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The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias

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One of the most egregious examples of the tension between federal employment discrimination law and psychological science is the federal common law doctrine known as the same-actor inference.

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When originally elaborated by the Fourth Circuit in Proud v. Stone, the same-actor doctrine applied only when an “employee was hired and fired by the same person within a relatively short time span.” In the two decades since, the doctrine has widened and broadened in scope. It now subsumes many employment contexts well beyond hiring and firing, to scenarios in which the “same person” entails different groups of decision makers, and the “short time span” has been elastically extended over seven years. Per the same-actor doctrine, when a supervisor first behaves in a way that benefits an employee and then subsequently takes adverse action against that employee, many federal courts conclude that the supervisor’s adverse treatment is presumptively nondiscriminatory, adopting the strong inference that the supervisor’s negative employment decision was not motivated by bias.

This Article concludes that this doctrine should be curtailed. Given the dearth of textual support and legislative history supporting the creation of the same-actor doctrine, the striking growth rate of this unjust doctrine in circuits that apply the strong-inference standard, and the psychological science amassed that powerfully reveals the errors laden within the doctrine, federal courts should reevaluate their existing jurisprudence on the same-actor inference. Ultimately, this Article recommends that federal courts resolve the existing circuit split by adopting the approach of the U.S. Court of Appeals for the Seventh Circuit. Fundamentally, same-actor evidence should be one evidentiary datum for the ultimate trier of fact to weigh along with all other possible evidence of discrimination.

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Aversive racists recognize prejudice is bad, but they do not recognize that they are prejudiced. . . . Like a virus that has mutated, racism has also evolved into different forms that are more difficult not only to recognize but also to combat.

—John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice: The Causes, Consequences, and Challenges of Aversive Racism*¹

[E]stablishing one’s lack of prejudice, even with a token gesture like choosing the best-qualified candidate who happens to be a member of a minority group, licenses individuals to express otherwise dubious preferences, such as those that favor Whites over minorities.

—Anna C. Merritt, Daniel A. Effron & Benoît Monin, *Moral Self-Licensing: When Being Good Frees Us to Be Bad*²

1. In CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 25 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998).

2. 4 SOC. & PERSONALITY PSYCHOL. COMPASS 344, 346 (2010).

The measure of a “rule,” the measure of a right [to be free from unlawful bias in the workplace], becomes what can be done about the situation. *Accurate* statements of a “real rule” or of a right [to be free from discrimination in the workplace on the basis of race, color, religion, national origin, and sex] includes all procedural limitations on what can be done about the situation.

—Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*³

INTRODUCTION

Over the past half century, the field of social psychology has amassed vast scientific knowledge on how stereotypes, prejudice, and discrimination manifest and operate in the modern day.⁴ Psychological science has powerfully demonstrated that discrimination against members of many stereotyped groups has mutated from overt “old-fashioned racism” into new forms of bias that are more difficult to directly detect and observe, but are no less pernicious, pervasive, and systematically unjust.⁵ This psychological science has revealed that many well-intentioned people believe themselves to be egalitarian and unbiased, yet many of these well-intentioned people are affected by societal stereotypes, negative racial sentiments, and implicit bias.⁶ This scientific knowledge, moreover, underscores two profound insights: First, psychological science has shown the extent to which social contexts, situations, structures, and institutions significantly shape how bias is expressed.⁷ Second, discrimination has evolved from primarily an intergroup phenomenon (e.g., discrimination turning on employers preferring white over black employees) to both an intergroup phenomenon and a within-category problem (e.g.,

3. 30 COLUM. L. REV. 431, 448 (1930).

4. John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829 (2001); Jason A. Nier & Samuel L. Gaertner, *The Challenge of Detecting Contemporary Forms of Discrimination*, 68 J. SOC. ISSUES 207 (2012); see *infra* Part II.

5. See Dovidio, *supra* note 4; Nier & Gaertner, *supra* note 4.

6. John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 1084 (Susan T. Fiske et al. eds., 5th ed. 2010); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 364–67 (Daniel T. Gilbert et al. eds., 4th ed. 1998); *infra* Part II.A.

7. See Dovidio & Gaertner, *supra* note 6, at 1112; Alice H. Eagly & Amanda B. Diekmann, *What Is the Problem? Prejudice as an Attitude-in-Context*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 19 (John F. Dovidio et al. eds., 2005); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1039 (2006) (“One of the most important insights emerging from social psychology in the past fifty years is the principle that situations, along with one’s subjective construal of those situations and one’s attempt to negotiate the conflicting pressures they impose, exert a far more powerful effect on people’s behavior than the ‘intuitive psychologist’ generally assumes.”); *infra* Part II.A.

discrimination turning on employers preferring less stereotypic or less racially salient employees).⁸

Despite this vast scientific knowledge, many federal courts today elaborate an antidiscrimination jurisprudence that imposes on claimants evidentiary burdens which reflect the belief that discrimination against members of stigmatized groups necessarily manifests as old-fashioned, blatant prejudice.⁹ This worldview is in marked tension with the best scientific evidence available on how discrimination, in fact, operates in American society against stigmatized groups. As a consequence, the startling and widening societal disparities in education, employment, housing, and criminal justice between groups on account of their race, sex, and/or national origin fall farther and farther beyond reach of existing federal antidiscrimination laws.¹⁰

One of the most egregious examples of the epistemological and material tension between federal employment discrimination law and psychological science is the doctrine known as the same-actor inference of nondiscrimination.¹¹ When originally elaborated by the Fourth Circuit in *Proud v. Stone*, the doctrine applied only when an “employee was hired and fired by the same person within a relatively short time span.”¹² In the two decades since, the doctrine has widened and broadened in scope. The same-actor inference of nondiscrimination now extends to many employment contexts beyond hiring and firing,¹³ to scenarios in which the “same person” entails

8. See DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013); Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004); Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006); Cheryl R. Kaiser & Jennifer S. Pratt-Hyatt, *Distributing Prejudice Unequally: Do Whites Direct Their Prejudice Toward Strongly Identified Minorities?*, 96 J. PERSONALITY & SOC. PSYCHOL. 432 (2009); Cheryl R. Kaiser & Clara L. Wilkins, *Group Identification and Prejudice: Theoretical and Empirical Advances and Implications*, 66 J. SOC. ISSUES 461, 462, 465 (2010); Andrew M. Penner & Aliya Saperstein, *Engendering Racial Perceptions: An Intersectional Analysis of How Social Status Shapes Race*, 27 GENDER & SOC’Y 319 (2013).

9. See Nier & Gaertner, *supra* note 4, at 215; Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1977).

10. See Quintanilla, *supra* note 9, at 214–15; Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363 (1992).

11. *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991); *infra* Part I.A.; see, e.g., *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996), *abrogated on other grounds by* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (Age Discrimination in Employment Act (ADEA) case); *EEOC v. Our Lady of Resurrection Med. Ctr.*, 77 F.3d 145, 152 (7th Cir. 1996) (Title VII race discrimination case); *infra* Part II.A.

12. *Proud*, 945 F.2d at 798; *infra* Part I.A.

13. See *infra* Part II.B.1.

groups of decision makers who make employment decisions,¹⁴ and the “short time span” has been elastically extended to over seven years.¹⁵

While the outer boundaries of the doctrine are both nebulous and in flux, the same-actor inference may be applicable when the same actor has taken both a positive and adverse employment action toward a claimant who brings an employment discrimination suit.¹⁶ Per the same-actor doctrine, when a supervisor first behaves in a way that benefits an employee and then subsequently takes adverse employment action against that employee, many federal courts conclude that the supervisor’s adverse treatment of the employee is presumptively nondiscriminatory, adopting the strong inference that the supervisor’s negative employment decision was not motivated by bias. This strong inference of nondiscrimination is said to be legally justifiable on grounds of “common sense” about how humans behave and economic rationality.

As we will discuss, these justifications are troubling and, on close examination, fail to support the judicial creation of the same-actor doctrine.¹⁷ Indeed, the implicit behavioral theories underpinning the same-actor doctrine have been discredited by decades of psychological science on aversive racism, implicit bias, and moral licensing.¹⁸ Yet the doctrine continues to deprive claimants of access to justice in cases in which discrimination, in fact, may have deprived them of equal and fair employment opportunity. As originally designed, moreover, the same-actor inference of nondiscrimination applied in a narrow subset of employment discrimination cases. However, given the growth, breadth, drift, and ambiguity of the doctrine’s boundaries, along with the centralization of human resources (HR) functions in most employment settings, the strong inference of nondiscrimination, if left unchecked, may one day license bias in a much broader swath of employment matters.¹⁹

Further, the doctrine grants employers a decisive defense against claims of discrimination in a context in which psychological science reveals that employers will behave as if they are morally licensed to discriminate. For example, some members of the public point to having a black friend or to having voted for President Barack Obama as moral credentials of egalitarianism—credentials that absolve them of conduct that could be

14. *See infra* Part II.B.1.

15. *See infra* Part II.B.1.

16. *See infra* Part II.A.

17. *See infra* Part II.A.

18. *See infra* Part I.

19. For an excellent discussion of the dynamics of legal endogeneity in the Equal Employment Opportunity context, see Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES* 337 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

perceived as racist.²⁰ So too, in the employment context, employers point to having hired a female or black employee as a moral credential to absolve them of charges that they have engaged in sex or racial discrimination.²¹ Troublingly, the same-actor doctrine materially reifies and reinforces the psychological effect of this moral credential and, in turn, increases the likelihood that the moral licensing that follows will result in discrimination. By providing employers with a virtually irrebuttable defense to charges of discrimination in this context, the same-actor doctrine converts this moral credential into a legal privilege to engage in bias, thus licensing workplace discrimination.²² Finally, insofar as the doctrine presumes that Title VII prohibits only overt animus by “old-fashioned racists,” the doctrine impermissibly denies the central purpose of Title VII, which was enacted to eradicate discriminatory behavior within the employment sector of the U.S. economy.²³

Two hypothetical examples of employees who challenge disparate treatment and claim that their employers have unlawfully discriminated against them will help explain this phenomenon. In the first, Betty is a white female²⁴ computer programmer who works for a technology company in Silicon Valley. Her manager, Mike, is in charge of personnel decisions and hired her three years ago. During Betty’s tenure at the technology company, she worked steadfastly at the company, earning praise and consistent positive annual reviews. As a result, Betty applied for a promotion to a supervisory position. The technology company has very few women in supervisory positions. However, Mike ultimately chose to promote Carl as a supervisor, even though Carl was technically less qualified, because of Mike’s belief that Carl will better lead a team of computer programmers.

In this scenario, many federal courts would apply the same-actor doctrine and adopt a strong inference of nondiscrimination in favor of Mike against

20. See Daniel A. Effron et al., *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 590 (2009).

21. *Id.*

22. Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001); *infra* Part II.C.

23. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015).

24. While we refer to Betty as a woman, we recognize that biological sex and gender performances are distinct constructs. For instance, while Betty is assumed to be a woman, she could be, for example, biologically male and self-present her gender as female. See Joy L. Johnson & Robin Repta, *Sex and Gender: Beyond the Binaries*, in *DESIGNING AND CONDUCTING GENDER, SEX, AND HEALTH RESEARCH* 17 (John L. Oliffe & Lorraine Greaves eds., 2012); Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC’Y 125 (1987). Moreover, while we refer to Betty as a white female programmer, we appreciate that people from many different racial and ethnic groups are computer programmers, see #YESWECODE, <http://www.yeswecode.org> [perma.cc/HX6P-J4JR] (last visited Dec. 9, 2015), and that Black female programmers experience distinct intersectional barriers in the workplace, see BLACK GIRLS CODE, <http://www.blackgirlscode.com> [perma.cc/8BZ2-LSZC] (last visited Dec. 9, 2015).

Betty. Because Mike is the manager who hired Betty as a computer programmer, federal courts will presumptively deem Mike's decision not to promote Betty to a supervisory position nondiscriminatory. Per the same-actor doctrine, unless Betty can produce compelling evidence of sex discrimination to dispel the strong inference of nondiscrimination—often requiring direct evidence of discrimination—a federal court will grant summary judgment in favor of the technology company and dismiss Betty's case. As this example suggests,²⁵ the same-actor inference is in marked tension with sociological evidence of the glass ceiling that hinders the advancement of women in American workplaces,²⁶ including in fields such as science, technology, engineering, math,²⁷ and computer programming in particular.²⁸

25. While this example is harnessed for illustration, we developed this example by weaving the troubling accounts reported in several U.S. Court of Appeals decisions. *Cf.* *Philbrick v. Holder*, 583 F. App'x 478 (6th Cir. 2014); *Peters v. Shamrock Foods Co.*, 262 F. App'x 30, 31 (9th Cir. 2007); *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4th Cir. 1999), *abrogated on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Richmond v. Johnson*, No. 96-6329, 1997 WL 809962, at *1 (6th Cir. Dec. 18, 1997); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir. 1995).

26. Manuela Barreto et al., *Introduction: Is the Glass Ceiling Still Relevant in the 21st Century?*, in *THE GLASS CEILING IN THE 21ST CENTURY: UNDERSTANDING BARRIERS TO GENDER EQUALITY* 3 (Manuela Barreto et al. eds., 2009); VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (MIT Press 1998); *GENDER AND OCCUPATIONAL OUTCOMES: LONGITUDINAL ASSESSMENT OF INDIVIDUAL, SOCIAL, AND CULTURAL INFLUENCES* (Helen M.G. Watt & Jacquelynne S. Eccles eds., 2008).

27. Beatriz Chu Clewell & Patricia B. Campbell, *Taking Stock, Where We've Been, Where We Are, Where We're Going*, 8 J. WOMEN & MINORITIES SCI. & ENGINEERING 255 (2002); Janet S. Hyde et al., *Gender Similarities Characterize Math Performance*, 321 SCIENCE 494 (2008); Mary C. Murphy et al., *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings*, 18 PSYCHOL. SCI. 879 (2007). *See generally* CHRISTINE HILL, CHRISTIANNE CORBETT & ANDRESSE ST. ROSE, AM. ASS'N OF UNIV. WOMEN, *WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS* (2010), <http://www.aauw.org/learn/research/whysofew.cfm> [perma.cc/455R-F6MW]; ANNE E. PRESTON, *LEAVING SCIENCE: OCCUPATIONAL EXIT FROM SCIENTIFIC CAREERS* (2004); Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, in 34 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 379 (Mark P. Zanna ed., 2002); *see also* EXEC. OFFICE OF THE PRESIDENT, *WOMEN AND GIRLS IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATH (STEM)* (June 2013), https://www.whitehouse.gov/sites/default/files/microsites/ostp/stem_factsheet_2013_07232013.pdf [perma.cc/47FL-V48Q]; VIVAN GORNICK, *WOMEN IN SCIENCE: THEN AND NOW* (Feminist Press 2009); EILEEN POLLACK, *THE ONLY WOMEN IN THE ROOM: WHY SCIENCE IS STILL A BOY'S CLUB* (Beacon Press 2015).

28. One of the most up-to-date and granular datasets publicly available on gender disparities in computer programming has been compiled by Tracy Chou, a female computer programmer. *See Women-in-Software-Eng.*, GITHUB, <https://github.com/triketora/women-in-software-eng> [perma.cc/9UVS-PWGR] (last visited Dec. 9, 2015). The spreadsheet synthesizes business-level data and reveals gender disparities among software engineers. *WOMEN IN SOFTWARE ENGINEERING STATS*, https://docs.google.com/spreadsheets/d/1BxbEifUr1z6HwY2_IcExQwUpKPRZY3FZ4x4ZFzZU-5E/edit?usp=sharing [perma.cc/LYS5-RHWT] (last visited Dec. 9, 2015). The spreadsheet reveals, for example, that the percentage of female engineers at Dropbox is 10.94 percent, Airbnb is 13.52 percent, Yelp is 8.25 percent, and PayPal is 6.75 percent. The National Center for Women and Information Technology assembles industry-level statistics on the number of women and minorities in computer science. *See* NAT'L CTR. FOR WOMEN & INFO. TECH., *BY THE NUMBERS* (2014), <http://www.ncwit.org/sites/default/files/legacy/pdf/BytheNumbers09.pdf> [perma.cc/WRB5-G9NB].

In the second example, Jason is a black male employee of a logistics company in Tuscaloosa, Alabama. Mike, the manager in charge of personnel decisions, hired Jason three years ago, a period during which Jason worked steadfastly at the company, receiving above-average annual reviews. In the third year, Mike hired a new supervisor, Dan, who is white, and who began overseeing Jason's day-to-day affairs. Difficulties then began; Dan cited Jason a number of times for a lack of productivity, which Jason felt was unjustified, especially because Jason was working at the same pace as his coworkers. Although Jason complains to Mike about Dan's conduct, Mike ultimately fires Jason after several incident reports.

Here too, because Mike is the same person who ultimately hired and fired Jason, many federal courts will apply a strong inference of nondiscrimination, deeming Mike's decision to fire Jason presumptively unbiased. Unless Jason can produce direct evidence of racial discrimination that wards off the strong inference of nondiscrimination, federal courts will grant summary judgment and dismiss Jason's case; the trier of fact will never address whether prejudice animated Mike and Dan's behavior.²⁹ As the second example reveals, the same-actor inference is in marked tension with the reality of how bias manifests in modern American workplaces against members of stereotyped groups.

In this Article, we introduce psychological science that speaks directly to how bias operates in modern American workplaces so as to evaluate the same-actor inference. A paramount insight is that social contexts, situations, structures, and institutions powerfully shape whether and how bias is expressed against members of stereotyped groups.³⁰ Interpersonal and intergroup contexts and situations shape the degree to which—in addition to *when*, *where*, and *how*—bias manifests.³¹ In addition to rooting out “old-fashioned racists,” a behaviorally realistic antidiscrimination law would target the situations within American workplaces that foment and fuel the manifestation of societal stereotypes, negative racial sentiments, and implicit bias against members of stereotyped groups.

One such situation—a context that directly informs the continued application of the same-actor inference—can be derived from psychological science on moral credentials and moral licensing.³² In the main, people feel

29. For a case illustrating the dynamics of this example, see *Ako-Doffou v. Univ. of Tex.*, No. 02-51287, 2003 WL 21417478 (5th Cir. June 3, 2003). For a case that suggests a more sensible way to resolve this scenario, see *Coburn v. PN II, Inc.*, 372 F. App'x 796, 799 (9th Cir. 2010).

30. LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (Pinter & Martin Ltd. 2011) (1991); Dovidio & Gaertner, *supra* note 6, at 1112; Eagly & Diekmann, *supra* note 7; Eliot R. Smith & Elizabeth C. Collins, *Situated Cognition*, in *THE MIND IN CONTEXT* 126 (Batja Mesquita et al. eds., 2010); *see infra* Part II.

31. Eagly & Diekmann, *supra* note 7.

32. *See* Anna C. Merritt et al., *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 4 *SOC. & PERSONALITY PSYCHOL. COMPASS* 344 (2010); Dale T. Miller & Daniel A. Effron,

more comfortable behaving in biased (nonegalitarian) ways when they can point to evidence that demonstrates their previous lack of bias.³³ After making a decision that favors a stereotyped group member, most majority group members are less concerned with continuing to appear and behave in egalitarian and unbiased ways. As a result, a subsequent decision about a member of a stereotyped group is more likely to express bias when it follows an initial unbiased decision that serves as a moral credential than when the subsequent decision does not. This psychological science on moral credentials and moral licensing, therefore, illuminates situations in which implicit bias may result in workplace discrimination.

Troublingly, the U.S. Courts of Appeals that apply a strong inference of nondiscrimination per the same-actor doctrine have the matter scientifically in reverse. Psychological science on moral licensing reveals that, when a person makes both an initial positive employment decision and a subsequent negative employment decision against a member of a protected group, the second negative decision is *more likely* to have resulted from bias, *not less*.³⁴ That is, federal courts should be more vigilant to the possibility of discrimination in the same-actor context, rather than less. Supervisors often behave as if hiring a member of a protected group provides them with a moral credential of being bias free, which inhibits their egalitarianism when making other decisions that affect that employee. As such, these U.S. Courts of Appeals have developed an interstitial doctrine that is behaviorally unrealistic and inconsistent with how humans actually behave. The same-actor doctrine enacts a strong inference of nondiscrimination in situations in which psychological science cautions that discrimination is even more likely to operate unjustly.

