressing a liquor bottle, or they drape themselves coyly on the nearest male."[38] Men, on the other hand, "stand up, they look competent, and they look purposeful."[39] What's more, the National Organization for Women (NOW) initiated the "Love Your Body" campaign in 1998 as "a national day of action to speak out against advertisements and images of women that are harmful, offensive, disrespectful and demeaning."[40] The fact that the leading women's organization has set aside a day to address issues of size and weight stereotyping in the media is indicative of the overwhelming prevalence of female weight discrimination.

A preference for bodies that conform to sex stereotypes is by no means confined to the media. Jayne Stake and Monica L. Lauer have found that average weight study participants preferred women who were "somewhat smaller than normal with no extra fat and little muscular development."[41] The same participants preferred men who were larger than normal and "slightly overweight."[42]

Although it is unclear why these stereotypes developed, academics put forth varying theories. Jeremy Earp and Jackson Katz argue that while media images of male bodies have become increasingly larger, female bodies have been shrinking in inverse proportion.[43] Earp and Katz look at the increasing size of characters such as Superman, Batman, professional wrestlers, G.I. Joe and Star Wars characters to illustrate the pressure put on boys and men to be bigger, more physical, and more masculine:

> [I]n an era when women have been challenging male power in business, the professions, education, and other areas of economic and social life, the images of women's bodies that have flooded the culture depict women as less threatening . . . It stands to reason that one of the ways that men have responded to women's challenges is

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37. SHELLEY BOVEY, THE FORBIDDEN BODY: WHY BEING FAT IS NOT A SIN 1 (1994).

38. Margaret W. Matlin, *Bimbos and Rambos: The Cognitive Basis of Gender Stereotypes*, EYE OF PSI CHI, Winter 1999, at 12, 13 (citing study by Melinda Jones, *Gender Stereotyping in Advertisements*, 18 TEACHING OF PSYCHOL. 231–33 (1991)).

39. *Id.*

40. National Organization for Women, *NOW Foundation Celebrates Seventh Annual Love Your Body Day*, Oct. 20, 2004, http://loveyourbody.nowfoundation.org/mediakit.html.

41. Korn, *supra* note 4, at 30 (quoting Jayne Stake & Monica L. Lauer, *The Consequences of Being Overweight: A Controlled Study of Gender Differences*, 17 SEX ROLES 31, 43 (1987)).

42. *Id.*

43. Jeremy Earp & Jackson Katz, *Media Education Foundation Study Guide: Tough Guise: Violence, Media & the Crisis in Masculinity* 11, http://www.mediaed.org/videos/MediaGenderAndDiversity/ToughGuise/studyguide/ToughGuise.pdf (last visited Oct. 26, 2005).

> by overcompensating and placing greater value on size, strength, and muscularity.[44]

Other researchers theorize that the changing role of women in society has forced them to alter their figures to look more like men. Specifically, one commentator has noted that professional women desire to appear thinner because it decreases the likelihood that they will be seen in the traditional female role of mother and nurturer, and increases the likelihood that they would be able to step into the professional sphere traditionally occupied by men.[45] This phenomenon—women themselves participating in weight-based gender stereotyping —is especially worrisome when developing a strategy to correct for employers' use of weight and appearance stereotypes in hiring, promoting, and firing women. If both the employer and the female employee or applicant are utilizing these stereotypes, they are together perpetuating the problem of discriminatory treatment based on traditional gender roles and rooted in notions of female inferiority in the public sphere.

B. Effects of Weight Stereotypes on Employment and Salaries

Just as scholars, doctors, and researchers have begun to focus on obesity as a serious health concern, organizations such as the National Association to Advance Fat Acceptance and the Council on Size and Weight Discrimination have developed in response to social, economic, and employment discrimination faced by those who are overweight or obese. The American Obesity Association (AOA) notes that "[p]ersons with obesity are victims of employment and other discrimination"[46] and "[w]omen with obesity appear to have much more prejudice and discrimination directed against them than men with obesity."[47] The AOA continues, "[o]besity contributes to unemployment for women," noting that "[a]fter undergoing surgery to reduce obesity, a drop in unemployment rate from 84 to 64 percent was reported for women."[48] Similarly, NOW's "Love Your Body" campaign reports that while all overweight people face discrimination in the workplace—in terms of hiring, promotion, salary, insurance, and discharge—overweight and obese women in particular have lower income and higher rates of poverty

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44. *Id. See also* SUSAN J. DOUGLAS, WHERE THE GIRLS ARE: GROWING UP FEMALE WITH THE MASS MEDIA 16–17 (1994) ("In standard Hollywood movies, men act—they solve crimes, engage in sword fights, right social injustice, and swing from vines—while women are on screen to be looked at. Constantly positioned on staircases, stages, rugs, beds, beaches, even tables, their bodies exposed . . ."); SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 70 (1991) ("Once a society projects its fears onto a female form, it can try to cordon off those fears by controlling women—pushing them to conform to comfortingly nostalgic norms and shrinking them in the cultural imagination to a manageable size . . .").

45. Korn, *supra* note 4, at 32.

46. *What is Obesity, supra* note 9.

47. *Women and Obesity, supra* note 18.

48. *Id.*

than their thinner peers[49] and than overweight and obese men.[50]

In addition to the pervasiveness of information about weight discrimination in academic journals and advocacy organizations, such information has also surfaced in mainstream media. For example, the Wall Street Journal's Executive Career Site reports that while both men and women have suffered from adverse employment decisions and salary penalties from weight discrimination, "[t]he consequences of being overweight hit women harder than men."[51] The article explains this discrepancy by pointing to the fact that companies often judge men against a medical weight standard, whereas females, particularly executives, are held to a stricter aesthetic standard—one which legal consultant Sandra Solovay calls "the size-eight straitjacket."[52] Solovay's term highlights that whereas men and women both may face weight discrimination at very heavy weights, only women face weight discrimination at lower weights—a sign of a gender stereotype. Elizabeth Theran writes:

> For women, economically as well as socially, thinner is always better, no matter how thin you already are . . . Our estimates indicate that the wages of mildly obese white women are 5.8% lower than their standard weight counterparts, and wages of morbidly obese white women are 20.0 to 24.1% lower, depending on the definition of morbid obesity used . . . These differences yield substantial wage penalties for women. In contrast, . . . we estimate that men who are mildly obese experience a wage *premium* (7.1% for white men and 16.0% for black men) compared to their standard weight counterparts. Remarkably, men do not experience a wage penalty until their weight exceeds standard weight by more than 100 lb [sic]. . . Men only experience wage penalties at the very highest weight levels.[53]

This differential leads to a crucial argument: whereas all people who weigh more than 100 pounds over standard weight face adverse employment decisions based on *weight*, women who weigh less than 100 pounds over standard weight face adverse employment decisions based on *sex*. This is the key to the weight-sex discrimination argument.[54]

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49. National Organization for Women, *Love Your Body Campaign: Size Discrimination Fact Sheet*, Oct. 20, 2004, http://loveyourbody.nowfoundation.org/factsheet4.html.

50. See *infra* notes 51–53 and accompanying text.

51. Sharon Voros, *Weight Discrimination Runs Rampant in Hiring*, http://www.careerjournal.com/myc/climbing/20000905-voros.html (last visited Aug. 31, 2005).

52. *Id.*

53. Theran, *supra* note 3, at 158 (emphasis and ellipses in original) (quoting Cheryl L. Maranto & Ann Fraedrich Stenoien, *Weight Discrimination: A Multidisciplinary Analysis*, 12 EMP. RESP. & RTS J. 9, 19 (2000)).

54. This is also the key to responding to employers who may argue that hiring thinner women is comparable to hiring non-smokers because both are less of a health risk. While both smokers and obese women face known medical dangers, both obese men and obese women face known medical dangers. *See supra* notes 13–14 and accompanying text. Therefore, the increased risk of health problems does not explain why overweight and obese women face employment and wage

The disparate treatment of overweight women is shown in empirical research. For example, a 1993 study showed that overweight women averaged $6700 less in household income than their thinner counterparts and had higher poverty rates, regardless of socioeconomic background and aptitude test scores.[55] In comparison, overweight men do better economically when compared to thinner counterparts.[56] Scholars have suggested that obese men do not face the same wage penalty because they are able to engage in "occupational sorting," whereby overweight men determine in which professions they might encounter weight discrimination and sort themselves into other, equally lucrative, positions to counteract the wage penalty.[57] One scholar, Scott Peterson, summarizes gender-based weight discrimination:

> [T]he evidence shows that women simply face more job-related discrimination because of their weight. It is culturally acceptable to be an overweight male. Mens' [sic] cultural status is tied to profession or intellect, while womens' [sic] status depends on conformity to ideals of beauty. Men have to be much more overweight than women before they encounter the same discrimination. There is clearly an inverse relationship between obesity and socioeconomic status in women; with men, the relationship is not as clear.[58]

This unequal treatment of men and women is the reason that women should be protected from weight discrimination under Title VII.

Losing weight is not the solution to counteract gender-based discrimination. Although such discrimination is often based on notions that overweight people are "less competent, less productive, not industrious, disorganized, indecisive, inactive, and less successful,"[59] research has shown that this is not always the case. Studies indicate that it is difficult—and often impossible—to lose weight, thus "debunk[ing] the myth that fat people are lazy and undisciplined because they cannot lose weight."[60] More importantly, focusing on the ability to lose weight sidesteps the real issue: that although some women may be able to lose weight and thus avoid weight-sex discrimination, men do not have to make such a choice.

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penalties at a significantly greater rate than men. The only explanation is sex discrimination.

55. Peterson, *supra* note 34, at 110 (citing Steven L. Gortmaker, Aviva Must, James M. Perrin, Arthur M. Sobol & William H. Dietz, *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENGL. J. MED. 1008, 1011 (1993)).

56. *Id.*

57. Puhl & Brownell, *supra* note 6, at 790 (citing Jose A. Pagan & Alberto Davila, *Obesity, Occupational Attainment, and Earnings*, 78 SOC. SCI. Q. 756–70 (1997)).

58. Peterson, *supra* note 34, at 110 (internal citations omitted).

59. Theran, *supra* note 3, at 156-157 (quoting Judith Candib Larkin & Harvey A. Pines, *No Fat Persons Need Apply: Experimental Studies of the Overweight Stereotype and Hiring Preference*, 6 SOC. WORK & OCCUPATIONS 312, 321 (1979)).

60. Kristen, *supra* note 6, at 69. *See also* Kimberly B. Dunworth, Cassista v. Community Foods, Inc.: *Drawing the Line at Obesity?*, 24 GOLDEN GATE U. L. REV. 523, 545 (1994) (noting, "Obesity researchers consistently find that obese people cannot control their weight.").

This article addresses the sex discrimination element of weight-sex discrimination. Overweight and obese women face more employment obstacles than both thin women and overweight and obese men. Therefore, the problem is one of sex discrimination, and the debate should not stagnate on the mutability or immutability of weight. Instead, it must concentrate on the ways in which this gender bias, clearly seen in the disproportionate discrimination against overweight and obese women, should be curbed through the law.