In marked contrast, the U.S. Court of Appeals for the Seventh Circuit has cautioned, criticized, and ultimately curtailed application of the same-actor inference.³⁵ The Seventh Circuit has adopted the most appropriate jurisprudential approach, one that leaves weighing same-actor evidence—along with all other circumstantial evidence—for the trier of fact to reach a lawful decision on the merits. In brief, the same-actor situation should not be deemed circumstantial evidence in favor or against discrimination; rather, same-actor

Psychological License: When It Is Needed and How It Functions, in 43 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115 (Mark P. Zanna & James M. Olson eds., 2010).

33. Jill C. Bradley-Geist et al., *Moral Credentialing by Association: The Importance of Choice and Relationship Closeness*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 1564 (2010); Efron et al., *supra* note 20; Daniel A. Efron et al., *Inventing Racist Roads Not Taken: The Licensing Effect of Immoral Counterfactual Behaviors*, 103 J. PERSONALITY & SOC. PSYCHOL. 916 (2012); Daniel A. Efron, *Making Mountains of Morality from Molehills of Virtue: Threat Causes People to Overestimate Their Moral Credentials*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 972 (2014); Nikki H. Mann & Kerry Kawakami, *The Long, Steep Path to Equality: Progressing on Egalitarian Goals*, 141 J. EXPERIMENTAL PSYCHOL. 187 (2012); Monin & Miller, *supra* note 22.

34. Efron et al., *Inventing Racist Roads*, *supra* note 33; Monin & Miller, *supra* note 22.

35. See *Perez v. Thorntons, Inc.*, 731 F.3d 699 (7th Cir. 2013); *Williams v. Vitro. Servs. Corp.*, 144 F.3d 1438 (11th Cir. 1998).

evidence should be left for the trier of fact to weigh with all other evidence of prejudice. Our primary recommendation is that the Seventh Circuit should be justly lauded and rightly followed. This recommendation flows directly from an empirical study of the growth rate in the application of the same-actor doctrine at summary judgment we report in this Article. We find that the growth rate in the application of the doctrine at summary judgment has risen and that the growth rate among circuits differs markedly.³⁶ Problematically, these growth models predict that, unless the doctrine is curtailed, the growth rate of this unjust doctrine will rise greater still.³⁷

The Article will proceed as follows: Part I introduces psychological science on prejudice, aversive racism, and moral licensing, first discussing three waves of psychological science on prejudice, then psychological science on aversive racism and the importance of a situational understanding of bias, and finally to moral licensing literature. Part II turns to the same-actor inference, first discussing the origins, justifications, and scope of the doctrine and turning next to its evolution and permutations. Part III then reports our empirical analyses on the same-actor inference, revealing the doctrine's troubling and differential growth across circuits. Part IV offers our conclusions and recommendations. In Part IV, we also highlight epistemological tension between the flawed assumptions of the same-actor inference and the best scientific evidence available. We then turn to a more nuanced understanding of how moral licensing operates in modern workplaces, discuss the lack of a legitimate and neutral rationale for the same-actor doctrine, and end with our recommendations for curbing the doctrine's growth. Finally, we conclude with additional insights that synthesize our jurisprudential recommendations.

I.

PSYCHOLOGICAL SCIENCE ON PREJUDICE, AVERSIVE RACISM, AND MORAL LICENSING

We first turn to psychological science on prejudice, aversive racism, and moral licensing, elaborating a body of knowledge in the psychological and behavioral sciences that has accumulated over the past half century. First, we describe three historical waves of psychological science to underscore how prejudice has evolved from a primarily blatant and overt phenomenon to encompass less blatant and more complex forms. Second, we introduce research on aversive racism, thereby illuminating the importance of a situational approach to understanding when bias manifests. Last, we turn to a particular situation, mainly moral licensing, a context in which actions are perceived as providing moral credentials that, in turn, license and lead to discrimination.

36. See Figs.1 & 2 in Section III.B.

37. See text following Fig.2 in Section III.B.

A. *Three Historical Waves of Psychological Science on Prejudice and Discrimination*

Over the past century, scientific study of prejudice has progressed in three waves.³⁸ From the 1920s through the 1950s, psychologists in the first wave conceived of prejudice as a form of psychopathology. They considered racism to be a dangerous and abnormal deviation from normal tendencies, rather than a disruption in normal thinking.³⁹ By way of one of our introductory examples, in the first wave, researchers would have been primarily concerned with whether Jason's manager, Mike, and his supervisor, Dan, were racist—whether Mike and Dan espoused “old-fashioned” blatant racism against black employees. If so, Mike and Dan would have been deemed bad apples who acted out of a psychopathology.

In the 1950s through the 1980s, psychologists in the second wave reconceptualized prejudice as widespread and rooted in normal rather than abnormal thought processes.⁴⁰ Gordon Allport's profound insights epitomized the views of this second wave.⁴¹ Focus shifted from prejudice as a psychopathology to how normal cognitive and socialization processes influence the manifestation of prejudice.⁴² Prejudice, stereotyping, and discrimination were reconceived as the result of cognitive processes—social cognition and social categorization—associated with classifying social information.⁴³ For example, in the second wave, researchers may have investigated whether Dan exhibited a greater propensity to construe Jason's behavior as inadequate compared to white employees; that is, stereotypes and schemas about black employees may have shaped Dan's attributions about Jason's performance.

38. See Dovidio, *supra* note 4, at 830–33. In presenting this brief history of the field's study of racial prejudice, I draw a distinction between the history of studying the causes and consequences of racial prejudice and the history of psychologizing racial differences. For an excellent account of the latter history, see generally *DEFINING DIFFERENCE: RACE AND RACISM IN THE HISTORY OF PSYCHOLOGY* (Andrew S. Winston ed., 2004).

39. See Dovidio, *supra* note 4, at 830; John Harding & Russell Hogrefe, *Attitudes of White Department Store Employees Toward Negro Coworkers*, 8 J. SOC. ISSUES 18, 18–28 (1952). For a discussion on prejudice and ethnic relations, see G.M. Gilbert, *Stereotype Persistence and Change Among College Students*, 46 J. ABNORMAL & SOC. PSYCHOL. 245 (1951); Daniel Katz & Kenneth Braly, *Racial Stereotypes of One Hundred College Students*, 28 J. ABNORMAL & SOC. PSYCHOL. 280 (1933).

40. See Dovidio, *supra* note 4, at 831; Eagly & Diekmann, *supra* note 7, at 17–27; Thomas F. Pettigrew, *Personality and Sociocultural Factors in Intergroup Attitudes: A Cross-National Comparison*, 2 J. CONFLICT RESOL. 29, 29 (1958).

41. See Gordon W. Allport, *Prejudice and the Individual*, in *THE AMERICAN NEGRO REFERENCE BOOK* 706, 707, 710 (John P. Davis ed., 1966) (“Research suggests that perhaps 80 percent of the American people harbor ethnic prejudice of some type and in some appreciable degree. . . . With the aid of aversive categories [many] avoid the painful task of dealing with individuals as individuals. Prejudice is thus an economical mode of thought, and is widely embraced for this very reason.”).

42. See Dovidio, *supra* note 4, at 831; Pettigrew, *supra* note 40, at 29.

43. See Dovidio, *supra* note 4, at 831; Fiske, *supra* note 6, at 357 (“On the cusp of the twenty-first century, stereotyping, prejudice, and discrimination have not abated.”).

Moreover, while Mike chose not to investigate Jason's complaints, Mike may have more closely investigated complaints brought by in-group members against a supervisor belonging to an out-group.

In the 1990s, psychologists in the third wave harnessed sophisticated new technologies to study implicit processes that were once theorized but not directly measured.⁴⁴ These new technologies measure implicit associations—that is, implicit bias and automatic and unconscious attitudes and beliefs.⁴⁵ While explicit measures of prejudice rely on self-reports, implicit measures draw on a variety of psychological measures, including response latency measures of association (such as the Implicit Association Test), physiological responses, nonverbal behavior, word-fragment completion, linguistic cues, and fMRI imaging.⁴⁶ These new methods enabled social psychologists to assess individual differences in implicit and explicit attitudes and helped to identify those who explicitly adopt egalitarian values, but who nonetheless are influenced by stereotypes and implicit bias.⁴⁷ These psychological scientists also investigated when, how, and why intergroup contexts and situations influence the manifestation of bias⁴⁸—a fundamental insight, social contexts and situations powerfully influence the expression of prejudice and implicit bias.⁴⁹ In the third wave, researchers would have shifted attention to new methods to reveal discrepancies between Mike's and Dan's explicit self-presentations of egalitarianism and their implicit attitudes against black employees and in favor of white employees. While the second wave theorized a distinction between explicit and implicit attitudes, researchers in the third wave may have directly measured this disassociation using sophisticated methods. Using these methods, researchers may have studied whether Mike and Dan self-identify as egalitarian but nonetheless hold implicit biases against black employees, and if so, whether and how various social contexts, structures, and institutions within the workplace allow this bias to manifest.

B. Aversive Racism and a Situational Understanding of Bias

Aversive racism rests on a contradiction between explicit and implicit attitudes.⁵⁰ This form of modern prejudice characterizes the racial attitudes of

44. See Dovidio, *supra* note 4, at 832.

45. See Dovidio & Gaertner, *supra* note 6, at 1084; Fiske, *supra* note 6.

46. See John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002); Dovidio & Gaertner, *supra* note 6, at 1086; Dovidio, *supra* note 4, at 838; Wendy Berry Mendes et al., *Challenge and Threat During Social Interactions with White and Black Men*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 939 (2002).

47. See Dovidio, *supra* note 4, at 835.

48. See Dovidio & Gaertner, *supra* note 6, at 1112.

49. See *id.*; Eagly & Diekmann, *supra* note 7.

50. See SAMUEL L. GAERTNER & JOHN F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL 13–14 (2000); B. Keith Payne & C. Daryl Cameron, *Divided Minds, Divided Morals: How Implicit Social Cognition Underpins and Undermines Our Sense of*

many well-intentioned people who possess strong egalitarian values and believe themselves to be nonprejudiced but who nonetheless hold negative racial feelings and stereotypes.⁵¹ For aversive racists, implicit bias coexists with egalitarian beliefs and the denial of personal prejudice. John Dovidio and his colleagues refer to this modern form of prejudice as “aversive” for two reasons: First, rather than manifesting open antagonism, many majority-group members feel anxiety toward minority-group members, which leads them to avoid interracial interactions.⁵² Second, because aversive racists adhere to egalitarian principles, they find the thought that they are prejudiced disquieting and disturbing.⁵³

Over the past decades, social psychologists have revealed that situations shape and influence the expression of implicit bias.⁵⁴ Aversive racists aspire to be nonprejudiced. They do not discriminate against minority-group members in situations with strong egalitarian norms, where discrimination would be obvious to others and themselves.⁵⁵ In these conditions, aversive racists avoid feelings, beliefs, and behaviors that would be associated with bias. Yet aversive racists express bias subtly and in ways that can be rationalized under conditions of situational ambiguity—when norms are unclear, when situations are ambiguous, when the correct choice is uncertain—then bias against minority-group members can be rationalized on some factor other than race.⁵⁶ In these situations, aversive racists may discriminate against minority-group members in ways that allow them to maintain a nonprejudiced self-concept.⁵⁷

A robust body of social-psychological research has investigated these phenomena. Many studies examine employment situations in which majority-group members exhibit in-group preferences in favor of majority-group

Social Justice, in HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 445 (Bertram Gawronski & B. Keith Payne eds., 2010).

51. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315–16 (2000); Dovidio & Gaertner, *supra* note 6; Payne & Cameron, *supra* note 50.

52. See John F. Dovidio & Samuel L. Gaertner, *When Good People Do Bad Things: The Nature of Contemporary Racism*, in COVERT RACISM 111, 113 (Rodney D. Coates ed., 2011); Jennifer A. Richeson & J. Nicole Shelton, *When Prejudice Does Not Pay: Effects of Interracial Contact on Executive Function*, 14 PSYCHOL. SCI. 287, 287 (2003).

53. See Dovidio & Gaertner, *supra* note 52, at 111–20.

54. See, e.g., Laura G. Babbitt & Samuel R. Sommers, *Framing Matters: Contextual Influences on Interracial Interaction Outcomes*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1233 (2011); Krieger & Fiske, *supra* note 7, at 1039–40; Richeson & Shelton, *supra* note 52.

55. See Christopher L. Aberson & Tara E. Ettl, *The Aversive Racism Paradigm and Responses Favoring African Americans: Meta-Analytic Evidence of Two Types of Favoritism*, 17 SOC. JUST. RES. 25, 42–43 (2004).

56. See, e.g., Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 316–18.

57. See James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995).

members while withholding assistance to minority-group members.⁵⁸ In these studies, decisions are affected by stereotypes, social cognition, and implicit bias, resulting in disparate treatment toward minority-group members.⁵⁹ Nevertheless, this bias is rationalized after the fact: subjective decision-making criteria change, standards subtly shift, and the weight accorded to this decision-making criterion varies depending on whether the decision is about an in-group versus an out-group member.⁶⁰

This important research reveals the fallacy of equating all prejudice against members of stereotyped groups as a “taste” or “preference” for discrimination.⁶¹ Unfortunately, some scholars have analogized the psychological discomfort experienced toward members of different groups as a *taste* for race or sex discrimination.⁶² Yet, decades of psychological science have revealed that, while many members of the American public experience aversion toward different groups (e.g., anxiety and uneasiness leading to awkwardness or avoidance), because members of the public simultaneously endorse egalitarian beliefs, the very thought that one could be prejudiced is aversive.⁶³ Moreover, in contrast to blatant dislike of an out-group, aversive racism may entail a strong favoring of one’s in-group, which nevertheless results in disparate treatment and outcomes.⁶⁴ For example, within the workplace, majority group members may be more willing to share valuable information about employment opportunities with other majority group members, rather than stereotyped group members. As such, characterizing all prejudice as a *taste* for racism or sexism is at best error, and at worst, a botched metaphor that distracts attention to bias as depicted in the first wave of psychological research—psychopathology—rather than more modern, complex, and pervasive forms of the psychological phenomenon.

C. Psychological Science on Moral Credentials and Moral Licensing

Psychological science on moral credentials and moral licensing demonstrates that people are more likely to act in ethically questionable ways when they can point to evidence that they have a virtuous character.⁶⁵ For

58. See John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, in 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 16 (Mark P. Zanna ed., 2004); see also Michael I. Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 820–22 (2004).

59. See Dovidio & Gaertner, *supra* note 58; see also Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460 (2002); Norton et al., *supra* note 58; Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005).

60. See Dovidio & Gaertner, *supra* note 58; see also Norton et al., *supra* note 58.

61. See generally GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

62. See generally *id.*

63. See Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH, *supra* note 19, at 377.

64. *Id.*

65. See Merritt et al., *supra* note 32; Miller & Effron, *supra* note 32.

example, people are more likely to engage in discriminatory behavior in an ambiguous situation when they have previously demonstrated a lack of prejudice.⁶⁶ According to research on moral licensing, the initial opportunity to express unprejudiced attitudes provides a moral credential that reduces the salience of egalitarian norms on subsequent decision making and behavior. Because a person has engaged in a prior nonprejudiced act, the ambiguously discriminatory nature of a subsequent act is reappraised as legitimate rather than prejudicial. That is, an initial egalitarian decision acts as a moral credential that changes the way people construe their own ambiguously discriminatory behavior. After making an initial nonprejudiced decision, the salience of norms that demand egalitarianism tend to reduce and people are less likely to conceive of their own behavior as potentially biased.

In these moral licensing studies, people are first granted the opportunity to express their egalitarian views or to exhibit their lack of prejudice by making an unbiased decision in favor of a member of a stereotyped group.⁶⁷ This first step psychologically provides people a moral credential. In a seminal study, for example, participants were asked to consider five job applicants for a starting position in a consulting firm.⁶⁸ The study manipulated whether the stellar candidate among the five applicants was a white woman, black man, or white man. When participants were presented with and then selected either the stellar white woman or black man, they were more likely to discriminate against female and minority employees in favor of a white man in subsequent employment decisions. These studies have revealed other ways in which to prompt moral credentials. Simply declaring one's egalitarian values has been found to trigger this psychological effect, as has freely writing about a positive experience with a member of a stereotyped group and imagining a racist action that one could have taken but avoided in the past.⁶⁹ By engaging in these kinds of egalitarian acts, people later tend to behave as if they have a moral credential, increasing the likelihood that they will engage in bias.

After exhibiting a lack of prejudice in the first phase in these psychological experiments, people then encounter an ambiguous decision in which it is possible—potentially legitimate and rationalizable—to discriminate against members of stereotyped groups. These psychological studies reveal that participants are more likely to express bias in the subsequent decision. Moral licensing occurs when the second decision presents people with an ambiguous situation that contains a seemingly legitimate reason to discriminate against a member of a stereotyped group, such as gender-specific job norms,⁷⁰ racial

66. See Bradley-Geist et al., *supra* note 33; Effron et al., *supra* note 20; Effron et al., *Inventing Racist Roads*, *supra* note 33; Effron, *Making Mountains of Morality*, *supra* note 33; Mann & Kawakami, *supra* note 33; Monin & Miller, *supra* note 22.

67. See Monin & Miller, *supra* note 22.

68. *Id.*

69. See *id.*

70. See *id.*

hostility in a small town hiring police officers,⁷¹ and scarce resources for dealing with crime.⁷² Because the first equalitarian decision suggests to oneself and others that one is neither sexist nor racist, one ceases to reflect on remaining egalitarian in subsequent decisions, thereby making it more likely that these later decisions will be tainted by bias.

Synthesizing these two steps and returning to the seminal experiment on moral licensing,⁷³ white participants were asked to view five job candidates and were told to pick the best candidate for the job. Half of the participants were assigned to a condition in which there were four white candidates and one black candidate. The black candidate was made to look the most exceptional of all candidates (e.g., prestigious education, highest GPA), subsequently causing participants to select the star black candidate. For the other half of the participants, there was no black candidate, just five white candidates, one of whom was also portrayed as the star candidate; thus participants in this condition all selected a white candidate for the job. According to the theory of moral credentialing, participants who were in the condition where they had the opportunity to select a black candidate would feel less psychological dissonance in behaving negatively toward subsequent black employees. In the second phase of the study, all participants were then given the opportunity to learn about an opening for a police officer position in a department that had a reputation for being hostile toward African Americans. They were then asked to indicate whether the police officer position was better suited for a black or white candidate. Ultimately, participants in the condition in which they had previously had the opportunity to hire a black candidate were more likely than those who had not had this opportunity to state that an open police officer position was better suited for a white candidate than a black candidate. Thus, ironically, engaging in an initial positive behavior toward a member of a stereotyped group freed white participants to make a subsequently biased decision in a situation where behaving biasedly could be rationalized as potentially unbiased.

The psychological processes underlying moral credentialing have been observed outside the laboratory setting as well, although these tests have occurred in more general moral domains. For example, in a study of over twelve hundred adults in the United States and Canada, participants were messaged (on smartphones) several times a day for three days and asked about moral behaviors they observed and committed during the past hour.⁷⁴ Evidence of moral credentialing was observed such that participants who engaged in a moral act at one point in the day were significantly more likely to engage in an

71. See Bradley-Geist et al., *supra* note 33; Effron et al., *supra* note 20; Effron et al., *Inventing Racist Roads*, *supra* note 33; Monin & Miller, *supra* note 22.