IV.
THE HISTORY AND USE OF TITLE VII

In the previous two sections, I have set forth the gender stereotypes underlying weight discrimination in employment. The question remains: how can the law address the problem? In this section, through a description of the history and use of Title VII of the Civil Rights Act of 1964, I will argue that Title VII was broadly designed to address and prohibit both obvious and subtle forms of sex discrimination, including weight-based sex discrimination. The first part of this section will address the history of Title VII and the second part will set forth the proscribed evidentiary tests.

A. The Legislative History of Title VII: Where Did the Framers Stand?

Title VII of the Civil Rights Act of 1964 is the centerpiece of federal anti-discrimination law. The statute states, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[61] Although the intensely debated Civil Rights Act as a whole is accompanied by a mass of legislative history and commentary, the legislative history of Title VII itself is somewhat vague. Ultimately, Congress appeared to leave clarification to the Equal Employment Opportunity Commission (established as a part of the Civil Rights Act of 1964) and the courts. Nonetheless, in evaluating the direction in which the interpretation of Title VII should progress, it is imperative to begin with an analysis of the original legislative history and commentary.

There is significant disagreement as to the placement and role of sex discrimination in the passage of Title VII. Until recently, many accepted the notion that a conservative southern Congressman introduced sex as a protected class in a last-ditch attempt to defeat the bill.[62] Although sex was unquestionably introduced as an amendment just prior to the passage

61. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000).

62. *See* C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACTS 115–17 (1985).

of the legislation, some commentators have questioned the "last-ditch" theory by pointing to the amendment's significant congressional support.[63] While there has been a significant amount of commentary debating the original role of sex in Title VII, the debate has little practicality. Indeed, it is nothing more than symbolic. The United States Supreme Court has stated that the rationales implicated in the legislative history of the much-debated racial component are not limited to race, "but instead [are] general statements on the meaning of Title VII."[64] Therefore, it follows that one must consider that all the legislative history is equally applicable to the sex classification.

First, we must define what the framers intended by the term "discrimination." If they envisioned solely overt, "smoking gun" evidence discrimination,[65] my thesis fails. Indeed, weight discrimination can be seen as a subset of sex discrimination only if the framers intended to create a broader definition of what constitutes discrimination. According to several academics, Congress intended the latter: the legislative history points to a broad reading of discrimination that encompasses both "subtle and overt discrimination alike."[66] Specifically, Chad Derum and Karen Engle identify a memorandum issued by Senators Case and Clark, the Senate Republican and Democratic floor managers of Title VII, as evidence of the broad understanding of discrimination in Title VII:

> In response to the argument that the concept of discrimination was too vague, the Senators defined discrimination to cover all adverse conduct that was "in any way" based on race, color, religion, sex, or national origin. "To discriminate," the Senators argued, "is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited . . . are those which are based on any five of the forbidden criteria."[67]

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63. *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15–16 (1995).

64. Price Waterhouse v. Hopkins, 490 U.S. 228, 244 n.9 (1989).

65. The term "smoking gun" evidence generally refers to direct, rather than circumstantial, evidence. In sex discrimination, an example of "smoking gun" evidence would be an email from the boss indicating that she terminated her employee simply because she was a woman. Because discriminating against someone because of her weight does not overtly implicate any protected category of Title VII, however, an email indicating that an employer fired a woman because of her weight would not be "smoking gun" evidence of sex discrimination. That does not mean, however, that it is not indicative of sex discrimination.

66. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 530 (2003) (discussing the history and use of Title VII's Section 704 retaliation clause in race discrimination cases). *See also* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return of 'No Case' Employment*, 81 TEX. L. REV. 1177, 1198 (2003) (analyzing legislative history of Title VII in order to showcase a shift toward presuming personal animosity—a legal reason to make an employment decision—in the absence of direct evidence of discrimination).

67. Derum & Engle, *supra* note 66, at 1198 (citations omitted).

In the mound of discussion surrounding the debate and passage of Title VII, the Supreme Court has given authoritative weight to the Clark-Case Memorandum[68] and read Title VII to cover both subtle and overt discrimination.[69]

Second, we must clarify what the Framers meant when they included the phrase, "based on sex." Although courts have struggled to define what is covered under Title VII, the legislative history points to a broad conception of "based on sex." Derum and Engle note that Congress rejected—by a fifty to thirty-nine vote—an amendment to Title VII limiting the scope of the statute to employment actions based "solely" on one of the forbidden criteria. During the debate, Senator Case indicated that limiting the scope of protection only to actions alleging discrimination based solely on sex or race would essentially obliterate the purpose of the Title. He noted:

> The difficulty with this amendment is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of. But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of the section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.[70]

Congress' rejection of this limiting amendment opened the door for so-called "mixed-motive" sex discrimination actions.[71] In these cases, courts have found discrimination where an employer had both a legal and illegal motive in his or her negative employment decision. For example, the Seventh Circuit Court of Appeals noted that when Congress rejected the limiting amendment, the Legislature "intended to strike at the *entire spectrum of disparate treatment of men and women resulting from sex stereotypes*."[72] In addition, Congress clarified the meaning of "based on sex" in the Civil Rights Act of 1991, which states that an unlawful employment practice is established "when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."[73] As will be shown below, the Supreme Court has interpreted the 1991 statute to stand for the proposition that a plaintiff may show—through direct or circumstantial evidence—that sex was a

68. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 581 n.14 (1984) ("Senators Clark and Case were the bipartisan 'captains' of Title VII. We have previously recognized the authoritative nature of their interpretive memorandum."). *See also Price Waterhouse*, 490 U.S. at 243–44.

69. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("It is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

70. 110 CONG. REC. 13,837-38 (1964).

71. *See infra* text accompanying footnotes 77–81.

72. Sprogis v. United Air Lines, 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis added).

73. 42 U.S.C. § 2000e-2(m) (2000).

motivating factor in a negative employment decision, even where there were other, legal factors.[74]

Taken together, analysis of the meaning behind "discrimination" and "based on sex" shows that a major goal of Title VII was to prohibit employers from making employment decisions based on stereotypical notions of a protected class, including sex. In *City of Los Angeles, Department of Water and Power v. Manhart*, the Supreme Court stated:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid. It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.[75]

The idea that a woman should be a certain size and shape is an outgrowth of stereotypical notions of women and what constitutes an acceptable female form. Thus, employment decisions based on these stereotypes should be covered by Title VII protections.

B. Title VII and Its Tests: McDonnell Douglas/Desert Palace *and* Price Waterhouse

Under Title VII, a plaintiff may show discrimination in one of three ways. First, a plaintiff may prove that an employment practice is discriminatory on its face. This is uncommon because whereas in the past, sex discrimination occurred in more blatant forms, sex discrimination today is more veiled. Second, a plaintiff may prove that an employment practice has a disparate impact on one gender. That is, she may show that a facially neutral employment practice has a negative impact on a protected class of persons. Third, a plaintiff may show that an employment decision based on sex negatively affects her specifically. This third method, called "disparate treatment," requires the plaintiff to overcome the defendant's denial of sex discrimination to prove that she was treated negatively because of sex. While disparate impact cases provide a valuable means of addressing sex discrimination, advancing such a theory will not likely be of use in cases of weight-sex discrimination. Instead, plaintiffs alleging weight-sex discrimination will most likely turn to a disparate treatment analysis. Therefore, this section will focus on the two models of proving disparate treatment when the employer denies discrimination.

The courts have generally accepted two evidentiary tests to prove

74. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

75. 435 U.S. 702, 707 (1978) (citation omitted).

a discrimination claim under Title VII, based on two watershed cases: *McDonnell Douglas Corp. v. Green*[76] and *Price Waterhouse v. Hopkins*.[77] The *McDonnell Douglas* test—originated as a claim of racial discrimination but extended to sex discrimination claims in *Texas Department of Community Affairs v. Burdine*[78]—has since been modified by *Desert Palace, Inc. v. Costa*.[79] Under the *McDonnell Douglas/Desert Palace* test, the plaintiff makes her *prima facie* case by proving: (1) that she belongs to a protected class; (2) that she applied for and was qualified for a job for which the employer was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the employer continued to seek applications from persons with similar qualifications.[80] Once the plaintiff makes her *prima facie* case, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[81] Under the original *McDonnell Douglas* test, once the employer gave a legitimate reason for the adverse employment decision, the burden shifted once more to the plaintiff to show that the purported reason was a pretext for discrimination based on a protected class.[82] *Desert Palace*, however, indicates that once the burden shifts back to the plaintiff, she *either* may show pretext *or*, alternatively, may show sufficient evidence that a characteristic of a protected class was a "motivating factor" in termination.[83] In determining the broader impact of *Desert Palace* on the *McDonnell Douglas* framework, district courts have divided on whether the *McDonnell Douglas* test has folded into the less rigid *Price Waterhouse* framework,[84] discussed below, or whether it maintains some modified importance.[85] Because the final outcome of this debate is unclear, I will proceed under the assumption that the two distinct frameworks survive, and that *Desert Palace* modifies the *McDonnell Douglas* test only insofar as it allows a broader range of evidence to disprove the defendant's proffered legitimate purpose. Notably, even if the higher courts determine that *Desert Palace* has effectively transformed the *McDonnell Douglas* test into the *Price Waterhouse* "mixed-motive" analysis, my thesis remains valid under the *Price Waterhouse* framework, as shown below.

In *Desert Palace*, the Court's recent interpretation of the *McDonnell Douglas* pretext test, the Court recognized that people's decision-making is

76. 411 U.S. 792 (1973).
77. 490 U.S. 228 (1989).
78. 450 U.S. 248 (1981).
79. 539 U.S. 90 (2003).
80. *McDonnell Douglas*, 411 U.S. at 802.
81. *Id.*
82. *Id.* at 804.
83. Brown v. Westaff (USA), Inc., 301 F. Supp. 2d 1011, 1019 (D. Minn. 2004).
84. *See, e.g.*, Dare v. Wal-Mart Stores, 267 F. Supp. 2d 987, 992–93 (D. Minn. 2003).
85. *See, e.g.*, Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, 285 F. Supp. 2d 1180, 1194–97 (N.D. Iowa 2003).

generally complicated and decision-makers often have many reasons for deciding to hire or fire someone. Even before the debate created by *Desert Palace* arose, however, the Supreme Court had developed a "mixed-motive" cause of action in *Price Waterhouse*, based on this concept of complicated intent.[86] The Court explained, "[G]ender must be irrelevant to employment decisions. To construe the words 'because of' [in the Title VII legislation] as colloquial shorthand for 'but-for causation' . . . is to misunderstand them."[87] Therefore, the Court held that once the plaintiff shows that gender was a motivation in the employer's decision, the employer can only avoid liability by showing that it would have made the same employment decision if it had not taken gender into account.[88]

In the Civil Rights Act of 1991, Congress further expanded the *Price Waterhouse* understanding of Title VII protection by requiring a plaintiff to demonstrate that sex "was a motivating factor for any employment practice, even though other factors also motivated the practice."[89] In interpreting this requirement, the Supreme Court held that a plaintiff may put forth either direct or circumstantial evidence of sex discrimination to satisfy his or her production burden.[90] In fact, Justice Thomas, speaking for a unanimous Court, noted that, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[91] Since sex discrimination often exists today in less overt, more covert ways, allowing a plaintiff to rely on circumstantial evidence to prove her discrimination claim has become especially important.