72. See Effron et al., *supra* note 20; Effron et al., *Inventing Racist Roads*, *supra* note 33.

73. See Effron et al., *supra* note 20.

74. Wilhelm Hofmann et al., *Morality in Everyday Life*, 345 *SCIENCE* 1340 (2014).

immoral act later that day. This naturalistic study highlights how individuals use their prior behavior as a basis to understand their moral self-concept, permitting them to behave less morally in contexts in which immoral acts can be justified without impugning their moral character.

II.

THE SAME-ACTOR INFERENCE OF NONDISCRIMINATION

We will begin by elaborating the origins of the same-actor inference doctrine and the doctrine's troubled justifications. We then turn from the Fourth Circuit's original elaboration of the doctrine in *Proud v. Stone* to the same-actor doctrine's evolution and ever widening boundaries. We close by discussing the divide among the U.S. Courts of Appeals on the legal effect of the same-actor doctrine.

A. *The Same-Actor Inference*

In the early 1990s federal courts began applying the same-actor inference doctrine as a means of swiftly resolving motions for summary judgment in federal employment discrimination cases.⁷⁵ The doctrine applies in employment discrimination cases that proceed under the theory of disparate treatment. Under Title VII, the ultimate issue in a disparate treatment case is whether the claimant was discriminated against because of the claimant's race, color, religion, national origin, or sex.⁷⁶ Given the difficulty of producing direct evidence of discrimination, most claimants proceed at summary judgment under the *McDonnell Douglas-Burdine* burden-shifting framework and advance circumstantial evidence of disparate treatment. Depending on the quality and quantum of circumstantial evidence that a plaintiff presents, a federal court may rule that the plaintiff has offered sufficient evidence that the defendant's nondiscriminatory reason for adversely treating her was pretextual. In such a case, a federal court would deny summary judgment, thereby allowing the case to be presented to the jury for final resolution on the merits.

At summary judgment, however, many U.S. Courts of Appeals require federal district courts to apply the same-actor doctrine in employment discrimination cases.⁷⁷ Indeed, the same-actor doctrine has been applied at

75. See *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), *abrogated on other grounds* by *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993); *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991).

76. See 42 U.S.C. § 2000e (2012). Title VII also prohibits retaliation against employees who oppose discrimination or participate in Title VII processes. 42 U.S.C. 2000e-3(a) (2012); 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 10-90 (4th ed. 2007).

77. See *Arraleh v. Cty. of Ramsey*, 461 F.3d 967, 976 (8th Cir. 2006) (Title VII race and national origin discrimination case); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006) (Title VII race and national origin discrimination case); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267 (9th Cir. 1996); *Brown*, 82 F.3d at 658 (ADEA case); *EEOC v. Our Lady of Resurrection Med.*

summary judgment in cases that assert disparate treatment discrimination on account of race,⁷⁸ sex,⁷⁹ national origin,⁸⁰ disability,⁸¹ and age.⁸² These courts apply the same-actor doctrine when a supervisor first makes a decision that benefits the claimant and later that same supervisor makes another decision that adversely affects the claimant. The implicit theory supporting the doctrine is that a supervisor who holds bias against members of a stereotyped group would never have hired a member of such group (e.g., African Americans or women) in the first place; as such, because the supervisor *has* hired a member of the stereotyped group, the supervisor holds no bias against them, and hence the subsequent adverse decision cannot be discrimination.

While frequently applied at summary judgment, the same-actor doctrine has considerable procedural breadth and has been incorporated into virtually all other federal civil procedural contexts: the pleading stage,⁸³ summary judgment,⁸⁴ judgment as a matter of law,⁸⁵ and trial.⁸⁶ Troublingly, courts after *Twombly* have also extended the same-actor inference to the pleading stage.⁸⁷ For example, in *Long v. Teradata Corp.*, a district court applied the same-actor inference at the pleading stage and dismissed an amended complaint after declaring several of the plaintiff's allegations to be legal conclusions and then deeming the remaining allegation insufficient to overcome the strong inference

Ctr., 77 F.3d 145, 152 (7th Cir. 1996) (Title VII race discrimination case); *Buhrmaster*, 61 F.3d at 464 (Title VII sex discrimination case); *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 215 (4th Cir. 1994) (ADA case); *LeBlanc*, 6 F.3d at 847 (ADEA case); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 174–75 (8th Cir. 1992) (ADEA case).

78. See *Hobby v. L.A. Unified Sch. Dist.*, 386 F. App'x 722, 724 (9th Cir. 2010).

79. See *Bradley*, 104 F.3d at 271.

80. See *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1097 (9th Cir. 2005).

81. See *Jacques v. Clean-Up Grp., Inc.*, 96 F.3d 506, 512 (1st Cir. 1996); *Tyndall*, 31 F.3d at 215.

82. See *Brown*, 82 F.3d at 658.

83. See *Springs v. Mayer Brown, LLP*, No. 3:09cv352, 2009 WL 3461231, at *6 (W.D.N.C. Oct. 20, 2009), *objections overruled*, No. 3:09cv352, 2010 WL 2347946 (W.D.N.C. June 9, 2010).

84. See *Spears v. Patterson UTI Drilling Co.*, 337 F. App'x 416 (5th Cir. 2009); *Peters v. Shamrock Foods Co.*, 262 F. App'x 30, 31 (9th Cir. 2007); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006); *Coghlan*, 413 F.3d 1090; *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326 (5th Cir. 1998); *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315 (5th Cir. 1997); *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 174 (8th Cir. 1992).

85. See *Terrance v. Pointe Coupee Par. Police Jury*, 177 F. App'x 457 (5th Cir. 2006); *Burton v. Town of Littleton*, 426 F.3d 9 (1st Cir. 2005); *Hernandez v. Muns*, No. 96-40087, 1996 WL 661171 (5th Cir. Oct. 21, 1996).

86. See *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995). Several cases involved appeals in instances in which the court declined to provide a jury instruction regarding the same-actor inference. In these cases, the U.S. Courts of Appeals most often affirmed the district court's decision not to provide such an instruction. See *Jackson v. Host Int'l, Inc.*, 426 F. App'x 215 (5th Cir. 2011); *Banks v. Travelers Cos.*, 180 F.3d 358 (2d Cir. 1999); *Parra v. Premier Salons Int'l, Inc.*, No. 97-50782, 1998 WL 792738 (5th Cir. Nov. 5, 1998); *Kim v. Dial Serv. Int'l, Inc.*, No. 97-9142, 1998 WL 514297 (2d Cir. June 11, 1998).

87. See *Springs*, 2009 WL 3461231, at *6.

resulting from the same-actor doctrine.⁸⁸ Moreover, federal courts have applied the same-actor doctrine at trial, instructing juries on the same-actor inference and advising them, when applicable, to draw the strong inference of nondiscrimination when reaching a verdict.⁸⁹

Let us return to our first hypothetical discussed in the Introduction, where Mike denied Betty's application for a promotion to a supervisory position and chose to promote Carl as a supervisor even though Carl was less qualified.⁹⁰ Here, unless Betty can produce extremely compelling direct evidence of discrimination that overcomes the strong inference of Mike's nondiscrimination, Betty's claim of sex discrimination will not survive summary judgment. The same-actor inference presumes that Mike's decision to promote Carl over Betty cannot be influenced by gender bias because Mike hired Betty three years before. As this example suggests, this doctrine operates as a material restraint on breaking the glass ceiling by licensing discrimination at the promotion stage against women who have been hired by the same manager, despite psychological science which warns that, by first hiring these women, these managers are less likely to inhibit bias when failing to promote them.

In the second example, per the same-actor doctrine, federal courts will deem Mike's decision to fire Jason, a black man, presumptively free of discrimination and the case will be dismissed at summary judgment, unless Jason can produce compelling direct evidence of Mike's intentional racial discrimination that overcomes the strong inference of nondiscrimination. But here, as well, psychological science on moral licensing explains that, because Mike hired Jason to begin with, Mike will likely behave as if he holds a moral

88. See *Long v. Teradata Corp.*, No. 1:12cv787, 2012 WL 6026441, at *4 (E.D. Va. Dec. 4, 2012) (applying the same-actor inference when dismissing a § 1981 claim at the pleading stage); *Springs*, 2009 WL 3461231, at *6 (applying the same-actor inference to dismiss complaint at pleading stage). There are several examples of district courts, however, explicitly rejecting application of the same-actor inference at the pleading stage. See *FirstMerit Bank v. Ferrari*, 71 F. Supp. 3d 751, 756 (N.D. Ill. 2014); *King v. U.S. Sec. Assocs., Inc.*, No. 11 Civ. 4457, 2012 WL 4122025, at *7 (S.D.N.Y. Aug. 22, 2012), *report and recommendation adopted*, 2012 WL 4327396 (S.D.N.Y. Sept. 18, 2012); *O'Diah v. Yogo Oasis*, No. 11-cv-309, 2012 WL 691534, at *6 (S.D.N.Y. Mar. 1, 2012). There are also several examples in which employers sought dismissal based, in part, on the same-actor inference, in which district courts declined to apply the doctrine because the antecedents necessary for application of the doctrine had not been established. See *Hagan v. City of New York*, 39 F. Supp. 3d 481, 498 (S.D.N.Y. 2014) (rejecting the same-actor inference where the plaintiff alleged that she was hired to quiet minority employees complaining of discrimination and that employer made potentially discriminatory remarks); *Penn v. N.Y. Methodist Hosp.*, No. 11-cv-9137, 2013 WL 5477600, at *14 (S.D.N.Y. Sept. 30, 2013) (rejecting same-actor inference given the time-span between hiring and firing); *Barrentine v. River Place Nursing Ctr., L.L.C.*, No. 1:11CV072, 2013 WL 494074, at *5 (N.D. Miss. Feb. 7, 2013) (rejecting same-actor inference at the pleading stage where multiple people were involved in the hiring and firing decision); *Blakely v. Big Lots Stores, Inc.*, 833 F. Supp. 2d 1042, 1047 (N.D. Ind. 2011) (refusing to apply the same-actor inference and suggesting exceptions to the general rule).

89. See *Buhrmaster*, 61 F.3d at 461.

90. See *supra* Introduction, at 7–7.

credential, increasing the hazard that he will make a biased decision at the firing stage later. Here, the same-actor doctrine reifies this psychological license into a legal license to engage in bias, thereby making it even more likely that injustice will operate against stereotyped employees in American workplaces.

1. *Origins of the Same-Actor Doctrine*

The earliest reference to the same-actor inference is *Proud v. Stone*, a 1991 decision of the U.S. Court of Appeals for the Fourth Circuit.⁹¹ When crafting the same-actor doctrine, the Fourth Circuit referenced a law review article, authored by Professors John Donohue and Peter Siegelman,⁹² for the proposition that “[c]laims that employer animus exists in termination but not in hiring seem irrational.”⁹³

In their article, Professors Donohue and Siegelman sought to explain the rise in employment discrimination filings between 1969 and 1987 and to account for the compositional shift in the kinds of employment-discrimination claims: mainly, the shift from hiring to discharge claims.⁹⁴ Donohue and Siegelman discussed a number of explanations for the rising filing rate, such as macroeconomic trends and changes in the legal backdrop, including adoption of the Pregnancy Discrimination Act (PDA) and the Age Discrimination Enforcement Act (ADEA). They sought to dispel several explanations for the rise in discrimination claims, including an increase in societal discrimination, the promotion of employment-discrimination litigation by plaintiff lawyers, and changes in the propensity for Americans to sue.⁹⁵ The authors ultimately concluded that none of these explanations fully accounted for the rise in filings.

Instead, Professors Donohue and Siegelman offered an alternate explanation “consistent with increasing litigation in an era of declining discrimination.”⁹⁶ They cited national surveys on racial attitudes suggesting that overt prejudice had steadily waned.⁹⁷ Ultimately, Donohue and Siegelman theorized that the increase in filing of employment discrimination cases could

91. See *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991).

92. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

93. See *id.* at 1017.

94. See *id.*

95. See *id.* at 1001 (“Growth in discrimination”), 1003 (“Litigation promoted by lawyers”) (“Changes in propensity to sue”).

96. See *id.* at 1001.

97. They note that survey studies document changes in self-reported beliefs and external conduct but do not answer the fundamental question of whether or not people harbor prejudice against minority groups. *Id.* Indeed, there is considerable social psychology literature that demonstrates that people self-censor when self reporting their own beliefs about stereotypes and the degree to which they would engage in discrimination in a particular context. Further, people often lack awareness into their own implicit processes and claim to be egalitarian, even when their actions suggest otherwise.

be explained by minorities receiving better jobs and workplace integration.⁹⁸ Specifically, they posited that, as women and minorities enter the workforce, the resulting increased wages and the prevalence of comparators make it much more likely for women and minorities to detect, appraise, and prove differences in treatment.⁹⁹ The authors did not conclude that women and minorities faced greater levels of societal discrimination per se or resistance when rapidly entering American workplaces. Instead, their primary explanation was that minority-group members who enter the workplaces would have a greater economic incentive and ability to detect and prove discrimination.

In explaining the shift from hiring claims to firing claims, Donohue and Siegelman theorized that one would observe this compositional shift because women and minorities no longer needed to complain about blanket exclusions from good jobs. Whereas in 1966, hiring charges outnumbered termination charges by 50 percent, by 1985 the pattern had reversed. The authors posited that societal discrimination and the nature of prejudice in American workplaces could not account for the rising rate of discharge claims.¹⁰⁰

While the authors explored a number of explanations for the rise in discharge claims, they did not examine the hypothesis that this rise could be attributed to the changing nature of prejudice against women and minorities in American workplaces—the shift from overt animus to modern forms of bias, such as aversive racism. Instead, the authors equated unlawful discrimination with overt animus, i.e., a taste for discrimination. When conceptualized in this manner, a sexist or racist who harbors overt animus against women or minorities would have refused to hire women and minorities in the first place. If this were the case, one would have hypothesized that hiring claims would be higher than firing claims all else being equal, rather than the reverse. As such, blatant racism and sexism could not explain the rise in discharge claims.

98. See *id.* at 984–85, 1006–11 (“The ‘better jobs’ effect”), 1011–14 (“The ‘integration’ effect”).

99. See *id.* at 1006–15 (“[T]he better-jobs and integration effects have an ironic aspect: The attainment of better and more integrated jobs for minorities is clearly a major goal of antidiscrimination laws, but society’s very success in meeting this goal has contributed to a sizable increase in employment discrimination lawsuits. Improvements in the workplace have spawned strife in the courtroom.”).

100. *Id.* at 1017 (“Claims that employer animus exists in termination but not in hiring seem irrational: it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job. Such behavior seems doubly irrational given that the expected penalties for terminating a worker are probably much higher than for failing to hire her.” (footnotes omitted)). For the model of animus-based employer discrimination, see BECKER, *supra* note 61, at 13–38; see also Donohue & Siegelman, *supra* note 92, at 1017 n.106. Donohue and Siegelman also noted that the legal standards for proving discrimination in hiring as opposed to firing cases did not change during this period, nor were there changes in the calculation of damages. On the latter point, they note that the probability of being sued for termination is six times greater than that for hiring given the availability of evidence. See Donohue & Siegelman, *supra* note 92, at 1017 n.107.

Soon after Donohue and Siegelman's article was published, the U.S. Court of Appeals for the Fourth Circuit quoted the above-mentioned language in its seminal decision articulating the same-actor inference doctrine. *Proud v. Stone* involved Warren Proud's age discrimination claim against the U.S. Army. In *Proud*, the person who fired Proud was the same person who had hired him six months earlier. Affirming the lower court's decision to grant summary judgment on Proud's age-discrimination case, the Fourth Circuit concluded that Proud's case raised no genuine issue of material fact:

One is quickly drawn to the realization that "[c]laims that employer animus exists in termination but not in hiring seem irrational." From the standpoint of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." Therefore, in cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.¹⁰¹

Unfortunately, the court in *Proud v. Stone* predicated the same-actor doctrine upon an erroneous psychological account. As previously discussed, blatant animus against women and minorities in hiring diminished between 1969 and 1989, given that express rules barring the inclusion of women and minorities from the workplace were dismantled and affirmative-action policies began to offer equal access to American workplaces.¹⁰² Though American workplaces began to dismantle blanket exclusions and to implement affirmative action programs, the manifestation of implicit bias in favor of in-group members and against out-group members increased at later stages of the employment relationship, including promotion and termination. As workplaces became more diverse and diversity structures were poorly managed, majority-group members were more likely to express implicit bias in favor of in-group members and against women and minorities. That is, changing demographics in the workplace made social identity salient for many majority-group members who experienced the growing workplace representation of out-group members with anxiety and discomfort, as a threat for scarce resources and finite employment opportunities.¹⁰³

101. See *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (alterations in original) (citation omitted).

102. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

103. See HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* (1981); Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 *PSYCHOL. BULL.* 307 (1979); Henri Tajfel & John Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 33, 45-46 (William G. Austin & Stephen Worchel eds., 1979); Henri Tajfel et al., *Social*

Moreover, while explicit intergroup (between-group) bias against women and minorities began to wane, intragroup (within-category) bias began to wax against minorities and women for being too stereotypical, for failing to abide by prescriptive self-presentation norms, for failing the double-bind against minorities for being “too black, not acting white enough,” and for being “too feminine, not assertive enough” or “too masculine, bitchy.”¹⁰⁴ So too, bias began to mutate like a disease into more challenging and persistent forms, including aversive racism, benevolent sexism,¹⁰⁵ and intersectional bias.¹⁰⁶

As a result, the changing pattern of discrimination cases had much to do with the complex interaction and combined effect of many factors: prohibitions on express discriminatory bars on hiring, the mandate of affirmative-action policies in some workplaces to counteract the history of blatant racism and sexism against stereotyped group members, the changing nature of societal discrimination in American workplaces from blatant to less overt, and the phenomenon of implicit bias increasingly operating in favor of in-group members and against out-group members in American workplaces and via within-category bias. Troublingly, claims that employer bias existed at termination and promotion—especially during the period between 1969 and 1989¹⁰⁷—were not only plausible but likely¹⁰⁸ given the influx of women and minorities into workplaces and the pervasive level of societal discrimination against members of stigmatized groups during this period.¹⁰⁹ In short, the Fourth Circuit premised the doctrine on an erroneous psychological account of

Categorization and Intergroup Behaviour, 1 EUR. J. SOC. PSYCHOL. 149 (1971); Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1 (1982).

104. See Kaiser & Pratt-Hyatt, *supra* note 8; Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 189–205 (2014).

105. See Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications of Gender Inequality*, 56 AM. PSYCHOL. 109 (2001); Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491 (1996).

106. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139; see Lawrence, *supra* note 9 at 322 (“Much of one’s inability to know racial discrimination when one sees it results from a failure to recognize that racism is . . . a disease. This failure is compounded by a reluctance to admit that the illness of racism inflects almost everyone.”).

107. See Donohue & Siegelman, *supra* note 92, at 986.

108. Indeed, one national survey of over two thousand adults conducted in 1972 found that 9 percent of respondents said that they had experienced job discrimination at least once in the last year. See Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH, *supra* note 19, at 3, 18 (citing BARBARA A. CURRAN, AM. BAR FOUND., THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 103 (1977)). A second national survey reported that about 11 percent of those surveyed had experienced illegal or unfair treatment. *Id.* (citing KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 424 (1988)).

109. See JAMES W. VANDER ZANDEN, AMERICAN MINORITY RELATIONS: THE SOCIOLOGY OF RACE AND ETHNIC GROUPS (2d ed. 1966); Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 316 (exploring both racial attitudes and discrimination from 1988–89 to 1998–99).

prejudice, one that obscures how stereotyped groups experience bias in American workplaces.

So began the same-actor inference doctrine.

2. *Two (Troubled) Justifications for the Same-Actor Inference: Common Sense and Economic Rationality*

Federal courts have articulated two reasons for the same-actor inference, justifying the doctrine on grounds of “common sense” and economic rationality. Applying the “common sense” theory, federal courts have explained that when the same actor is involved in both hiring and firing a claimant, a strong inference of nondiscrimination is warranted because a decision maker who dislikes members of a protected group would incur “psychological costs” by associating with them and firing them later. As such, this explanation presumes that a person who hires a claimant is extremely unlikely to hold bias toward that claimant or the claimant’s protected group.¹¹⁰ This “common sense” rationale for the doctrine is implicitly predicated on the lay psychological account¹¹¹ that people who hold bias against members of stereotyped groups experience dissonance when closely working with them. As such, these supervisors anticipate and avoid the dissonance by choosing not to hire out-group members.