Although the advent of the mixed-motive *Price Waterhouse* test was a step forward in the fight against discrimination, the term "mixed-motive" is somewhat of a misnomer, seen clearly in the weight-sex discrimination analysis. The mixed-motive notion is based on the idea that an employer has both a legal *and* an illegal reason for making an adverse employment decision. It is not always that straightforward; in many cases the legal reason for an adverse employment decision would not have occurred without the illegal reason. For instance, in *Price Waterhouse*, the plaintiff, Ms. Hopkins, proved that she was fired both because she was a woman (the illegal motive) and because her personality was abrasive and aggressive (the legal motive). Because a man would not have been fired for his abrasive or aggressive style, however, it follows that the employer only acted on the legal reason *because of* the illegal sex-based stereotype. Likewise, in the weight-sex discrimination context, a legal reason for an adverse employment decision (weight) only arises due to

86. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
87. *Id.* at 240.
88. *Id.* at 258.
89. 42 U.S.C. § 2000e-2(m) (2000).
90. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).
91. *Id.* at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).

an illegal stereotype of a woman's desired appearance. To illustrate, we may consider this hypothetical. A is a man who is 50% overweight and fully qualified for the employment position. B is a woman who is also 50% overweight and fully qualified for the employment position. Because an employer has different visions of what "acceptable" weights are for men and women, he hires the man and not the woman. Therefore, had sex not been a factor, the employer might have hired the woman. Had weight not been a factor, he also might have hired the woman. Both sex and weight were "but for" causes, if you will, of the adverse employment decision. Therefore, it follows that evidence of a statistical link between weight discrimination and sex should be acceptable circumstantial evidence of illegal sex discrimination under the *Price Waterhouse* doctrine.

V.
AN EVIDENTIARY MATTER

Finally, I will look at the use of statistics as evidence in jury trials as a means by which to address weight-sex discrimination under the current legal models. Using Professor Laurence Tribe's categorical analysis of the use of statistical evidence, I will argue that although statistics as probative evidence have generally been discarded, they are important, and often necessary, to get to the truth behind intention and mental beliefs. Where—as in hiring—the defendant is in complete control of all evidence of intention, statistics are essential for the plaintiff to provide evidence of intent. In the following sections, I will look at the way statistics have been treated in the courtroom, consider the use of statistics in Title VII and employment discrimination,[92] and ultimately recommend that statistical evidence of weight discrimination be given probative weight by the courts. Finally, I will set forth a model jury charge explaining the relevant weight-sex statistics and creating a permissible inference for the jury.

A. Background and Use of Statistics

In *People v. Collins*,[93] the California Supreme Court overruled a robbery conviction based significantly on statistics. The court deemed mathematics a "veritable sorcerer in our computerized society"[94] and found that the "'trial by mathematics' so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice."[95] Objections to the use of statistical evidence derived from fears that expert evidence would appear more probative to a jury than anecdotal evidence,

92. Statistics have generally been accepted in Title VII disparate impact cases, which are not the focus of this article. In this article, I argue that courts should expand their use of statistics to Title VII disparate treatment cases.

93. 438 P.2d 33 (Cal. 1968).

94. *Id* at 33.

95. *Id.* at 41.

that conflicting experts would confuse the jury, and that the uncertainty surrounding scientific evidence would permit jurors to base their decisions on "irrelevancies" such as presentation or style.[96] The study of heuristics, however, has shown that when both case-specific evidence and base rate statistics[97] are introduced, decision makers pay more attention to case-specific evidence than base rate statistics unless the statistics are nearing one hundred percent.[98] Therefore, where statistics serve a crucial evidentiary function, they should not be discarded for fear of obliterating the import of anecdotal evidence.

Courts are beginning to understand the validity of mathematical and statistical evidence. For instance, Judge Richard Posner has noted, "It is now generally recognized, even by the judiciary, that since all evidence is probabilistic—there are no metaphysical certainties—evidence should not be excluded merely because its accuracy can be expressed in explicitly probabilistic terms."[99] Given the increasing openness of the judiciary to statistics, it becomes necessary to discuss the places and cases in which statistics will have a probative evidentiary force.

Professor Tribe, in his groundbreaking "Trial by Mathematics: Precision and Ritual in the Legal Process," created three distinct, but overlapping categories in which statistics may be used in the courtroom:

> (1) [T]hose in which such proof is directed to the *occurrence* or nonoccurrence of the event, act, or type of conduct on which the litigation is premised; (2) those in which such proof is directed to the *identity* of the individual responsible for a certain act or set of acts; and (3) those in which such proof is directed to *intention* or to some other mental element of responsibility, such as knowledge or provocation.[100]

Evidence professors often point to Professor Tribe's "blue bus" illustration as an example of the second category. In Tribe's hypothetical, a pedestrian was blindsided by a bus, and it is later adduced that the "blue bus company" operated four-fifths of the buses on that particular route. The question becomes whether the bus company's market share should be evidence of its guilt.[101]

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96. *See* Stephen E. Fienberg, Samuel H. Krislov & Miron L. Straf, *Understanding and Evaluating Statistical Evidence in Litigation*, 36 JURIMETRICS J. 1, 7 (1995).

97. A base rate is "a proportion—the relative frequency with which an event occurs or an attribute is present in some reference population." Jonathan J. Koehler, *When Do Courts Think Base Rate Statistics Are Relevant?*, 42 JURIMETRICS J. 373, 374 (2002).