This lay psychological account is, of course, troubling, as we will explore in Part IV.¹¹² Most Americans endorse egalitarian beliefs while also exhibiting implicit bias against members of stereotyped groups.¹¹³ Many Americans

110. See *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006); *O’Brien v. Lucas Assocs. Pers., Inc.*, 127 F. App’x 702 (5th Cir. 2005); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267 (9th Cir. 1996); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991); see also *Wofford v. Middletown Tube Works, Inc.*, 67 F. App’x 312, 318 (6th Cir. 2003). *But see Johnson v. Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999) (criticizing the descriptive accuracy of this implicit theory).

111. As Krieger and Fiske have elsewhere described, we might refer to such a lay theory as a psychological metatheory underpinning legal theories as opposed to the legal theory itself. See Krieger & Fiske, *supra* note 7, at 998 n.2.

112. We leave for another day the more general critique of premising legal jurisprudence on “common sense,” “collective opinion,” and folk theories rather than on empirically based knowledge and scientific evidence. See generally BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008). Since the dawn of Western civilization, philosophers have cautioned against premising law, morality, and justice on unexamined, common opinion. See, e.g., ARISTOTLE, ETHICS (Jonathan Barnes & Anthony Kenny trans., Princeton Univ. Press 2014) [hereinafter ARISTOTLE, NICOMACHEAN ETHICS]; ARISTOTLE, METAPHYSICS (Richard Hope trans., Columbia Univ. Press 1952); ARISTOTLE, ON RHETORIC (George A. Kennedy trans., Oxford Univ. Press 2d ed. 2006); DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (Peter Millican ed., Oxford Univ. Press 2007) (1748); JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Roger Woolhouse ed., Penguin Books 1997) (1689) [hereinafter LOCKE, HUMAN UNDERSTANDING]; PLATO, THE REPUBLIC (R.E. Allen trans., Yale Univ. Press 2008) [hereinafter PLATO, THE REPUBLIC].

113. Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 315; Hodson et al., *supra* note 59, at 460–64.

would find it aversive to *overtly* deliberate on whether to hire a member of a stereotyped group in light of the potential discomfort of associating with them.¹¹⁴ Such explicit reasoning threatens virtually every American's sense of rationality, egalitarianism, and nonprejudice. Nonetheless, societal discrimination is pervasive and persistent.¹¹⁵ This is, in part, because in contemporary American society prejudice limits the opportunities of minorities in ways more difficult to detect and eradicate, such as through structures that allow implicit bias to operate against members of stereotyped groups and institutions that result in disparate outcomes.¹¹⁶ When hiring discrimination occurs, this discrimination may have been influenced by implicit bias. The expression of this bias can be considered from the perspective of dual-process theories in psychology. Dual-process perspectives on prejudice demonstrate that bias is likely to occur when situations afford discretion and subjectivity, as these contexts provide many potential reasons for any given decision and individuals may believe they are objective when they are in fact influenced by implicit biases and stereotypes.

Second, some courts predicate the same-actor inference doctrine on "economic rationality." Federal courts that elaborate this basis contend that employer animus at termination, rather than at hiring, is economically irrational. The implicit behavioral theory behind this justification presupposes that, rather than hiring workers from a group one dislikes and firing them later, an economically rational discriminator would refuse to hire stereotyped group members at all: put rather bluntly, given the transaction costs of hiring and training employees, refusing to hire a worker from the stigmatized group would be more economically rational. Further, given the difficulty of proving discrimination in hiring as compared to firing, an efficient discriminator would choose to discriminate at hiring rather than firing. As such, discrimination within American workplaces is unlikely.

As Part IV will elaborate, the economic irrationality justification is deeply flawed. The economic irrationality account presumes, for example, that bias

114. See Dovidio & Gaertner, *Aversive Racism*, *supra* note 51; Dovidio & Gaertner, *supra* note 6; Hodson et al., *supra* note 59, at 460.

115. Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544 (1997); Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 318; Hodson et al., *supra* note 59, at 460–64.

116. See Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES 238, 239–43 (2012); Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 315, 318; Dovidio & Gaertner, *supra* note 6; Dovidio, *supra* note 4, at 836–38; Dovidio & Gaertner, *supra* note 52, at 111–20; Krieger & Fiske, *supra* note 7, at 1032–34; Nier & Gaertner, *supra* note 4, at 209–10; Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 230 ("Based on the evidence we can glean from the interactions between testers and employers in our field experiments, it seemed that only in rare cases were employers categorically unwilling to hire African Americans." (citing Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 787–88 (2009))); Richeson & Shelton, *supra* note 52, at 287.

against members of stereotyped groups operates like ordinary preferences that consumers seek to cost-benefit maximize in market transactions. Yet decades of social psychological research have revealed that contemporary prejudice does not operate like ordinary consumer preferences.¹¹⁷ Most Americans would not openly deliberate at the hiring stage on how to hedonically maximize a misogynistic or hostile racial preference in cost-benefit fashion.¹¹⁸ To be sure, biased decisions can, and often are, rationalized after the fact based on seemingly neutral criteria—a phenomenon known as *casuistry* or shifting standards.¹¹⁹ Even so, one must distinguish the phenomenon of rationalizing a biased decision post hoc¹²⁰ from the phenomenon of arriving at a biased decision after cost-benefit maximizing a psychopathological taste for discrimination. That is, people’s actual behavior does not follow the dictates of the efficient discriminator model,¹²¹ and the economic rationality account is an inaccurate depiction of how people, in fact, behave in the day-to-day. Despite the “economic irrationality” of bias in American workplaces, discrimination persists.

B. Evolution and Permutations of the Same-Actor Inference

In this Section, we describe the evolution and permutations of the same-actor doctrine—that is, the ever-widening boundary of factual scenarios in which courts have applied the same-actor inference. We turn first to the antecedent factual postures triggering application of the doctrine and then to the legal consequences of the doctrine at summary judgment.

117. See Dovidio, *supra* note 4, at 830–33; Krieger & Fiske, *supra* note 7, at 1028, 1037, 1051; Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations and Affirmative Action*, 86 CALIF. L. REV. 1251, 1310 (1988); see also Dan Ariely & Michael I. Norton, *How Actions Create—Not Just Reveal—Preferences*, 12 TRENDS COGNITIVE SCI. 13 (2008).

118. Unfortunately, instances occur in which businesses seek to cater to the discriminatory preferences of their customers or employees. See *United States v. N.Y.C. Transit Auth.*, No. 04-CV-4237, 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

119. See Norton et al., *supra* note 58.

120. See Monica Biernat & Kathleen Fuegen, *Shifting Standards and the Evaluation of Competence: Complexity in Gender-Based Judgment and Decision Making*, 57 J. SOC. ISSUES. 707 (2001); Julie E. Phelan et al., *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCHOL. WOMEN Q. 406 (2008).

121. See AMARTYA SEN, *THE IDEA OF JUSTICE* 177 (2009) (“The relation between rational choice and actual behaviour connects, in fact, with a long-standing divide in the discipline of economics, with some authors tending to think that it is by and large correct to assume that people’s actual behaviour would follow the dictates of rationality, while others remain deeply sceptical of that presumption. This difference in foundational assumptions about human behaviour, and in particular the scepticism about taking actual behaviour to be identifiably rational, has not, however, prevented modern economics from using rational choice quite extensively as a predictive device. The assumption is used often enough without any particular defence, but when some defence is given, it tends to take the form of either arguing that as a general rule this is close enough to the truth (despite some well-known divergence), or that the assumed behaviour is useful enough for the purpose at hand, which may differ from seeking the most truthful description.”).

1. *Antecedent Fact Patterns Triggering the Same-Actor Inference*

When first designed by the Fourth Circuit in *Proud v. Stone*, the court defined the same-actor inference doctrine as follows: “In cases where the hirer and the firer are the *same individual* and the *termination of employment* occurs within a *relatively short time span* following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.”¹²² Since first elaborated, the doctrine has loosened from this original factual mooring and drifted, widening in meaning and scope. Federal courts have significantly extended the allowable timespan between favorable and unfavorable action; broadened the doctrine to employment practices beyond hiring and firing, such as promotion and transfers; and expanded the meaning of “same individual” to include different groups of people who make employment decisions. Additionally, some federal courts enhance the flawed doctrine when the actor and claimant are of the same protected group.¹²³

Regarding the timespan between favorable and unfavorable treatment, *Proud v. Stone* envisioned that the strong inference of nondiscrimination would apply only when these employment actions were “within a relatively short time span.”¹²⁴ Nonetheless, circuit courts are now divided on whether the nexus of time connecting the positive and adverse employer actions is a necessary criterion of the same-actor doctrine at all. For example, in *Buhrmaster v. Overnite Transportation Co.*, the Sixth Circuit affirmed the district court’s decision to instruct the jury on the same-actor inference, despite the fact that the case involved a period of seven and a half years. En route, the Sixth Circuit concluded that “a short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff’s [protected] class does not change.”¹²⁵

In a number of cases, moreover, the Fifth Circuit affirmed application of the same-actor inference when the favorable and unfavorable actions were three years apart,¹²⁶ four years apart,¹²⁷ and five years apart.¹²⁸ Finally, in two

122. See *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (emphasis added).

123. See *Robinson v. Am. Acryl NA, LLC*, No. H-06-570, 2007 WL 471121 (S.D. Tex. Feb. 8, 2007); *Stover v. Hattiesburg Pub. Sch. Dist.*, No. 2:05CV388KS, 2007 WL 465664 (S.D. Miss. Feb. 8, 2007), *aff’d in part*, 549 F.3d 985 (5th Cir. 2008); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), *abrogated on other grounds by* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

124. See *Proud*, 945 F.2d at 797.

125. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995); see also *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1097 (9th Cir. 2005) (“First, this length of time [of three years] would be significant only had Coghlan proffered evidence suggesting that Andreassen developed a bias against [his protected group] during that period; but he did not.”).

126. See *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315 (5th Cir. 1997).

127. See *O’Brien v. Lucas Assocs. Pers., Inc.*, 127 F. App’x 702 (5th Cir. 2005).

128. See *Brooks v. Lubbock Cty. Hosp. Dist.*, 373 F. App’x 434 (5th Cir. 2010); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326 (5th Cir. 1998).

troubling examples, the Fifth Circuit applied the same-actor inference despite the fact that the favorable and unfavorable employment actions were more than seven years apart.¹²⁹

Applying these approaches to our example involving Betty the computer programmer, a federal district court would be within the allowable bounds of doctrinal leeway to impose a strong inference of nondiscrimination where Mike's decision to hire Betty and his failure to promote her were more than three years apart. Problematically, this example is precisely the factual scenario in which most failure-to-promote claims arise: after learning, growing, and gathering experience for several years, employees often seek promotions.

When the person who originally takes favorable action toward a claimant is not the same person who adversely treats the claimant, the same-actor inference does not apply.¹³⁰ Even so, federal courts have broadened the "same individual" requirement to apply to collective or group decision making. Thus the same-actor inference now applies when groups of people engage in employment decision making.¹³¹ Often this doctrinal permutation has applied when virtually the same group of people makes both the favorable and unfavorable decisions. However, several circuit courts have affirmed the grant of summary judgment when many (as opposed to most or all) of the decision makers were the same.¹³²

129. See *Lewis v. 20th-82nd Judicial Dist.*, No. 99-50189, 1999 WL 642898 (5th Cir. July 29, 1999).

130. See *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572 (1st Cir. 1999) (declining to apply the same-actor inference in a Title VII action at the summary judgment stage when the person who originally hired the claimants differed from the person who subsequently failed to reinstate them), *abrogated on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); see also *Burgess v. Bowen*, 466 F. App'x 272 (4th Cir. 2012); *Russell v. Mountain Park Health Ctr. Props.*, 403 F. App'x 195, 195-96 (9th Cir. 2010); cf. *Wolgat v. Tam-O-Shanter Country Club*, No. 97-1135, 1998 WL 69281 (6th Cir. Feb. 10, 1998) (affirming the grant of summary judgment against plaintiff alleging sex discrimination under Title VII in discriminatory termination for alternate reasons).

131. See *Mischer v. Erie Metro Hous. Auth.*, 168 F. App'x 709 (6th Cir. 2006); *DeJarnette v. Corning Inc.*, 133 F.3d 293, 295-96 (4th Cir. 1998) (same company); *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1128-29 (4th Cir. 1995) (same company); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 174 (8th Cir. 1992) (same company officials or same people); *Campbell v. All. Nat'l Inc.*, 107 F. Supp. 2d 234, 237-39 (S.D.N.Y. 2000); cf. *Wofford v. Middletown Tube Works, Inc.*, 67 F. App'x 312 (6th Cir. 2003); *Jones v. Yonkers Pub. Sch.*, 326 F. Supp. 2d 536, 546 (S.D.N.Y. 2004) ("[T]he [same-actor] inference may be applied even when the supervisor at issue . . . is not the only person with input into the hiring and firing decision. The inference 'is applicable so long as one management-level employee played a substantial role in both the hiring and firing of the plaintiff.'" (quoting *Ramos v. Marriott Int'l, Inc.*, 134 F. Supp. 2d 328, 345 (S.D.N.Y. 2001))).

132. See *Houk v. Peoploungers Inc.*, 214 F. App'x 379 (5th Cir. 2007) (one of multiple decision makers); *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006) (same) (affirming summary judgment granted against employee who brought claim against former employer asserting Title VII claims for race and national origin discrimination, retaliation, and other claims, and applying same-actor inference in the context of the discrimination claims at the pretext stage); *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620 (7th Cir. 2006) (same), *overruled by* *Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013); *Wofford v. Middletown Tube Works, Inc.*, 67 F. App'x 312 (6th Cir. 2003) (same); *Waterhouse v. District of Columbia*, 298 F.3d 989 (D.C. Cir. 2002) (same); *Sreeram v. La. State Univ. Med. Ctr.-Shreveport*, 188 F.3d 314 (5th Cir. 1999) (same).

This doctrinal permutation is in tension with realities in the modern American workplace.¹³³ In our second hypothetical, if Mike hired Jason, and Mike and Dan (his seemingly prejudiced supervisor) were both involved in deciding to fire him several years later, a court might nonetheless apply the same-actor inference doctrine. Mike was the “same individual” who played a role in both hiring and firing Jason; hence, a court would presume that the decision to fire was not discriminatory. Even assuming that a single individual is unbiased within a larger group, the presence of that individual in the second group should not be legally presumed to block the expression of bias against a member of a protected group. Indeed, the mere presence of a group can decrease the likelihood that a well-intentioned person will speak up or engage in actions that run counter to situational norms, especially when the person setting the norm has power and status. The doctrine, moreover, presumes that the group of people who made the first favorable action was unbiased; yet, as we discuss below, several compelling reasons exist as to why the first group may have chosen to hire a member of a protected group. For example, the female or black candidate might have been unambiguously the most qualified candidate, and the hiring team might have deployed clear, determinate hiring criteria.

This permutation is also predicated on the implicit theory that people who comprise a decision-making group are more likely to confront bias. Yet fear of reprisal or censure prevents many well-intentioned, egalitarian actors from speaking up in groups and curtailing bias.¹³⁴ Considerable psychological science exists on the extent to which individuals confront wrongdoers within groups to reduce sexism and racism within workplaces.¹³⁵ While research reveals that majority-group members and minority-group members are generally inclined to confront bias when *imagining* a sexist or racist encounter, in reality many women and minorities remain silent in *actual* sexist or racist encounters. For example, confrontation requires that decision makers detect discrimination, perceive the incidence as urgently requiring rectification, personally take responsibility to confront, and decide how to confront.¹³⁶ At the same time, there are material and psychological barriers to confronting

133. See *Jean-Baptiste v. K-Z, Inc.*, 442 F. Supp. 2d 652 (N.D. Ind. 2006). Professor Natasha Martin ably argues this point and problematizes the modern workplace’s dynamics of collective decision making and organizational dimensions. Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117 (2008).

134. See Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 496–500 (2001) (applying insights from the social psychology of group decision making to disparate treatment cases involving multiple decision makers).

135. See Julia C. Becker et al., *Confronting and Reducing Sexism: A Call for Research on Intervention*, 70 J. SOC. ISSUES 603, 605–08 (2014).

136. See Sarah J. Gervais & Amy L. Hillard, *Confronting Sexism as Persuasion: Effects of a Confrontation’s Recipient, Source, Message, and Context*, 70 J. SOC. ISSUES 653, 654–56 (2014).

prejudice, including social costs to the person who confronts, such as fear of retaliation or being perceived as overreacting, whiny, oversensitive, interpersonally cold, troublemaking, self-interested, or egoistic.¹³⁷ Moreover, people are far less likely to confront bias when the perpetrator holds more power in an employment setting than the would-be confronter.¹³⁸

The breadth of the favorable employment action that triggers the same-actor inference has broadened from hiring to other actions, some formal, others quite informal. For example, the antecedent employment action has extended from hiring to recommending hiring,¹³⁹ from promotion¹⁴⁰ to recommending promotion,¹⁴¹ to transfer,¹⁴² rehiring,¹⁴³ and even abstaining from taking potentially unfavorable action against the claimant, such as by providing employee performance scores that are high enough to avoid vulnerability to discharge.¹⁴⁴ The latter courts appear to suggest that withholding unfavorable action against a female or minority employee on a prior occasion may trigger a strong inference of nondiscrimination on a later date.¹⁴⁵

Returning to our second hypothetical, assume that another manager, Steven, hires Jason, and then Mike transfers Jason to a logistics warehouse that the logistics company thinks is more favorable than Jason's original location. At the new warehouse, Dan is assigned as Jason's supervisor; problems begin. If Mike later terminates Jason after Dan's unjustified write-ups, Mike would be deemed the same-actor, and many courts would apply the same-actor doctrine and presume that Mike's firing of Jason was nondiscriminatory.

Taken together, these doctrinal permutations are precisely those that plaintiff-side employment-discrimination attorneys have urged their colleagues to raise when distinguishing their cases from those in which the same-actor

137. See, e.g., *id.* at 655–56 (“[A] woman who confronts may be seen as acting with self-interest and conforming to expectations, whereas a man who confronts may be seen as acting without self-interest and violating expectations, which may cause surprise and positive regard.”).

138. See Leslie Ashburn-Nardo et al., *Do You Say Something When It's Your Boss? The Role of Perpetrator Power in Prejudice Confrontation*, 70 J. SOC. ISSUES 615, 617–22 (2014).

139. See *Bergeron v. Sw. La. Hosp. Ass'n*, No. 98-31019, 1999 WL 766403, at *13 (5th Cir. Aug. 31, 1999) (affirming district court grant of summary judgment in favor of defendants on claims of sexual harassment); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 957 (4th Cir. 1996).

140. See *Taylor v. Va. Union Univ.*, 193 F.3d 219, 231 (4th Cir. 1999), *abrogated on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Hartsel v. Keys*, 87 F.3d 795, 804 (6th Cir. 1996).

141. See *Philbrick v. Holder*, 583 F. App'x 478 (6th Cir. 2014) (affirming in part and reversing in part the grant of summary judgment).

142. See *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1097 (9th Cir. 2005); *Washington v. Valspar Indus. Coatings Grp.*, No. 01-60458, 2002 WL 753503 (5th Cir. Apr. 9, 2002) (affirming the grant of summary judgment on plaintiff's claim of discriminatory firing based on age); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993).

143. See *Sreeram v. La. State Univ. Med. Ctr.-Shreveport*, 188 F.3d 314 (5th Cir. 1999).

144. See *Idemudia v. J.P. Morgan Chase*, 434 F. App'x 495 (6th Cir. 2011); *EEOC v. Boeing Co.*, 577 F.3d 1044, 1051–52 (9th Cir. 2009) (allowing the court to apply the same-actor inference but not requiring a “strong inference”).