98. JACK B. WEINSTEIN, JOHN H. MANSFIELD, NORMAN ABRAMS & MARGARET A. BERGER, EVIDENCE: CASES AND MATERIALS 74 (9th ed. 1997) (quoting Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 127–29 (1980)).

99. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1508 (1999).

100. Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process,* 84 HARVARD L. REV. 1329, 1339 (1971).

101. *Id.* at 1340–41.

Students and professors have analyzed the hypothetical by changing the statistics and arguing whether purely statistical information can ever prove guilt by a preponderance of the evidence. Discussions often center on the use of statistics in the courtroom, generally, and the use of policy preferences in creating statistical presumptions and inferences, specifically. At least one Massachusetts court also considered the implications of Professor Tribe's work, stating that it is "not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black."[102] It is Tribe's third category, mental knowledge, however, for which the debate about the use of statistics in proving weight-sex discrimination is most relevant. This is also the category that potentially has the greatest use in the courtroom.

Academics have noted several exceptions to the general discounting of statistical evidence in the courtroom, including cases concerning employment discrimination, mass torts, antitrust, and environmental law.[103] In the employment discrimination context, there has been a focus on statistics in class action and disparate impact claims, where plaintiffs use statistical evidence to show that a facially neutral employment practice has a disparate negative impact on a protected class, such as women. For example, in *International Brotherhood of Teamsters v. United States*, the Supreme Court noted that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."[104] And while there has been very little discussion of the use of statistical evidence in disparate treatment cases under the *McDonnell Douglas* or *Price Waterhouse* frameworks, I will show that there are valid reasons to use statistics in the employment discrimination context

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102. Sargent v. Massachusetts Accident Co., 29 N.E.2d 825, 827 (Mass. 1940).

103. THE EVOLVING ROLE OF STATISTICAL ASSESSMENTS AS EVIDENCE IN THE COURTS 85 (Stephen E. Fienberg ed., 1989) (stating that there has been a growth in the use of statistics in employment discrimination, antitrust, and environmental law); Fienberg, Krislov & Straf., *supra* note 96, at 7. Fienberg writes:

> The major reason that courts have welcomed statistical evidence, however, is as a means of establishing a cause-and-effect relationship. For some cases no other probative evidence is available. Thus, statistical assessments have been used to establish discrimination in employment practices and to establish that a pollutant is the cause of a disease.

Id. Koehler, *supra* note 97, at 386. Koehler opines:

> Discrimination claims, particularly Title VII disparate impact claims, are a notable exception [to the inadmissibility of statistical evidence]. These cases concern pattern and practice allegations that do appear to have a reasonably clear statistical structure. Indeed, some courts have indicated that statistical evidence alone may be sufficient to prove these claims. Regardless of their sufficiency, courts do seem to find various base rates and base rate analyses to be relevant and admissible in discrimination cases.

Id (citations omitted).

104. 431 U.S. 324, 339 (1977) (quoting Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 620 (1974)).

when trying to prove intentional discrimination.

Because scienter is difficult to prove, courts have continually looked for ways to draw out personal knowledge and information. In the Title VII context, the *McDonnell Douglas* burden-shifting process is designed to force the defendant to speak, to compel the defendant to put forth a legitimate reason for an adverse employment decision.[105] The burden-shifting model is insufficient, however, because an employer can satisfy her burden by putting forth *any* legitimate reason, even if she was also motivated by an illegitimate reason. Therefore, it is unnecessary for the defendant to set forth evidence[106] of her actual mindset in making the decision. Furthermore, in the weight-sex context, it is perfectly legal for an employer to state that she decided against hiring a female because of her weight, as weight is not a protected class. An employer could hide that her disdain for the plaintiff's weight is connected to the plaintiff's sex and that the same applicant, if male, would have received the job offer. In the "mixed-motive" case, the Supreme Court has stated:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive [or overweight], or that she must not be, has acted on the basis of gender.[107]

In this type of case, where the question to be asked is what the employer was thinking at the moment of decisionmaking, it is nearly impossible to draw out the complexity of the thought process in a courtroom setting. Therefore, whether the defendant was subconsciously stereotyping women or whether the defendant believed that she had the legal right to place weight stereotypes on women, statistics showing the relationship between sex- and weight-based discrimination should have probative value in the courtroom.

B. Using Statistics to Address Hidden Bias Through Title VII

Academics and advocates have criticized Title VII's usefulness because of the failure of Congress or the courts to adjust it to the evolving nature of discrimination. For example, academics such as Chad Derum and Karen Engle challenge courts to consider the changing presumptions in a Title VII disparate treatment suit.[108] Specifically, Derum and Engle argue that the law has

105. *See* Brown v. Westaff (USA), Inc., 301 F. Supp. 2d 1011, 1017 (D. Minn. 2004).

106. Here I use "evidence" as more than simply asserting a legal reason for an adverse discrimination policy, but as the evidence that could be useful in getting to the defendant's mindset.

107. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (citations omitted).

108. Derum & Engle, *supra* note 66.

shifted from a *Furnco* presumption[109]—"a presumption of unlawful discrimination"—to what they coin a "personal animosity presumption." This effectively permits an employer to claim personal distaste of a job candidate—a legal rationale—as the reason for an adverse employment decision. Derum and Engle argue that it also "permits courts to avoid engaging in a close examination of employer motives[,] . . . resurrect[ing] what [they] term 'no cause' employment."[110] Their argument parallels an "unconscious bias" critique of Title VII, which characterizes Title VII's shortcoming as an inability to address discrimination that is under the surface, easily masked, or unknown even by the defendant. Derum and Engle's analysis criticizes Title VII's focus on specific discriminatory intent as ignoring the "changing nature of discrimination" and failing to acknowledge that "[a]t the very least, intent encompasses more than what the employer (or its agent) is thinking at the precise moment that an adverse employment action is taken; that moment has been influenced by a lifetime of societal and workplace stereotypes and biases."[111] In order to reach this kind of hidden stereotype and bias through the law, it will be necessary to utilize statistical analysis within the context of Title VII discrimination claims.