145. See *Idemudia*, 434 F. App'x at 495; *Boeing Co.*, 577 F.3d at 1051–52.

doctrine first began.¹⁴⁶ These plaintiff-side employment-discrimination attorneys have urged their colleagues, when apt, to contend that new and different persons are involved in hiring and firing, that the passage of time should defeat the doctrine's application, and that the same-actor inference should not apply in failure-to-promote cases.¹⁴⁷ Yet these are precisely the doctrinal permutations that many federal courts have broadened the boundary of the doctrine to subsume. While some scholars have critiqued the advocacy of plaintiff-side employment attorneys for failing to raise similar objections,¹⁴⁸ the substantive doctrine is adrift, widening and leaving less leeway for counsel to press arguments to the contrary.

2. *Presumption Enhanced When the Claimant and Actor Belong to the Same Protected Group*

Further, many federal courts expressly strengthen the same-actor inference when the "actor" (i.e., the supervisor, manager, or employer) is of the same racial, gender, or ethnic group as the claimant.¹⁴⁹ This doctrinal permutation has been applied in the context of claimants and supervisors who belong to the same protected groups based on age,¹⁵⁰ gender,¹⁵¹ and race.¹⁵² Indeed, in one unusual case reversed by the Seventh Circuit, a magistrate judge heightened the same-actor inference where both the supervisor and claimant belonged to protected groups, albeit *different* protected groups: the supervisor was Hispanic and the plaintiff was black.¹⁵³ There, the lower court appears to have presumed either that interracial bias between minority groups does not exist or that minorities cannot harbor bias, two lay theories that decades of

146. See Lisa Dunne, *Challenge "Same Actor" Inference on Summary Judgment*, JAMES PUB. (Jan. 16, 2014), <http://jamespublishing.com/2014/employment-discrimination> [<http://perma.cc/72KZ-LRM7>].

147. *Id.*

148. See Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59 (2013).

149. See *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996), *abrogated on other grounds by Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (applying same-actor doctrine when defendant shared claimants' class as a strengthened inference); *Stover v. Hattiesburg Pub. Sch. Dist.*, No. 2:05CV388KS-MTP, 2007 WL 465664, at *9 (S.D. Miss. Feb. 8, 2007), *aff'd in part*, 549 F.3d 985 (5th Cir. 2008); *Robinson v. Am. Acryl N.A.*, No. H-06-570, 2007 WL 471121, at *3 (S.D. Tex. Feb. 8, 2007); *Mercer v. Capitol Mgmt. & Realty, Inc.*, 242 F. App'x 162, 164 (5th Cir. 2007); *see also Hervey v. Miss. Dep't of Educ.*, 404 F. App'x 865, 871 (5th Cir. 2010).

150. See, e.g., *Washington v. Valspar Indus. Coatings Grp.*, No. 01-60458, 2002 WL 753503 (5th Cir. Apr. 9, 2002) (affirming the grant of summary judgment on plaintiff's claim that he was discriminatorily fired because of his age); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993).

151. See *O'Brien v. Lucas Assocs. Pers., Inc.*, 127 F. App'x 702 (5th Cir. 2005).

152. See *Hobby v. L.A. Unified Sch. Dist.*, 386 F. App'x 722, 724 (9th Cir. 2010).

153. See *Johnson v. Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999) (affirming and reversing summary judgment ruling on racial discrimination claim).

social psychological literature have discredited.¹⁵⁴ This decision is a highly aggressive doctrinal elaboration that impermissibly extends the doctrine, as some courts have warned.¹⁵⁵

This permutation implicitly presumes that all members of a stereotyped group, such as black employees or female employees, will not engage in bias or discrimination against other members of their own stereotyped groups. This doctrinal permutation, however, fails to connect with the phenomenon of *intragroup* bias (e.g., bias by black employees against other black employees who experience the “racial doublebind” of being perceived as “not black enough” or “too black,” too Afrocentric, or stereotypically black).¹⁵⁶ Further the doctrinal elaboration fails to reach intersectional discrimination (e.g., a white female manager may not harbor bias against other white women or black men, but may harbor bias against black women).¹⁵⁷ Consider, for example, a variation of the hypothetical in which Mike, a black male supervisor, failed to promote Betty, a black female programmer, in favor of Carol, a white female programmer, with less experience.

Some federal courts have signaled that heightening the same-actor inference in this situation is inappropriate and in tension with the U.S. Supreme Court’s rejection of a “conclusive presumption” that an employer, or presumably its agents, will not discriminate against members of its own race or gender.¹⁵⁸ In *Oncale v. Sundowner Offshore Services, Inc.*, for example, the Court explicitly advised that, “[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”¹⁵⁹ Despite *Oncale*, however, many courts still heighten the inference of nondiscrimination in this scenario.

3. Legal Effect of the Same-Actor Inference

In this Section, we now turn from the evolving antecedents of the same-actor doctrine to the legal consequence of the same-actor inference at summary judgment. To situate this discussion, we first briefly explain how federal courts adjudicate most disparate treatment claims at summary judgment.

Given the difficulty of unearthing “smoking-gun” or direct evidence of intentional discrimination during discovery, most plaintiffs produce

154. See Jenessa R. Shapiro & Steven L. Neuberg, *When Do the Stigmatized Stigmatize? The Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression Norms*, 95 J. PERSONALITY & SOC. PSYCHOL. 877 (2008).

155. See *Feingold v. New York*, 366 F.3d 138, 155 (2d Cir. 2004).

156. See CARBADO & GULATI, *supra* note 8, at 15; Shapiro & Neuberg, *supra* note 154, at 877.

157. See Crenshaw, *supra* note 106, at 140; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

158. See *Feingold*, 366 F.3d at 155.

159. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

circumstantial evidence of disparate-treatment discrimination at summary judgment.¹⁶⁰ That is, most plaintiffs provide circumstantial evidence from which a court may infer that an employer discriminated. This circumstantial evidence is evaluated under the *McDonnell Douglas-Burdine* burden-shifting scheme, which allocates the burden of production and order for presenting proof.¹⁶¹

Under the *McDonnell Douglas-Burdine* framework, plaintiffs must first establish a prima facie case of discrimination. This prima facie case has been described as a “sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination” at summary judgment.¹⁶² To establish a prima facie case, a plaintiff must prove that (1) she is a member in a protected class, (2) she was qualified for a given job, (3) she was subject to an adverse employment action, and (4) a causal connection exists between the adverse action and the protected characteristic. In practice, on the fourth element, many federal courts now require plaintiffs to prove that employers treated similarly situated employees outside the protected class more favorably.¹⁶³ For example, Betty in our first hypothetical would establish a prima facie case of disparate-treatment discrimination based on the failure to promote her by showing that she was qualified for the denied promotion and that the man ultimately promoted, Carl, was not similarly qualified.

If a plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate a nondiscriminatory reason for the adverse employment action.¹⁶⁴ This burden is merely one of production, not of persuasion, meaning

160. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (discussing direct versus circumstantial evidence under Title VII); LINDEMANN & GROSSMAN, *supra* note 76.

161. See *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 49 n.3 (2003) (interpreting the *McDonnell Douglas-Burdine* framework); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (same); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 505–12 (1993) (same).

162. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002), *overruled in part on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

163. See, e.g., *Winsley v. Cook Cty.*, 563 F.3d 598, 605 (7th Cir. 2009). In disparate-treatment cases, the last element—whether the employer treated similarly situated people outside of the plaintiff’s protected class differently—is often determinative of whether a claim withstands summary judgment. See LINDEMANN & GROSSMAN, *supra* note 76, at 23. Circuit courts disagree on how rigorously to apply this final element. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743–48 (2011) (explaining that the “similarly situated” element has in essence become a widely employed heuristic). Some require plaintiffs to show that “similarly situated” employees were nearly identical in all or most respects. See, e.g., *Perez v. Tex. Dep’t of Criminal Justice*, 395 F.3d 206, 213 (5th Cir. 2004); *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). Others hold plaintiffs to a less exacting standard. See, e.g., *Rodgers v. U.S. Bank*, 417 F.3d 845, 852 (8th Cir. 2005), *abrogated by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011); *Ortiz v. Norton*, 254 F.3d 889, 894–95 (10th Cir. 2001).

164. See *Raytheon Co.*, 540 U.S. at 49 n.3.

that federal courts do not review the “credibility” or plausibility of the employer’s rationale.¹⁶⁵ If the employer offers some nondiscriminatory reason for the adverse action, the presumption of intentional discrimination disappears. In the third and final step, the plaintiff must establish by a preponderance of the evidence that the employer’s reason was mere pretext for discrimination.¹⁶⁶ In deciding whether the defendant’s explanation is pretextual, the court may consider the evidence establishing plaintiff’s prima facie case and any inferences properly drawn therefrom.¹⁶⁷ Courts have applied this summary judgment framework to a wide variety of workplace circumstances, including hiring, discharge, discipline, promotion, transfer, demotion, retaliation, and other adverse employment actions.¹⁶⁸

At the pretext stage, Betty could establish that the technology company’s purported nondiscriminatory reason for refusing to promote her was pretextual, masking sex bias. Mike explained that, though Carl was technically less qualified, he thought Carl would be a better leader of computer programmer teams. Betty could attempt to show that Mike’s decision was based on gender stereotypes that women are not as competent and capable as men in science and engineering fields, including computer science.¹⁶⁹

Connecting *McDonnell Douglas-Burdine* to the legal effect of the same-actor inference, federal courts have operationalized the same-actor inference at the third step of the summary judgment framework.¹⁷⁰ In this third step,

165. See *Reeves*, 530 U.S. at 142 (quoting *St. Mary’s Honor Ct.*, 509 U.S. at 509).

166. See *Raytheon Co.*, 540 U.S. at 49 n.3; *Reeves*, 530 U.S. at 143.

167. See *Reeves*, 530 U.S. at 143.

168. See LINDEMANN & GROSSMAN, *supra* note 76, at 12–13.

169. See Hill et al., *supra* note 27, at 38 (“Negative stereotypes about girls’ and women’s abilities in mathematics and science persist despite girls’ and women’s considerable gains in participation and performance in these areas during the last few decades. Two stereotypes are prevalent: girls are not as good as boys in math, and scientific work is better suited to boys and men.”); see also, e.g., Jo Handelsman et al., *Science Faculty’s Subtle Gender Bias Favors Male Students*, 109 PROC. NAT’L ACAD. NAT’L SCI. 16474 (2012); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Math = Male, Me = Female, Therefore Math ≠ Me*, 83 J. OF PERSONALITY & SOC. PSYCHOL. 44 (2002); Patrick D. Healy & Sara Rimer, *Furor Lingers as Harvard Chief Gives Details of Talk on Women*, N.Y. TIMES (Feb. 18, 2005), <http://www.nytimes.com/2005/02/18/education/furor-lingers-as-harvard-chief-gives-details-of-talk-on-women.html> [perma.cc/HVJ8-DCY7] (“[T]he Harvard leader suggested he believed that the innate aptitude of women was a factor behind their low numbers in science and engineering. ‘My best guess, to provoke you, of what’s behind all of this is that the largest phenomenon—by far—is the general clash between people’s legitimate family desires and employers’ current desires for high power and high intensity; that in the special case of science and engineering, there are issues of intrinsic aptitude”).

170. See *Hernandez v. Muns*, No. 96-40087, 1996 WL 661171, at *3 n.6 (5th Cir. Oct. 21, 1996) (“Depending on the factual setting, the same actor inference may be considered in determining whether a purported *prima facie* case, resting entirely on circumstantial evidence, has been sufficiently made out, although more usually the same actor inference will have its primary relevance at a later stage of the case.”). *But see* *Cordell v. Verizon Commc’ns Inc.*, 331 F. App’x 56 (2d Cir. 2009) (applying the same-actor inference in concluding that the claimant had failed to establish a prima facie case and show that the circumstances gave rise to an inference of discrimination).

plaintiffs must establish that their employer's rationale is pretextual.¹⁷¹ When applied, the same-actor inference greatly heightens the quantum and quality of evidence that the plaintiff must produce to survive summary judgment. Some federal courts reason as if the same-actor doctrine enacts a virtually insurmountable presumption of nondiscrimination, demanding that the claimant produce "smoking-gun" evidence of discrimination to survive summary judgment. In contrast, other courts have concluded that the same-actor inference is merely evidence for the trier of fact to weigh. In short, the U.S. Courts of Appeals diverge on the legal effect and analytical significance of the same-actor inference,¹⁷² and the U.S. Supreme Court has yet to resolve this divide.

The Second,¹⁷³ Fourth,¹⁷⁴ Fifth,¹⁷⁵ Eighth,¹⁷⁶ and Ninth¹⁷⁷ Circuits, for example, hold that the same-actor doctrine enacts a "strong inference" that the defendant did not engage in discrimination. These federal courts consider the same-actor inference very compelling¹⁷⁸ and at times equate the strong inference to a virtually irrefutable presumption of nondiscrimination, having explained that the claimant must come forward with "an extraordinarily strong showing of discrimination" to overcome the "strong inference" of nondiscrimination.¹⁷⁹ Under this view, plaintiffs must produce direct evidence of discrimination to survive the same-actor inference applied at summary judgment,¹⁸⁰ including direct evidence such as statements exhibiting animus.¹⁸¹

171. See, e.g., *Dabney v. Christmas Tree Shops*, 958 F. Supp. 2d 439 (S.D.N.Y. 2013); *Auguste v. N.Y. Presbyterian Med. Ctr.*, 593 F. Supp. 2d 659 (S.D.N.Y. 2009); *Abouzied v. Roy H. Mann Jr. H.S. No. 78*, No. 97-CV-7613, 2000 WL 1276635 (E.D.N.Y. Aug. 30, 2000).

172. See *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003).

173. See *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553 (2d Cir. 1997).

174. See *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4th Cir. 1999), *abrogated on other grounds* by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

175. See *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326 (5th Cir. 1998).

176. See *Arraleh v. Cty. of Ramsey*, 461 F.3d 967 (8th Cir. 2006).

177. See *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1097 (9th Cir. 2005).

178. Some have deemed the inference highly persuasive. See, e.g., *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 271 (9th Cir. 1996) (holding that the plaintiff's evidence was insufficient as a matter of law to rebut the strong same-actor inference); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 174 (8th Cir. 1992) ("The most important fact here is that plaintiff was a member of the protected age group both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him."); *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (urging the early dismissal of cases where the same individual both hired and fired the plaintiff).

179. See *Crudder v. Peoria Unified Sch. Dist. No. 11*, 468 F. App'x 781 (9th Cir. 2012); *Coghlan*, 413 F.3d at 1097 (requiring plaintiff to make an "extraordinarily strong showing of discrimination" to overcome the same-actor inference); see also *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177 (10th Cir. 2006); *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000); *Lowe*, 963 F.2d at 174; *Covarrubias v. Brink's, Inc.*, No. C05-5196, 2006 WL 3203733 (W.D. Wash. Nov. 3, 2006); *Kassa v. Selland Auto Transp., Inc.*, No. C05-1304, 2006 WL 2927706 (W.D. Wash. Oct. 11, 2006).

180. See *Adams v. Greenbrier Oldsmobile/GMC/Volkswagen, Inc.*, No. 97-1544, 1999 WL 34907 (4th Cir. Jan. 28, 1999) (reversing district court's application of the same-actor inference in granting a Rule 50(a) motion because the plaintiff had presented direct evidence—compelling evidence of discrimination).

Nevertheless, in several reported cases, these U.S. Courts of Appeals refused to set aside application of the same-actor inference where direct evidence in the record strongly suggested discriminatory animus was afoot.¹⁸² Indeed, in several reported cases, these circuit courts described the doctrine as enacting an “anti-animus presumption.”¹⁸³ Within these circuits, a minority of panels has applied the same-actor inference at summary judgment as a weak inference of nondiscrimination.¹⁸⁴

Returning to our hypothetical, Betty will most likely proffer circumstantial evidence at summary judgment that Mike failed to promote her because of her gender, as Betty was otherwise well qualified for the promotion and there are few female supervisors at the Silicon Valley technology company. Yet because Mike is the same individual who both hired and failed to promote her, these courts will apply a strong inference of nondiscrimination. In this scenario, the technology company will argue that her male coworker was better qualified for the position than Betty. Applying the same-actor inference on these facts, absent “smoking gun” evidence of discrimination, Betty will fail to establish a genuine dispute of material fact of gender discrimination and her case will be dismissed at summary judgment. A jury will not be granted the opportunity to weigh the evidence in favor or against discrimination.

Other U.S. Courts of Appeals, such as the Third¹⁸⁵ and Sixth Circuits,¹⁸⁶ have held that the same-actor inference is not a mandatory presumption but rather an inference that a federal court may draw at summary judgment.¹⁸⁷ In several instances, these courts have stated that summary judgment would be improper if the plaintiff has otherwise raised a genuine issue of material fact.¹⁸⁸

181. See *Johnson v. Boys & Girls Clubs of S. Puget Sound*, 191 F. App'x 541, 544–45 (9th Cir. 2006).

182. Although several cases had highly derogatory statements in the record, the same-actor inference was nonetheless applied. See *Philbrick v. Holder*, 583 F. App'x 478, 488 (6th Cir. 2014) (“stronger field general”); *Peters v. Shamrock Foods Co.*, 262 F. App'x 30, 32 (9th Cir. 2007) (“a mom [who] could not travel”); *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999), *abrogated on other grounds by* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 329 (5th Cir. 1998) (“[p]orch [m]onkey,” “[b]luckwheat”); *Richmond v. Johnson*, No. 96-6329, 1997 WL 809962, at *1 (6th Cir. Dec. 18, 1997) (“[W]hat? Are you pregnant?”).

183. See *O'Brien v. Lucas Assocs. Pers., Inc.*, 127 F. App'x 702, 707 (5th Cir. 2005); see also *Spears v. Patterson UTI Drilling Co.*, 337 F. App'x 416, 421–22 (5th Cir. 2009).

184. See *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (noting that the plaintiff “produced no meaningful evidence indicating either that [the employer’s] proffered explanation was false or that her supervisor harbored discriminatory animus towards her because she was a woman”); *Lowe*, 963 F.2d at 174–75 (holding that the same-actor inference warranted summary judgment because the plaintiff’s evidence of pretext was “thin”).

185. See *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995) (noting that the same-actor inference “is simply evidence like any other and should not be accorded any presumptive value” (quoting the EEOC’s brief in the case)).

186. See *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003).

187. See *id.* at 573.

188. See, e.g., *id.*; *Gaglioti v. Levin Grp., Inc.*, 508 F. App'x 476, 483 (6th Cir. 2012); *Idemudia v. JP Morgan Chase*, 434 Fed. Appx. 495 (6th Cir. 2011).

Of course, the strength of circumstantial evidence is inherently subjective, and judges' own experiences may shape their interpretations of how reasonable an evidentiary inference may be.¹⁸⁹ Under this permutation, a federal court would be permitted to apply the same-actor inference at summary judgment when dismissing the plaintiff's case or at least to consider the same-actor inference when deciding whether the inference to be drawn from circumstantial evidence is sufficiently reasonable to be considered by the ultimate trier of fact. Under this jurisprudential approach, while Betty may not technically be required to offer direct evidence of discrimination, if a federal district court chooses to apply the same-actor inference, her circumstantial case of discrimination will be perceived as less probative and the technology company will likely prevail at summary judgment.¹⁹⁰

Finally, the Seventh and Eleventh Circuits have essentially rejected application of the same-actor doctrine at summary judgment, equating the same-actor situation to potential evidence of nondiscrimination for the ultimate trier of fact to consider.¹⁹¹ The Seventh Circuit has, for example, concluded that "[t]he 'common actor' or 'same-actor' inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law."¹⁹² These courts have also described the same-actor doctrine as merely a convenient shorthand that describes the factual scenario in which a claimant has presented insufficient evidence of discrimination.¹⁹³ According to this view, reliance on the same-actor inference to carry the moving party over the hurdle of summary judgment is legally impermissible, because drawing legitimate inferences from the facts are jury functions and, at summary judgment, the court must disregard all evidence favorable to the moving party that the jury is not required to believe.¹⁹⁴ As such, "it is the province of the jury rather than the court . . . to determine whether the inference generated by 'same actor' evidence is strong enough to outweigh a plaintiff's evidence of pretext."¹⁹⁵

189. See Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 5 (2011).

190. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

191. See *Perez v. Thorntons, Inc.*, 731 F.3d 699 (7th Cir. 2013); *Nwanna v. Ashcroft*, 66 F. App'x 9 (7th Cir. 2003); *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438 (11th Cir. 1998). Indeed, some district courts in the Second Circuit have taken this approach when the evidence of gender discrimination is extremely stark. See, e.g., *Braunstein v. Barber*, No. 06 Civ. 5978, 2009 WL 849589 (S.D.N.Y. Mar. 30, 2009), *report and recommendation adopted*, 2009 WL 1542707 (S.D.N.Y. June 2, 2009).