For instance, the *Price Waterhouse* court looked for discrimination at the moment of the employment decision to see if gender played a role in the employer's adverse decision. Yet the court did not use statistics to put the moment of decision in a larger context of societal gender bias. In *Price Waterhouse*, Ms. Hopkins had to show that she was fired based on impermissible sex stereotypes—stereotypes that were likely a product of years of social and workplace biases—that played into the decisionmaking moment. Indeed, the Supreme Court understood that sex stereotypes played a role not only in the life of Ms. Hopkins' employers, but also in the moment the adverse employment decision was made. Similarly, as shown in the previous section,[112] because gender stereotypes about appearance and weight are a consequence of our culture's fixation on female thinness, it is clear that where hidden biases play

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109. *See* Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) (internal citations omitted). The Court stated:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume that 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.

Id.

110. Derum & Engle, *supra* note 66, at 1179.

111. *Id.* at 1181. *See also* Ann C. McGinley, ¡Viva La Evolucion! *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 445 (2000) ("[S]ince the nature of racist and sexist attitudes and behavior have changed since 1964, continuing to define discrimination in an outdated mode will underestimate by a large margin the number of racist and sexist decisions.").

112. *See supra* parts III.A and III.B.

a role in perpetuating illegal sex stereotypes, those biases should be highlighted in court. Where biases are lurking under the surface, it is imperative that courts allow plaintiffs to introduce statistical evidence of such biases and allow juries to take that evidence into account in the deliberative process.

C. The Solution

1. A Conversation With the Jury

Jury instructions explain to jurors the applicable law for the case they are considering, including how they may weigh the evidence presented. Where bias exists, but a plaintiff cannot draw it out of the defendant directly, it is necessary for the court and jury to take a careful look at the defendant's decisionmaking process to see if latent or overt discrimination played a role in its decision. One way to force this close examination is to provide jury instructions that point to the key aspects of the case.

In a sex discrimination disparate treatment case, where the plaintiff believes that a weight-based sex stereotype has played a negative role in her employer's decision, the court should allow the plaintiff to employ a three-prong evidentiary strategy to draw out any negative stereotyping. First, she should present evidence of weight discrimination by the defendant employer that led to an employment decision detrimental to her. Second, she should introduce expert evidence of weight-based sex stereotypes and statistics to demonstrate the nexus between weight discrimination and sex discrimination.[113] Third, based on the research showing (1) the statistical evidence of different treatment for men and women based on weight; (2) the social and cultural sex stereotypes generally accepted in the United States that hold women to a higher "thinness" standard; (3) the legislative history of Title VII and acceptance by the courts that Title VII was designed specifically to address and rid employment decisions of stereotypes based on protected classes of citizens; and (4) the practical need to place probative weight on statistics in cases of employment discrimination, specifically those cases based on latent social stereotypes, a Title VII plaintiff ought to be able to introduce a jury charge which would permit an inference of sex discrimination where there is specific evidence of weight-based discrimination. The judge's charge would tell the jury that as a matter of law, the jury could make the "permissible inference" that weight discrimination is evidence of sex discrimination. A permissible inference is a type of

113. The Supreme Court and lower courts have consistently admitted expert evidence of sex stereotyping as relevant and admissible. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 255 (1989); Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1264 (N.D.Cal. 1997) ("To the extent that Professor Fiske testifies as to the causes, manifestations, and consequences of gender stereotyping as well as the organizational circumstances which allow such stereotypes to flourish, her testimony would appear to be relevant and of assistance to the jury."); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1523 (M.D.Fla. 1991).

evidentiary presumption. Federal Rule of Evidence 301 states:

> [A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[114]

Rule 301's comments explain that a permissible inference, or permissive presumption, "may be described as a rule of law that holds that fact *B may* be, but *need not* be, found by the trier-of-fact upon proof of fact *A* (. . . where there is no evidence of non-*B*)."[115] In the case at hand, fact *A* represents evidence of weight discrimination in the plaintiff's specific employment case and fact *B* represents sex discrimination. Once the judge gives the suggested permissible inference jury charge, each juror weighs all of the evidence presented, including expert evidence of the statistical link between weight and sex discrimination, and makes an individual decision of whether she will take that statistical link into account to relate fact *B* (sex discrimination) to fact *A* (weight discrimination).

2. Model Jury Charge

In this section, I will offer a model jury charge for both a mixed-motive and a pretext employment discrimination case, creating a permissible inference for weight-sex discrimination. I begin with New York Pattern Jury Instructions sections 9:1 and 9:2[116] and add the weight-based discrimination permissible inference.[117]

a. Mixed-Motive Charge[118]—If you find that there has been evidence of

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114. FED. R. EVID. 301.

115. FED. R. EVID. 301 practice cmt. (Permissive Presumptions).

116. Civil. NY PJI 9:1 & 9:2. I use New York Pattern Jury Instructions, rather than federal model jury instructions, because they provide two distinct and concise model jury instructions specific to mixed-motive and pretext charges. A similar federal model jury instruction can be found at 3C Fed. Jury Prac. & Instr. § 171.20 (5th ed.).