192. *Perez*, 731 F.3d at 699, 709; see also *Blasdel v. Nw. Univ.*, 687 F.3d 813, 820 (7th Cir. 2012) (citing *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002)).

193. See *Johnson v. Zema Sys. Corp.*, 170 F.3d 734 (7th Cir. 1999).

194. See *Petts v. Rockledge Furniture LLC*, 534 F.3d 715 (7th Cir. 2008) (affirming on alternate ground summary judgment grant of plaintiff's claim of sex discrimination under Title VII).

195. See *Williams*, 144 F.3d at 1438 (reversing the grant of summary judgment where former employee sued under the ADEA, asserting discriminatory discharge and failure to hire claims).

III.

AN EMPIRICAL ANALYSIS OF THE GROWTH RATE OF THE SAME-ACTOR
DOCTRINE

We now turn to an empirical analysis of the same-actor inference, commencing first with a literature review of prior empirical analyses that have examined the same-actor doctrine. We then build upon these prior studies by contributing our own analysis that examines the growth rate in application of the doctrine at summary judgment by federal district courts nationally and across federal circuits.

Prior empirical studies have revealed that the doctrine increases case dismissals at summary judgment. Professor Natasha Martin conducted an exhaustive empirical legal study on the same-actor inference,¹⁹⁶ investigating decisions applying the same-actor inference doctrine by the circuit courts and district courts in 2006, 2007, and 2008.¹⁹⁷ Her sample included decisions adjudicating the same-actor inference under all federal statutes that forbid employment discrimination.¹⁹⁸ Martin found that the courts of appeals affirmed the grant of summary judgment for the employer, applying the same-actor doctrine, in 80 (78.43 percent) out of 102 decisions. Moreover, during this three-year period, district courts granted summary judgment for employers in 180 (77.58 percent) out of 232 decisions, applying the same-actor doctrine. Martin flagged that plaintiffs in race and gender cases bore the brunt of the same-actor inference doctrine when compared to claimants who asserted claims based on other protected categories.¹⁹⁹ This empirical legal study reveals a striking trend: when a court adjudicates the same-actor inference, that court will very likely grant (or affirm the grant of) summary judgment and dismiss the claimant's case.

Empirical studies on the same-actor doctrine demonstrate that the substantive scope of the doctrine is meaningful and significant for the litigation prospects of claimants aggrieved by discrimination.²⁰⁰ Given that plaintiffs lose summary judgment approximately 80 percent of the time when they are unable to reference favorable intracircuit substantive law on the same-actor doctrine, these dismal outcomes suggest that, as the doctrine continues to transform,

196. See Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010).

197. Professor Martin reviewed all appellate court opinions addressing the same-actor doctrine, published and unpublished, available on Westlaw. She also reviewed all federal district court opinions over the three-year period. She explicitly states that her goal in reviewing these cases was to identify various trends, including the stages at which the same-actor evidence proves most fatal and under what circumstances plaintiffs successfully overcome the inference. *Id.* at 370 n.247.

198. Professor Martin may have included cases applying the same-actor inference that arose under the Fair Housing Act, the Rehabilitation Act, the Pregnancy Discrimination Act, and alleged discrimination in the sale of a motor vehicle and unfair labor practices. *See id.* at 371.

199. *See id.*

200. See Moss, *supra* note 148 (suggesting that, when the scope of the same-actor inference clearly extends to the permutations described in Part II.B.1 and Part II.B.2, the likelihood of summary judgment increases).

widen, and expand, it will result in an even larger swath of case dismissals at summary judgment. In addition, given case-selection effects, we believe that expansion of the same-actor doctrine poses an access-to-justice problem. Expansion widens the swath of claimants who are unable to access counsel. These claimants will, in turn, either drop out of the dispute pyramid when they are unable to access counsel or they will press on pro se. Throughout the litigation process, pro se claimants of discrimination fail at a far higher rate than counseled claimants.²⁰¹

While these prior studies depict the rate at which federal district courts grant summary judgment when the same-actor doctrine is adjudicated in Title VII cases, we sought to examine empirically the rate at which adjudication of the same-actor doctrine by federal district courts at summary judgment has grown over time given the evolving and ever-widening scope of the doctrine. Thus, we conducted a time-series analysis that examined the growth rate in application by federal district courts of the same-actor doctrine.

In this regard, we had two primary hypotheses. First, we hypothesized that the expanding scope of the same-actor inference in Title VII cases would coincide with a rise in the growth rate in adjudication by federal district courts of the same-actor doctrine at summary judgment. Second, we hypothesized that, given the divergence among circuit courts in application of the strong-inference standard, the growth rate of the doctrine would diverge across circuits. Primarily, we predicted that the growth rate of the same-actor doctrine would be highest within circuits that affirmatively require district courts to apply the “strong inference of nondiscrimination” standard at summary judgment, such as the Second Circuit. In contrast, the growth rate would be lower in circuits that merely allow courts to weigh same-actor evidence at summary judgment, such as the Sixth Circuit, or in circuits that have sharply curtailed the same-actor doctrine, such as the Seventh Circuit.²⁰²

A. Method

Our time-series analysis was designed to establish the percentage of federal district court summary judgment decisions affected by the same-actor doctrine in Title VII cases. As described in Part I.B.2, much of the “bite” of the same-actor doctrine operates at summary judgment, where the strong inference of nondiscrimination results in case dismissals.²⁰³ Rather than examining the

201. See Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45 (2005); Cheryl R. Kaiser & Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI. 95 (2014); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188–89 (2010).

202. See *supra* Part I.A.3 and notes 191–93 and accompanying text.

203. See *supra* Part I.A.3 and notes 170–71 and accompanying text; see also FED. R. CIV. P. 56(a).

smaller set of published circuit court decisions, our time-series analysis examined the larger set of federal district court summary judgment decisions.²⁰⁴ We employed a twenty-three-year time horizon, collecting all publicly available federal district court decisions adjudicating motions for summary judgment in Title VII cases from 1990 to 2013. We established the annual percentage of total summary judgment decisions affected by the same-actor doctrine by compiling the frequency in which federal district courts invoked the same-actor doctrine at summary judgment. We then used that number as the numerator and divided by the total number of summary judgment decisions in Title VII cases as the denominator.

We first collected all publicly available cases over the twenty-three-year period from 1990 to 2013 in which federal district courts invoked the same-actor doctrine in Title VII summary judgment decisions. These cases were retrieved using targeted searches on WestlawNext for both published and unpublished decisions.²⁰⁵ We next conducted a second, broader search designed to collect all publicly available cases over the twenty-three-year period in which federal district courts adjudicated Title VII claims at summary judgment. These cases were retrieved using broader, albeit targeted, searches on WestlawNext for both published and unpublished decisions.²⁰⁶ In arriving at the annual percentage of total summary judgment decisions affected by the same-actor doctrine from 1990 to 2013, we divided the frequency counts of the decisions collected under the first, targeted search by the frequency counts of the broader, targeted search of all district courts cases. Finally, to examine the annual percentage of total summary judgment decisions by federal district courts affected by the same-actor doctrine within each circuit court, we combined the decisions of federal district courts within each federal circuit and stratified the analysis by federal circuit.²⁰⁷

We then conducted a time-series analysis that investigated the growth rate in the annual percentage of summary judgment adjudications affected by the

204. The study counted dispositive decisions by federal district courts and those of magistrate judges. The studies, however, did not count these decisions twice—for example, when both the magistrate judge decision and the federal district court decision were available and when the district court judge reviewed the report and recommendation of a magistrate judge.

205. The targeted search parameters for federal district court decisions adjudicating the same-actor inference at summary judgment in Title VII cases was as follows: WL: advanced: ((Title /4 VII) “42 U.S.C. 2000” “Pub. L. 88-352” “42 USC 2000” “78 Stat. 241” & (employment & discrim!)) & ((same /5 actor common /5 actor) & (infer! OR doct!)) & ((summary /3 judgment) OR (“Rule 56”) OR (FRCP /3 56) OR (F.R.C.P. /3 56)).

206. In order to circumvent the limited search result capacity of WestlawNext, the study first narrowed down federal district courts by state and then entered in search parameters tailored to a certain year. For example, when searching for the decisions adjudicating Title VII claims at summary judgment in Massachusetts in 1990, the search parameters were as follows: WL > Federal Materials > 1st Circuit > Massachusetts Federal Court > advanced: (((Title /4 VII) “42 U.S.C. 2000” “Pub. L. 88-352” “42 USC 2000” “78 Stat. 241” & (employment & discrim!)) & ((summary /3 judgment) OR (“Rule 56”) OR (FRCP /3 56) OR (F.R.C.P. /3 56))) & DA(aft 12-31-1989 & bef 01-01-1991).

207. The Tables are presented in the Appendix.

same-actor inference using an AutoRegressive-Integrated-Moving-Average (ARIMA) time-series method. One benefit of time series analysis is that it allows one to forecast future events based on past events. Moreover, an important benefit of the ARIMA method is that it allows one to forecast future percentages from past events while minimizing the temporal effect of autocorrelated data on the error terms and reducing the risk of Type I error. ARIMA modeling involves an iterative process to achieve a white noise series by taking into account noise parameters such as autoregressive and moving average terms.²⁰⁸

In brief, the ARIMA method regards a time series as having three possible features: stationarity, autoregressiveness, and a moving average.²⁰⁹ First, the *stationarity* aspect of the model entails the extent to which the time series remains in equilibrium or stable around a constant mean level. Second, the *autoregressive component* signifies the degree to which an observation at one time point is predictable from prior observations, meaning that values above the long-run average tend to follow values above the average, and values below the long-run average tend to follow values below that average.²¹⁰ For example, in a first-order autoregressive series, a time observation can be predicted from the observation immediately prior; therefore, the series may be regressed on itself one time point in the past. Finally, the *moving average* aspect of the model signifies whether the time series lags around a moving average (or random shocks) in the time series.²¹¹ These three parameters are often labeled *p*, *d*, and *q*, respectively, and expressed as ARIMA (*p*, *d*, *q*).²¹² Below, we provide our detailed statistical findings in the footnotes and place our narrative description of the results, along with the growth curves generated, in the body of the text.

208. Thor Norström, *Deriving Relative Risks from Aggregate Data. I. Theory*, 42 J. EPIDEMIOLOGY & COMMUNITY HEALTH 333 (1988).

209. See GENE V. GLASS ET AL., DESIGN AND ANALYSIS OF TIME-SERIES EXPERIMENTS 78 (Info. Age Publ'g 2008) (1975).

210. See DOUGLAS C. MONTGOMERY ET AL., INTRODUCTION TO TIME SERIES ANALYSIS AND FORECASTING 5 (2d ed. 2015).

211. See *id.*

212. ROBERT A. YAFFEE & MONNIE MCGEE, INTRODUCTION TO TIME SERIES ANALYSIS AND FORECASTING WITH APPLICATIONS OF SAS AND SPSS (2000); Leslie J. McCain & Richard McCleary, *The Statistical Analysis of the Simple Interrupted Time-Series Quasi-Experiment*, in THOMAS D. COOK & DONALD T. CAMPBELL, QUASI-EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS 233 (1979). ARIMA models are defined by the parameters labeled *p*, *d*, and *q*, expressed as ARIMA (*p*, *d*, *q*). The number of autoregressive terms (*p*) specifies the extent to which prior values have an impact on time-series values, meaning that the data are autocorrelated. The number of nonseasonal differences (*d*) specifies whether and what type of adjustment is needed to achieve stationarity, whereby the mean value of the dependent variable remains constant over the entire time series. The number of lagged forecast errors in the prediction equation (*q*) specifies whether an adjustment is needed to account for lagged effects of random shocks in the time series. See Todd M. Wyatt et al., *Population-Level Administration of AlcoholEdu for College: An ARIMA Time Series Analysis*, 18 J. HEALTH COMM. 898 (2013).

B. Results

This Section first presents the growth rate in the annual percentage of summary judgment decisions affected by the same-actor inference on a national basis and then turns to the growth rate in the annual percentage of such cases on a circuit-by-circuit court basis.

1. *Analysis 1: Has the Annual Percentage of Summary Judgment Decisions Affected by the Same-Actor Doctrine Grown?*

We first analyzed the degree to which federal district courts have increased application of the same-actor doctrine in Title VII cases at summary judgment. We theorized a rise in the annual rate of invocation of the same-actor doctrine given the doctrine's evolution and ever-widening scope, discussed in Part I.B.1.

As Table 1 in the Appendix reveals, the national frequency at which federal district courts adjudicate the same-actor doctrine at summary judgment in Title VII cases has increased annually from 1990 to 2013. Whereas from 1990 to 1994 the same-actor inference doctrine was seldom invoked, from 2000 to 2013 the annual frequency in application of the same-actor doctrine rose steadily to approximately sixty-four and sixty-three cases per annum in 2012 and 2013, respectively.

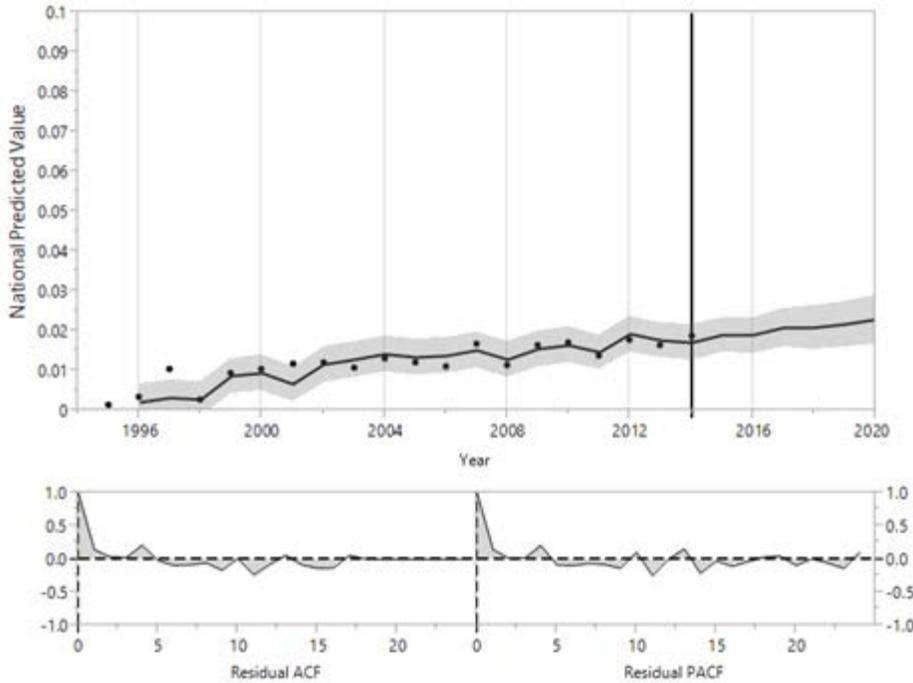
We then divided these frequency counts by the total number of summary judgment adjudications in Title VII cases to derive an annual percentage of summary judgment cases affected by the same-actor doctrine. We then employed these annual percentage figures to conduct a time-series analysis using an ARIMA model.²¹³ The ARIMA time-series analysis revealed that the rising growth rate in the percentage of cases affected by the same-actor inference on a national basis is statistically significant.²¹⁴ Moreover, the time-series analysis, depicted in Figure 1, reveals that, all else being equal, the

213. An ARIMA analysis entails three stages: identify, estimate, and forecast, which correspond to the stages described by Box and Jenkins. See GEORGE E.P. BOX ET AL., *TIME SERIES ANALYSIS: FORECASTING AND CONTROL* (5th ed. 2015). In the identification stage, one identifies the response series and candidate ARIMA models so as to suggest one or more ARIMA models that may fit. In the estimation and diagnostic checking stage, one estimates the parameters of the model and produces diagnostic statistics to help judge the adequacy of the model. In the forecasting stage, one uses the model to forecast future values of the time series and to generate confidence intervals for these forecasts. See BARBARA G. TABACHNICK & LINDA S. FIDELL, *TIME SERIES ANALYSIS IN USING MULTIVARIATE STATISTICS* ch. 18 (5th ed. 2007).

214. The time-series exhibited statistically significant time-dependent growth. An ARIMA(2,1,0) model fit using maximum likelihood and given by $Y_t = .000755 - 1.17Y_{t-1} - 0.723Y_{t-2} + Z_t$, $Z_t \sim WN(0, 5.145E-6)$ was found to best identify the trend as determined by using AIC. Adjusted $R^2 = .627$, $R^2 = .668$. The Box-Ljung Q statistic, which is distributed according to the chi-square distribution reveals that the residual autocorrelation for the specified ARIMA model was nonsignificant for more than 95 percent of lags (Lag 6: Box-Ljung Q = 2.0044, p = .9193; Lag 12: Box-Ljung Q = 6.52, p = .8878; Lag 18: Box-Ljung Q = 11.94, p = .85).

growth rate will continue to rise.²¹⁵ The ARIMA model predicts that the annual percentage will increase from between 1.39 percent and 2.41 percent in 2015 to between 1.65 percent and 3.04 percent by 2020.

FIGURE 1.
NATIONAL GROWTH RATE OF DECISIONS AFFECTED
BY THE SAME-ACTOR DOCTRINE



2. *Analysis 2: Does the Annual Rate of Decisions Affected by the Same-Actor Doctrine Differ Across U.S. Courts of Appeals?*

We then analyzed the degree to which invocation of the same-actor doctrine in Title VII summary judgment decisions differs on a circuit-by-circuit basis. This time-series analysis examines the degree to which the growth rate in invocation of the same-actor doctrine differs between circuits. We theorized that the growth rate would differ, chiefly predicting that the growth rate would be highest in federal circuits that apply the strong inference of nondiscrimination standard. In contrast, we theorized that the growth rate would be lower in circuits that allow (rather than require) courts to apply same-actor evidence at summary judgment, such as the Sixth Circuit, and lowest in

215. Prediction intervals for 2015 and 2020 are given by 1.39 percent and 2.41 percent, and 1.65 percent and 3.04 percent, respectively.