117. The text only contains the inference. The full charges are included in footnotes 118 and 119.

118. The complete mixed motive charge, based on New York Pattern Jury Instructions § 9:2, with inference in italics, is:

> This is an action to recover damages for employment discrimination. The law prohibits employment discrimination based on sex. In this case, plaintiff claims that [state facts alleged to constitute an unlawful discriminatory practice, such as—(Plaintiff claims that (he, she) was denied a promotion because (he, she) is a (man, woman.)] Defendant denies this and further claims that plaintiff was discharged [state defendant's reason].
>
> Plaintiff is not required to produce direct evidence that defendant discriminated against (him, her) on the basis of sex. Discrimination is rarely admitted and may be inferred from the existence of other facts.
>
> In order for the plaintiff to recover, you must first find that plaintiff has proved that (his,

discrimination based on weight, you may choose to infer sex-based discrimination from the statistical link between weight-based and sex-based discrimination.

b. Pretext Charge[119]—If the employer offers weight or appearance as its

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her) sex was a motivating factor, that is a substantial reason for the defendant's decision. If you find that plaintiff has failed to prove this, then you should proceed no further and report to the Court. *If you find that there has been evidence of discrimination based on weight, you may choose to infer sex-based discrimination from the statistical link between weight-based and sex-based discrimination.*

If you find that plaintiff has proved by a preponderance of the evidence that sex was a motivating factor in the defendant's decision to discharge the plaintiff, then the defendant has the burden to prove by a preponderance of the evidence that it would have discharged the plaintiff even if it had not taken plaintiff's sex into account. If you find that defendant has proved that it would have discharged the plaintiff even if it had not taken plaintiff's sex into account, then you will find for the defendant. If you find that defendant has not proved this, then you will find for the plaintiff.

NY PJI 9:2.

119. The complete pretext jury charge based on New York Pattern Jury Instructions § 9:1, with the inference in italics, is:

This is an action to recover damages for employment discrimination. The law prohibits employment discrimination based on sex. In this case, plaintiff claims that [state facts alleged to constitute an unlawful discriminatory practice, such as:— (Plaintiff claims that (he, she) was denied a promotion because (he, she) is a (man, woman.)]

In order for the plaintiff to recover, plaintiff must prove by a preponderance of the evidence that (his, her) sex was a determining factor in the defendant's decision to deny plaintiff the promotion. There can be more than one determining factor in any decision. Therefore plaintiff need not prove that sex was the only reason for defendant's decision. Sex is a determining factor if plaintiff would have received the promotion except for (his, her) sex. In other words, sex is a determining factor if it made a difference in determining whether or not (he, she) would receive the promotion.

Plaintiff is not required to produce direct evidence that defendant discriminated against (him, her) on the basis of sex. Discrimination is rarely admitted and may be inferred from the existence of other facts.

In deciding whether sex was a determining factor in defendant's decision, you must first consider whether plaintiff has established the following facts by a preponderance of the evidence. First, plaintiff must prove that (he, she) applied for and was qualified for the promotion. Second, plaintiff must prove that (he, she) was denied the promotion. Third, plaintiff must prove (that the position was filled by a (man, woman), that after plaintiff's rejection, the position remained open and the employer continued to interview persons with the same qualifications as the plaintiff).

If you find that plaintiff has failed to prove any one of these facts, you will find for the defendant (on this issue). If you find that plaintiff has proved all of these facts, then you must proceed to consider the reason defendant has given for denying plaintiff the promotion.

Defendant has produced evidence that [here state defendant's nondiscriminatory reason]. Plaintiff has the burden of establishing by a preponderance of the evidence that the reason offered by defendant was not really the reason the promotion was denied and that, more likely than not, plaintiff's sex was a determining factor in the decision.

excuse for discrimination, or you believe that the proffered rationale is a pretext for weight-sex discrimination, you may infer sex-based discrimination from the statistical evidence that connects weight-based discrimination to sex-based discrimination.

Indeed, such a jury charge would address the problem of hidden bias in employment discrimination and would force juries to focus on the potentially devastating stereotypes rampant in both employment decisions and our community as a whole.

VI.
CONCLUSION

Where a protected class of people faces employment discrimination based on illegal stereotyping and bias, the victim should be afforded legal protection. In the preceding sections, I have set forth an evidentiary model to be utilized where a Title VII plaintiff suspects an employer has engaged in weight discrimination rooted in illegal gender discrimination. As society progresses and the science of statistics changes, it may be possible to utilize this model to fight other gender stereotypes that have a profound negative impact specifically on men or specifically on women. For example, some statistics show that short men face employment discrimination as compared to tall men.[120] If this type of discrimination is unique to men and is rooted in similar gender stereotypes and expectations as weight discrimination, it might be possible to bring suit under Title VII using the evidentiary framework outlined above. Through the three-prong evidentiary model, a jury may give probative "weight" to statistics and thereby remedy discrimination deriving from entrenched stereotypical biases about a physical characteristic, personality trait, or social standard.

> If you find that plaintiff has failed to prove that the reason offered by defendant was not really the reason the promotion was denied, then you will find for the defendant (on this issue). If you find that plaintiff has proved that the reason offered by defendant was an excuse for discrimination, then you will find for the plaintiff (on this issue) and you should proceed to determine the amount of damages. *If the employer offers weight or appearance as its excuse for discrimination, or you believe that the proffered rationale is a pretext for weight-sex discrimination, you may infer sex-based discrimination from the statistical evidence that connects weight-based discrimination to sex-based discrimination.*

NY PJI 9:1.

120. *See* Kristen, *supra* note 6, at 64 n.34, (citing Steven Gortmaker., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENGL. J. MED. 1008, 1011 (1993) ("Interestingly enough, height predicted socioeconomic characteristics for men. A [twelve] inch reduction in height was associated with a 10% increase in poverty rates and a $3037 decline in household income.").