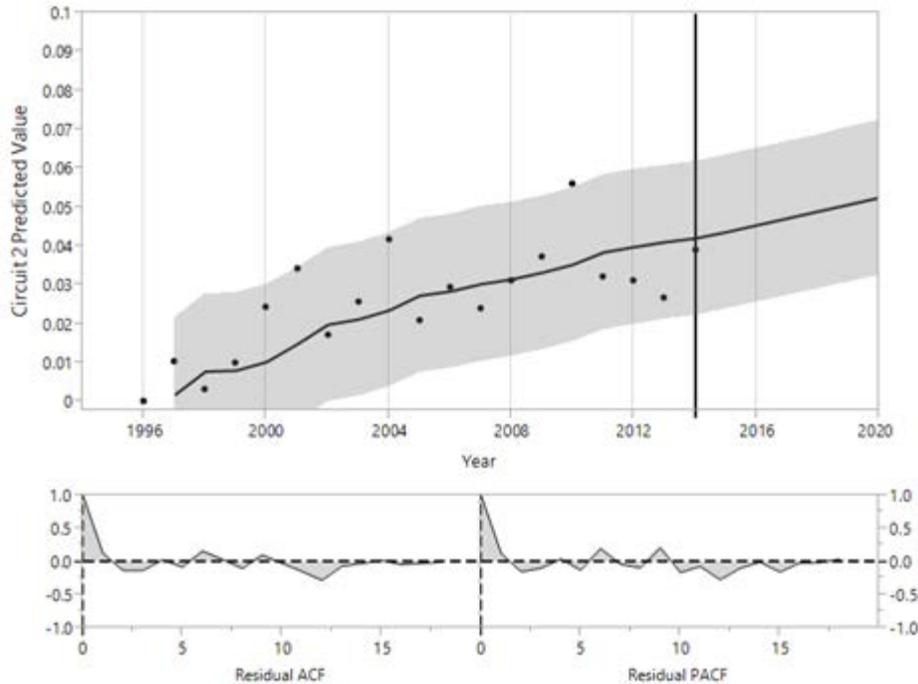
circuits that have sharply curtailed the same-actor doctrine, such as the Seventh Circuit.²¹⁶

As Table 2 in the Appendix reveals, the frequency with which federal district courts invoke the same-actor doctrine at summary judgment differs markedly across circuits. Whereas the annual frequency has risen sharply in the Second, Fourth, Fifth, and Ninth Circuits, the frequency is much lower in other circuits, including the Seventh, Eighth, Eleventh, and D.C. Circuits. The frequency in the Sixth Circuit lies between these two groups.

Next, we divided these frequency counts by the total number of summary judgment adjudications in Title VII cases within each U.S. Court of Appeals to derive an annual percentage of summary judgment cases affected by the same-actor doctrine by circuit.²¹⁷ We then conducted ARIMA time-series analyses that contrasted the growth rate trends in three circuits: the Second, Sixth, and Seventh Circuits, revealed in Figure 2 below.

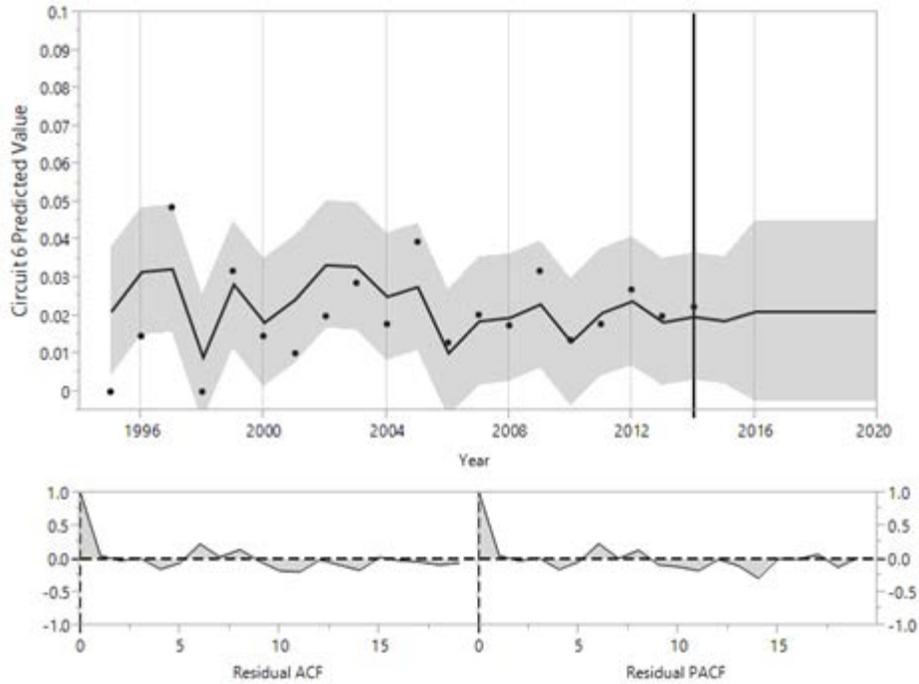
FIGURE 2.
GROWTH-RATE MODELS FOR THE SECOND, SIXTH, AND SEVENTH CIRCUITS

A. GROWTH-RATE PROJECTIONS IN SECOND CIRCUIT

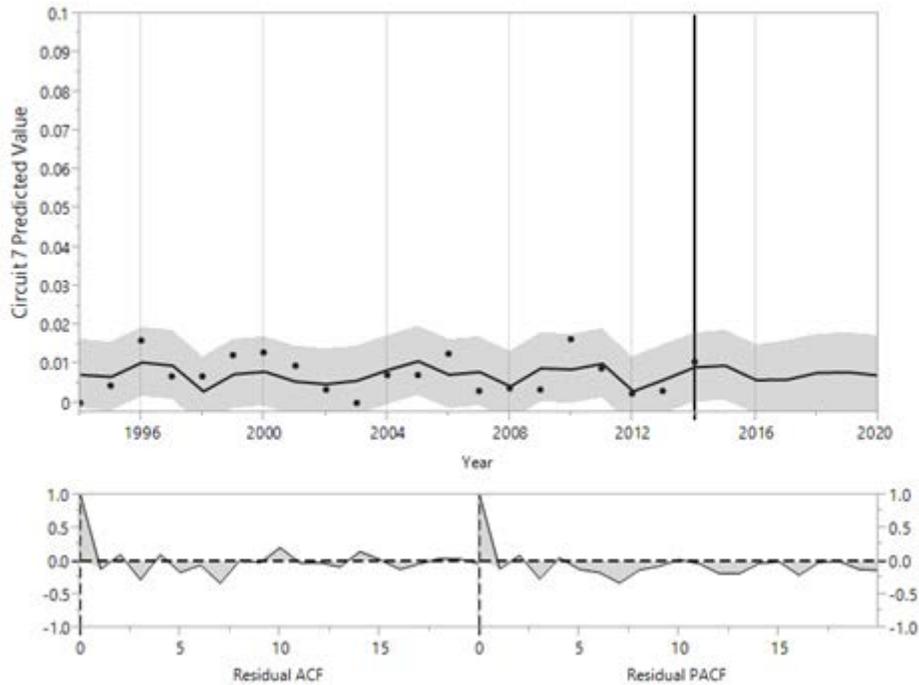


216. See *supra* Part I.3 and notes 191–92 and accompanying text.
 217. Tables with both the frequency counts and base rates within each circuit are presented in the Appendix.

B. GROWTH-RATE PROJECTIONS IN SIXTH CIRCUIT



C. GROWTH-RATE PROJECTIONS IN SEVENTH CIRCUIT



This ARIMA time-series analysis evidences that in Title VII cases adjudicated at summary judgment, the same-actor doctrine has been invoked at different rates across circuits and that the projected growth rate across circuits differs markedly. The projected difference in application across these three circuits is statistically significant.

To begin, as Figure 2 depicts, all else being equal, the growth rate in the Second Circuit will continue to rise.²¹⁸ The growth rate has risen sharply in the Second Circuit and is projected to increase further to between 3.26 percent and 7.23 percent by 2020.²¹⁹ This growth rate is theorized to represent the growth rate in federal circuits that apply the strong-inference-of-nondiscrimination standard.

In contrast, the rate at which the same-actor doctrine has been invoked at summary judgment is lower in the Sixth Circuit, where the annual rate is expected to remain constant at 2.11 percent, and projected to remain between 0.00 percent and 4.48 percent by 2020.²²⁰ Finally, the rate at which the same-actor doctrine has been invoked at summary judgment is least in the Seventh Circuit, where the annual rate is expected to remain constant at .73 percent, and projected to remain between 0.00 percent and 1.72 percent by 2020.²²¹

As revealed, the differential growth rate across circuit courts coincides with the different jurisprudential implications of the same-actor doctrine across circuits and the rate at which these courts in these circuits develop new, wider, and broader permutations of the same-actor doctrine. Consistent with our hypothesis, the projected doctrinal growth rate is highest in circuits that have

218. Prediction intervals for 2015 and 2020 regarding growth within the Second Circuit are between 2.38 percent and 6.35 percent, and between 3.26 percent and 7.23 percent, respectively.

219. The time-series in the Second Circuit exhibited statistically significant time-dependent growth. An ARIMA(0,1,1) model fit using maximum likelihood and given by $Y_t = .000177 + \varepsilon_t + .999\varepsilon_{t-1}$, $\varepsilon_t \sim \text{WN}(0, 0.000105)$ was found to best identify the trend as determined by using AIC. Adjusted R2 = .261, R2 = .3045. The Box-Ljung Q statistic, which is distributed according to the chi-square distribution reveals that the residual autocorrelation for the specified ARIMA model was nonsignificant for more than 95 percent of lags (Lag 6: Box-Ljung Q = 2.114, p = .9089; Lag 12: Box-Ljung Q = 8.577, p = .7386).

220. The time-series in the Sixth Circuit exhibited no statistically significant time-dependent growth. An MA(1) model fit using maximum likelihood and given by $Y_t = .02108 + \varepsilon_t + \varepsilon_{t-1}$, $\varepsilon_t \sim \text{WN}(0, 7.376\text{E-}5)$ was found to best identify the relationship between yearly observations as determined by using AIC. Adjusted R2 = .282, R2 = .3198. The Box-Ljung Q statistic, which is distributed according to the chi-square distribution reveals that the residual autocorrelation for the specified ARIMA model was nonsignificant for more than 95 percent of lags (Lag 6: Box-Ljung Q = 2.4847, p = .8702; Lag 12: Box-Ljung Q = 6.3686, p = .8964; Lag 18: Box-Ljung Q = 10.47, p = .9154).

221. The time-series in the Seventh Circuit exhibited no statistically significant time-dependent growth. An AR(2) model fit using maximum likelihood and given by $Y_t = .00728 + 0.1032Y_{t-1} - 0.4807Y_{t-2} + Z_t$, $Z_t \sim \text{WN}(0, 2.054875\text{E-}5)$, was found to best identify the relationship between yearly observations as determined by using AIC. Adjusted R2 = .118, R2 = .2065. The Box-Ljung Q statistic, which is distributed according to the chi-square distribution reveals that the residual autocorrelation for the specified ARIMA model was nonsignificant for more than 95 percent of lags (Lag 6: Box-Ljung Q = 3.7567, p = .7096; Lag 12: Box-Ljung Q = 9.4681, p = .6625; Lag 18: Box-Ljung Q = 13.2621, p = .7758).

enacted the strong inference of nondiscrimination standard, such as the Second Circuit. The Second,²²² Fourth,²²³ Fifth,²²⁴ and Ninth²²⁵ Circuits hold that the same-actor doctrine enacts a “strong inference” that the defendant did not engage in discrimination. These federal courts consider the same-actor inference very compelling,²²⁶ at times requiring claimants to come forward with “an extraordinarily strong showing of discrimination” to overcome the “strong inference” of nondiscrimination.²²⁷

The analysis also reveals that the doctrinal growth rate in the Sixth Circuit is lower than the Second Circuit. The Sixth Circuit²²⁸ and Third Circuit²²⁹ have adopted a doctrinal position in the middle holding that the same-actor inference is not a mandatory presumption but rather evidence that a judge may consider at summary judgment. Under this approach, a federal court would be permitted to deploy the same-actor inference at summary judgment when dismissing the plaintiff’s case.

Finally, the lowest doctrinal growth rate is found in the Seventh Circuit. The Seventh and Eleventh Circuits have rejected application of the same-actor doctrine at summary judgment, equating the same-actor situation to potential evidence of nondiscrimination for the ultimate trier of fact to consider.²³⁰ These U.S. Courts of Appeals have concluded that “[t]he ‘common actor’ or ‘same-actor’ inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law.”²³¹

Together, these results reveal that the evolving and ever-widening boundary of the same-actor doctrine coincides with a national growth rate in invocation of the same-actor doctrine at summary judgment. Our time-series analysis predicts that, all else being equal, the doctrinal growth rate will continue to rise. Secondly, the results reveal that the doctrinal growth rate among the federal circuits that adopt the strong-inference standard is higher (and is predicted to continue rising) when compared to circuits that have narrowed the legal effect of the doctrine, or curtailed the same-actor doctrine, such as the Sixth and Seventh Circuits. Troublingly, the doctrinal growth rate

222. See *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553 (2d Cir. 1997).

223. See *Taylor v. Va. Union Univ.*, 193 F.3d 219 (4th Cir. 1999), *abrogated on other grounds* by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

224. See *Boyd v. State Farm Ins. Cos.*, 158 F.3d 326 (5th Cir. 1998).

225. See *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090 (9th Cir. 2005).

226. See *supra* note 178.

227. See *also supra* note 179.

228. See *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003).

229. See *Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3d Cir. 1995) (noting that the same-actor inference “is simply evidence like any other and should not be accorded any presumptive value” (quoting the EEOC’s brief in the case)).

230. See *supra* note 191.

231. See *supra* note 192.

of the same-actor doctrine is projected to rise into the foreseeable future unless the doctrine is revisited and curtailed.²³²

IV.

RESOLVING THE TENSION BETWEEN THE SAME-ACTOR DOCTRINE AND PSYCHOLOGICAL SCIENCE

In this Part we explore the implications of law and psychological science on the same-actor doctrine. In so doing, we join with scholars and jurists in the tradition of calling for accumulated knowledge in the field of psychological science to be harnessed when designing and evaluating jurisprudence, law, and public policy.²³³ Psychological science has long served as a basis for evaluating and improving law and public policy.²³⁴ Indeed, the exchange between law, justice, and science has deep roots in both early²³⁵ and more recent Western philosophy.²³⁶ As William James once wrote when elucidating philosophical

232. In closing Part III, we note that, because our empirical study harnesses summary judgment adjudications, the results likely understate the wider consequences of the same-actor doctrine on the dynamics of civil rights litigation. In particular, plaintiffs' counsel would likely weigh the implications of procedural and substantive doctrines when engaging in case selection. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); cf. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012). That is, all else being equal, plaintiffs' counsel would likely refuse to represent claimants whose claims fall within the central boundaries of the same-actor doctrine. See Kaiser & Quintanilla, *supra* note 201, at 98–100. Ultimately, these claimants may choose to abandon their claims or to proceed as pro se claimants. *Id.* at 96.

233. See, e.g., WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (Cosimo, Inc. 2008) (1907); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); Lawrence, *supra* note, at 324–26; Kurt Lewin, *Action Research and Minority Problems*, in RESOLVING SOCIAL CONFLICTS 201 (Gertrud Weiss Lewin ed., 1948); see also HUNTINGTON CAIRNS, LAW AND THE SOCIAL SCIENCES 219 (1935) (“The development of the synthesis of law and psychology will be a long and perhaps a tedious process; but it is a process, however much patience it may require, which for the law will yield a fruitful harvest.”).

234. See generally Melvin M. Mark et al., *The Past, the Present, and Possible Futures of Social Psychology and Evaluation*, in SOCIAL PSYCHOLOGY AND EVALUATION 4 (Melvin M. Mark et al. eds., 2011); see also PETER H. ROSSI, FEEDING THE POOR: ASSESSING FEDERAL FOOD AID (1998); Donald T. Campbell, *Stereotypes and the Perception of Group Differences*, 22 AM. PSYCHOLOGIST 817 (1967); Kurt Lewin, *Action Research and Minority Problems*, 2 J. SOC. ISSUES 34 (1946).

235. See generally ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 112 (“The true student of politics, too, is thought to have studied virtue above all things; for he wishes to make his fellow citizens good and obedient to the laws. . . [C]learly the student of politics must know somehow the facts about soul, as the man who is to heal the eyes or the body as a whole must know about the eyes or the body; and all the more since politics is more prized and better than medicine; but even among doctors the best educated spent much labour on acquiring knowledge of the body. The student of politics, then, must study the soul, and must study it with these objects in view”); ARISTOTLE, POSTERIOR ANALYTICS (Jonathan Barnes trans., Oxford Univ. Press 2d ed. 1994); FRANCIS BACON, ADVANCEMENT OF LEARNING (William Aldis Wright ed., Oxford Univ. Press 1926) (1605); LOCKE, HUMAN UNDERSTANDING, *supra* note 112; PLATO, THE REPUBLIC, *supra* note 112.

236. See BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 31 (2007) (“Naturalism is a familiar development in recent philosophy: indeed, it would not be wrong to say that it is *the* distinctive development in philosophy over the last thirty years. . . . [T]raditional philosophical problems are . . . insoluble by the

pragmatism, “Science and metaphysics would come much nearer together, would in fact work absolutely hand in hand. . . . Science and critical philosophy thus burst the bounds of common sense. With science [naïve] realism ceases.”²³⁷ More recently, Professors Linda Krieger and Susan Fiske eloquently called on scholars and jurists to consider psychological science when designing legal doctrine: “[A]s judges develop and elaborate substantive legal theories, they should guard against basing their analyses on inaccurate conceptions of relevant, real world phenomena.”²³⁸ They urged jurists, when elaborating substantive legal theories, to identify advances within the field of psychological science that offer an empirically supported account of human behavior, and to contrast these empirically supported accounts with folk accounts of human nature embedded within the law.²³⁹ Finally, President Obama has recently issued an executive order calling for psychological and behavior science to be used in designing government policies that better serve the American people.²⁴⁰ Along this vein, Part I and Part II of our Article reveal epistemic tension between the folk accounts of human behavior animating the same-actor inference and the accumulated knowledge in the psychological sciences. Given the widening boundary of the same-actor doctrine and the doctrine’s troubling growth depicted in Part III, there is pressing need to reflect

a priori, armchair methods of the philosopher, and . . . require, instead, embedding in (or replacement by) suitable empirical theories.”); see also JOHN DEWEY, EXPERIENCE AND EDUCATION (1938); JAMES, *supra* note 233; W.V. QUINE, *Naturalism; or, Living Within One’s Means*, in QUINTESSENCE: BASIC READINGS FROM THE PHILOSOPHY OF W.V. QUINE 275 (Roger F. Gibson, Jr. ed., 2004).

237. JAMES, *supra* note 233, at 26, 82.

238. Krieger & Fiske, *supra* note 7, at 1000. Krieger and Fiske advanced a jurisprudential approach known as behavioral realism. *Id.* The approach was introduced at a July 2006 symposium issue discussing how advances in social and cognitive psychology lend new perspective to jurisprudence under federal nondiscrimination laws and the Equal Protection Clause. In the symposium, jurists and social and cognitive psychologists produced several noteworthy articles: Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Krieger & Fiske, *supra* note 7; Linda Hamilton Krieger, *Behavioral Realism in Law: Reframing the Discussion About Social Science’s Place in Antidiscrimination Law and Policy*, in BEYOND COMMON SENSE, *supra* note 112, at 383. For additional discussions of behavioral realism, see, for example, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506 (2005); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).

239. Professor Jerry Kang has elaborated a three-step process for this form of inquiry. First, one identifies psychological science that provides an accurate model of human behavior and decision making; second, one examines the “common sense” accounts of human behavior and decision making embedded within law and legal jurisprudence; and third, one accounts for the gap—where the gap is large, we must pressure law to bridge that gap. See Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627 (2015).

240. See Using Behavioral Sciences to Better Serve the American People, Exec. Order No. 13,707, 80 Fed. Reg. 54697 (signed Sep. 15, 2015) (“To more fully realize the benefits of behavioral insights and deliver better results at a lower cost for the American people, the Federal Government should design its policies and programs to reflect our best understanding of how people engage with, participate in, use, and respond to these policies and programs.”).

critically on this interstitial doctrine and to examine how it can be readapted to remain consistent with scientific evidence in the psychological sciences.²⁴¹

We return to the implicit theories of human behavior embedded within the same-actor inference doctrine. As described in Part II, the same-actor doctrine has been troublingly justified on grounds of common sense and economic rationality. The common sense justification presupposes an implicit descriptive theory of human behavior, whereby a decision maker who dislikes members of a protected group incurs psychological costs by associating with them. This lay theory suggests that because people who hold biases against stereotyped groups experience dissonance when closely working with out-group members, these persons explicitly anticipate, consider, and avoid the dissonance by choosing not to hire members of stereotyped groups.²⁴² Regarding economic rationality, the implicit behavioral theory behind this justification presupposes that, rather than hiring workers from a group one dislikes and firing them later, an economically efficient discriminator would refuse to hire stereotyped group members at all. Under this view, discrimination at termination cannot reflect how economically rational people actually behave and therefore, discrimination is unlikely in the everyday.

A. *Epistemological Tension Between the “Common Sense”
Underpinnings of the Same-Actor Doctrine and Decades of
Psychological Science on How Bias Manifests*

There is marked epistemological tension between the decades of accumulated psychological science on how stereotypes, prejudice, and discrimination operate against members of stereotyped groups and the lay psychological account animating the same-actor doctrine.²⁴³ The “common sense” explanation of the doctrine is predicated on the lay psychological theory that people who hold bias against members of stereotyped groups experience dissonance when working with them and, therefore, choose not to hire them. That is, this doctrine equates bias to “old-fashioned” prejudice, bias as the overt psychopathology of immoral and depraved bad actors—bias less frequently exhibited in society today. Given that the strong inference of nondiscrimination operates as a decisive defense, and licenses other forms of biased treatment, the doctrine is predicated on a folk account which presumes that Title VII prohibits only blatant, overt, and animus-laden discrimination. Yet, psychological science has shown that stereotyping, prejudice, and discrimination affect members of stigmatized groups far more pervasively than this account presumes. Stereotyping, prejudice, and discrimination are the result of common psychological processes; and this bias is, in fact, pervasive against members of stigmatized groups. Indeed, most majority-group members in American society

241. See Krieger & Fiske, *supra* note 7, at 1000.

242. See *supra* Part I.

243. See Krieger & Fiske, *supra* note 7, at 1039–52.

hold implicit bias in favor of their own majority-group and against minority-group members. Therefore, the pivotal question is not whether an actor holds bias, but rather whether the particular features of a context, situation, institution, or system are designed to curtail or cause the manifestation of implicit bias against members of stereotyped groups. Mainly, psychological science reveals that it is highly plausible for a person who holds bias against a member of a protected group to nonetheless hire a woman or minority, given the unique situational demands at the hiring stage, and later express disparate treatment against that same woman or minority at a subsequent employment stage.

Dual process perspectives on prejudice posit that the expression of implicit bias occurs automatically, with little awareness, control, and intention.²⁴⁴ Implicit bias is likely to manifest when situations afford discretion and subjectivity because these contexts provide many potential reasons for a given decision, and individuals may believe that they are objective when, in fact, they are influenced by implicit biases and stereotypes.²⁴⁵ However, people can override bias with an egalitarian response when they are motivated to be unbiased. For example, when people are aware of their propensity to express implicit bias, they may allocate more attention to regulating their decisions so that they behave in a more egalitarian manner.²⁴⁶ Yet, even those who truly desire to behave unbiasedly may express bias when they are cognitively taxed (e.g., multitasking, performing a complex task, etc.) and cannot garner sufficient mental resources to override biased decision making. Importantly, rather than primarily relying on individuals to regulate their own biases, situations can be designed to reduce the potential for implicit bias to emerge. Typically, these situational interventions involve minimizing the subjectivity laden in decision making, effectively rooting out bias where it is most likely to operate unjustly.

Dovidio and Gaertner, for example, conducted a laboratory experiment that examined reactions to black and white job applicants with very strong,

244. See *id.* at 1041; Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 *PSYCHOL. REV.* 101, 104 (2000).

245. See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013); Dovidio & Gaertner, *supra* note 58; Dovidio & Gaertner, *Aversive Racism*, *supra* note 51; Dovidio et al., *supra* note 46; Dovidio & Gaertner, *supra* note 6; Dovidio & Gaertner, *supra* note 52; Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 *CALIF. L. REV.* 945 (2006).

246. See Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 *J. EXPERIMENTAL SOC. PSYCHOL.* 1267 (2012); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5 (1989); Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations to Respond Without Prejudice*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 835 (2002); Margo J. Monteith et al., *Putting the Brakes on Prejudice: On the Development and Operation of Cues for Control*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 1029 (2002).

moderate, or very weak qualifications.²⁴⁷ When applicants' qualifications were either very strong or very weak, black and white applicants were recommended as hires at equivalent rates. In these situations, the clarity of the candidate's qualifications was so straightforward that there was little opportunity for subjective decision making. However, when applicants' qualifications were moderate, white applicants were hired more frequently than black applicants.²⁴⁸ Further, for white applicants, there was a jump in hiring recommendations from 6 percent when they had low qualifications to 76 percent when they had moderate qualifications; that is, moderately qualified whites were hired three-quarters of the time. In contrast, black applicants saw an increase from 13 percent when they had low qualifications to 45 percent when they had moderate qualifications; that is, identically moderately qualified blacks were hired less than half of the time. When there was room for discretion and subjectivity (when black and white applicants had moderate qualifications), white applicants were given the benefit of the doubt, whereas black applicants were not.

Similar discretionary contexts have yielded bias in experimental audit studies in labor markets. In a study of labor markets in Chicago and Boston, for example,²⁴⁹ Bertrand and Mullainathan sent identical resumes with either clearly white-sounding names (e.g., Greg Baker) or African American-sounding names (e.g., Jamal Jones) in response to posted employment ads. The resumes were experimentally varied to be strong or weak. Overall, white applicants received 50 percent more callbacks than African Americans. Given that the only attribute to vary across resumes was the name of the applicants, this finding shows clear evidence of discrimination against black job applicants. Additionally, white applicants with stronger resumes received 30 percent more callbacks than white applicants with weaker resumes. However, African American applicants with stronger resumes received only 9 percent more callbacks than African Americans with weaker resumes. This latter finding highlights that employers did not attend to strong qualifications in African Americans' resumes, which is consistent with decades of laboratory research showing that stereotypes can prevent people from noticing counter-stereotypical information (the same competence-related attribute is noticed when applied to Whites, but neglected when applied toward African Americans) and can cause them to reinterpret that information in a less favorable light (e.g., view the same information as diagnostic of competency for whites, but as nondiagnostic for African Americans).

247. See Dovidio & Gaertner, *Aversive Racism*, *supra* note 51, at 319–23.

248. *See id.*

249. See 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 (2004).

Taken together, these and many other²⁵⁰ psychological studies establish that when situations afford subjectivity and discretion, that is, when decisions entail ambiguous criteria or performance credentials, implicit bias may operate, prompting members of majority groups to favor members of their own group.²⁵¹ Decision makers do not perceive this in-group favoring as bias because the ambiguity in these contexts allows them to rationalize these decisions in ways that seem fair and impartial.²⁵² These biases are subtle, and even well-intentioned people who make biased decisions may honestly convince themselves that their decisions were based on neutral and legitimate criteria rather than bias.²⁵³ This logic is incorrect given that the experimental studies in the lab and labor market are tightly controlled, meaning that the only possible reason for favoring a white applicant is the candidate's racial group membership.

The expression of implicit bias is not inevitable, however, and the second stage of dual process theories of social cognition addresses how implicit bias can be overcome and corrected. Indeed, this second stage of the dual process model is crucial for determining whether people will correct their decision making and halt the operation of bias. In this stage, individuals' personal beliefs and motivations come into play. When people are motivated to be unbiased and have sufficient cognitive abilities to enact this motivation, they will consider their decision through the lens of egalitarian values and will behave without bias.²⁵⁴ This motivation to be unbiased can stem from differences in individuals' internalized racial attitudes or from external sources. External sources of this egalitarian motivation include social norms about being unbiased or workplace procedures that create oversight and accountability, leading individuals to slow down their processing and make careful decisions.²⁵⁵ When situations enhance the motivation and ability to control bias, people can exert control over their own implicit bias, helping them make fair decisions. Stated another way, whether implicit bias will manifest against members of stigmatized groups will be situationally and contextually aggravated, influenced, or attenuated. Discrimination may be exacerbated or

250. See BANAJI & GREENWALD, *supra* note 245; Corrine A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. 16474 (2012).

251. See, e.g., Russell H. Fazio, *Multiple Processes by Which Attitudes Guide Behavior: The MODE Model as an Integrative Framework*, in 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 75 (Mark P. Zanna ed., 1990); Krieger & Fiske, *supra* note 7, at 1039–42.

252. See Biernat & Fuegen, *supra* note 120; Phelan et al., *supra* note 120.

253. See Hodson et al., *supra* note 59, at 461.

254. See Devine, *supra* note 246; Monteith et al., *supra* note 246.

255. See Gilbert, *supra* note 39; Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341 (1984); Eliot R. Smith & Jamie DeCoster, *Dual-Process Models in Social and Cognitive Psychology: Conceptual Integration and Links to Underlying Memory Systems*, 4 PERSONALITY & SOC. PSYCHOL. REV. 108 (2000).

inhibited depending on the conditions in a situation and context.²⁵⁶ Situations may constrain the relationship between prejudice and bias, and powerfully curtail the degree to which bias is expressed.

One of the earliest social science studies on discrimination illuminates this “person x situation interaction” and underscores how unreasonable it is to infer that an actor who hires a member of a stereotyped group harbors no animosity toward that group.²⁵⁷ In this classic study, sociologist Richard LaPiere accompanied a Chinese couple to 251 hotels across the United States during the early 1930s. At each hotel, the group asked if they could be given a room or served a meal. Despite the marked anti-Chinese sentiment that characterized this time period in the United States, LaPiere and the couple were denied service only once. To investigate whether these positive behaviors represented a lack of bias toward the Chinese, LaPiere sent letters to these hotels six months after their visit asking if they would accept Chinese people in their establishments. In contrast to the positive reception received on actual visits, 92 percent of the businesses replied that they would not serve the Chinese.

Why would people who readily acknowledge their prejudice toward the Chinese actually fail to express behavior consistent with that prejudice in an actual interaction with Chinese guests? One reason for this disconnect between bias and behavior stemmed from the power of social situations in overriding dispositions and internally held attitudes. When the Chinese couple requested services, there was a strong situational norm to provide those services and to help potential patrons. Denying someone service requires publicly breaking service norms, something that many individuals find aversive and are reluctant to do. Thus, when the Chinese couple visited in person, the predominant norm to provide service may have been sufficiently powerful to override individuals’ attitudes toward the Chinese. In addition, LaPiere’s presence with his Chinese guests likely mitigated the expression of bias *in situ*. In short, the decision to allow the Chinese couple access in one instance had little bearing on the marked prejudice that these establishments harbored against this minority group. In the eight decades since, social scientists have systematically shown that situational factors can exacerbate or inhibit bias.²⁵⁸

256. See, e.g., Krieger & Fiske, *supra* note 7, at 1050 (“Whether biased decision makers will act in a way that expresses their bias varies as a function of many different variables, including the influence of social norms, the extent to which particular social norms are made salient in particular situations, decision makers’ perceptions of control, their motivation to avoid biased decision making, and the apparently relevant information they have at their disposal.”).

257. Richard T. LaPiere, *Attitudes Vs. Actions*, 13 SOC. FORCES 230 (1934).

258. BANAJI & GREENWALD, *supra* note 245; ALICE H. EAGLY, SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION (1987); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOCIAL PSYCHOL. 800 (2001); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004);

Regarding the second stage of the dual-process model, a supervisor who must make an employment decision in a context in which egalitarian norms are salient and in which discretion is cabined may not engage in discrimination, even though the supervisor harbors bias toward minorities or women. The folk depiction presumes that a person who holds bias at the hiring stage will be motivated to act on that bias and will do so irrespective of any criteria, expectations, norms, and constraints that operate at the hiring stage. This “common sense” account that people who hold bias would not hire minorities or women is deeply mistaken.

“Common sense” notwithstanding, it is not altogether inconceivable that an initial hiring decision may reflect the distinct possibility that a woman or minority was, in fact, the most highly qualified candidate. Indeed, despite bias against women in STEM, female computer programmers rank among the most celebrated scientists in the world, including Ada Lovelace (who is often regarded as the first computer programmer in the world), Grace Hooper (who is credited with helping to create the COBALT computer language and the word “debugging”), and Megan Smith (chief technology officer of the United States), among many others.²⁵⁹ Moreover, some workplaces may implement well-designed, formalized hiring criteria, leaving little discretion for supervisors to reject well-qualified women or minorities in the applicant pool. Further, despite harboring bias, HR managers may hire female or minority applicants to obtain the material, presentational benefits of diversity, which include signaling to clients, customers, prospective employees, and investors that the firm values diversity. Nancy Leong has powerfully argued that, at the hiring stage, firms may behave as if diversity is good business to obtain these signaling benefits.²⁶⁰

Indeed, there are many cases that illustrate situations which prompted the hiring of women and minorities, regardless of potentially biased decision makers at the hiring stage. For example, an initial hiring decision may reflect an employer’s desire to have a position expeditiously filled due to a pressing

Fiske, *supra* note 6; Monteith et al., *supra* note 246; Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177 (2003).

259. Indeed, among the most powerful people in the world are women who lead Fortune 500 technology companies, including Sheryl Sandberg (COO, Facebook), Safra Catz (Co-CEO, Oracle), Marissa Mayer (CEO and President, Yahoo), Susan Wojcicki (CEO, YouTube, Google), Ruth Porat (SVP and CFO, Google & Alphabet), Bridget Van Kralingen (SVP, IBM Global Business Services, IBM), and Diane Bryant (SVP & General Manager, Data Center Group, Intel). See Kristen Bellstrone et. al., *Fortune’s 50 Most Powerful Women List 2015*, 172 FORTUNE MAG. 90 (2015). Further, many brilliant female computer programmers who began careers at Google now lead start-up companies in Silicon Valley: Claire Hughes Johnson (COO, Stripe), Françoise Casals Brougher (Global Suiness Lead, Square), Stacy Brown-Philpot (COO, TaskRabbit), Katie Stanton (VP Global Media, Twitter), Natalie Fair (Head of Finance, Pinterest), Sukhinder Singh Cassidy (CEO, Joyus), April Underwood (Head of Platform, Slack), and Amy Chang (CEO, Accompany). See Patricia Sellers, *The Google Effect*, 172 FORTUNE MAG. 110 (2015).

260. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

need in the short term by a skilled employee.²⁶¹ When the exigent need passes, an employer may later fire the skilled claimant and fill the position with a majority-group member whom the employer favors.²⁶² Further, a workplace may have a strong organizational norm about rehiring employees on renewable annual contracts. As such, a manager may rehire an employee due to this organizational norm but later fire that employee based on bias. Indeed, in the latter scenario, an employer who desires to discriminate may face less resistance in firing than refusing to rehire the employee.²⁶³ Moreover, a high-level manager may be technically responsible for both hiring and firing employees, yet substantive decisions may be made by low-level managers, with the high-level manager largely accepting the recommendation of subordinates. In this scenario, the high-level manager's behavior reflects bureaucratic compartmentalization, with the substantive recommendations below tainted by bias.²⁶⁴ Finally, federal courts have extended the "hiring" prerequisite to scenarios in which a supervisor provides an employee an average, rather than a poor, review. Similarly, there are many reasons why a supervisor may provide an employee an average review, rather than a poor review. The average review might in fact reflect the employee's actual performance on the job.²⁶⁵ These examples, and countless more, underscore the incompleteness of the lay theory that when employers hire members of stereotyped groups they must necessarily like them and hold no bias toward them.

Finally, female and minority applicants may successfully circumnavigate the effect of stereotypes at the hiring stage; they may successfully self-present a less racially salient or a less stereotypical working identity to avoid stereotypes, such as by "resume whitening," a phenomenon that Devon Carbado and Mitu Gulati, among others, have explored.²⁶⁶ While bias against these employees may be less acute at the hiring stage, prejudice may emerge against them at later stages of the employment relationship when employment difficulties arise.²⁶⁷ Here, Carbado and Gulati's scholarship has revealed that bias is not

261. See *Spears v. Patterson UTI Drilling Co.*, 337 F. App'x 416 (5th Cir. 2009).

262. See *id.*; *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996).

263. See *Sreeram v. La. State Univ. Med. Ctr.-Shreveport*, 188 F.3d 314 (5th Cir. 1999) (affirming grant of summary judgment on Title VII claim alleging discriminatory discharge based on national origin and gender).

264. See *Ako-Doffou v. Univ. of Tex.*, No. 02-51287, 2003 WL 21417478 (5th Cir. June 3, 2003) (affirming grant of summary judgment against plaintiff who was hired by the University of Texas at San Antonio (UTSA) as visiting professor of finance, then renewed in tenure-track position. UTSA refused to reappoint claimant for a third year).

265. See *Idemudia v. J.P. Morgan Chase*, 434 F. App'x 495 (6th Cir. 2011).

266. See CARBADO & GULATI, *supra* note 8, at 15–16 (quoting Michael Luo, "Whitening" the *Résumé*, N.Y. TIMES, Dec. 6, 2009, at WK3); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1712 (1993) (describing the painful memories recounted by her grandmother of concealing her racial identity to gain entry into a workplace).

267. See Krieger & Fiske, *supra* note 7, at 1039–40. With regard to women in male-dominated workplaces, sociological evidence reveals that negative workplace social climates can lead to physiological stress responses. See Catherine J. Taylor, "Relational by Nature?" *Men and Women Do*

evenly distributed among all members of a stereotyped group.²⁶⁸ There is far-ranging variability among the psychological, physical, and social dimensions within minority groups,²⁶⁹ and an individual's experience with discrimination will vary considerably as a function of where they reside on the spectrum of these within-category features. For example, African Americans with more phenotypic stereotypic features (e.g., darker skin tone, wider noses, fuller lips) are more likely to be stereotyped and subjected to bias in both the lab and field.²⁷⁰ Racial minorities who are more highly identified with their racial group (those whose racial group membership is central to their self-concept) are more likely to experience discrimination compared to minorities who are less racially identified.²⁷¹ For example, social psychological experiments have demonstrated that strongly identified racial minorities (e.g., those who mentioned belonging to a racial affinity group) were evaluated more negatively by whites compared to identically portrayed minorities who did not express their racial identification (e.g., those who mentioned belonging to a social group unrelated to their racial background).²⁷² While minorities may self-present to avoid bias at the hiring stage, prejudice may emerge against them after entering the workplace. As Linda Krieger has noted, "Intergroup bias does not function as a stable trait or preference that expresses consistently across all situations."²⁷³

Not Differ in Physiological Response to Social Stressors Faced by Token Women, 122 AM. J. SOCIOLOGY (forthcoming); Bianca Manago & Catherine J. Taylor, *Occupational Sex-Composition and Chronic Physiological Stress Exposure* (draft on file with author).

268. See Blair et al., *supra* note 8; Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105 (1990); Kaiser & Pratt-Hyatt, *supra* note 8, at 432–34; Kaiser & Wilkins, *supra* note 8; Sei Jin Ko et al., *What the Voice Reveals: Within- and Between-Category Stereotyping on the Basis of Voice*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 806 (2006); Keith B. Maddox, *Perspectives on Racial Phenotypicity Bias*, 8 PERSONALITY & SOC. PSYCHOL. REV. 383 (2004); Eric Uhlmann et al., *Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America*, 20 SOC. COGNITION 198 (2002); Clara L. Wilkins et al., *Detecting Racial Identification: The Role of Phenotypic Prototypicality*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 1029 (2010).

269. Within a single stereotyped group, members of that group will differ from each other on a variety of dimensions, including phenotypic stereotypicality (the extent to which they physically resemble the prototype of their group, such as dark skin tone among African Americans), social class, education, national origin, religion, language and accent, gender, sexual orientation, and psychological identification with that group. See Kaiser & Wilkins, *supra* note 8, at 472.

270. For example, empirical studies on death-eligible federal defendants have revealed that more phenotypical African American murder defendants are more likely than less phenotypically stereotypic African American defendants to be sentenced to death, and this persists after controlling for a range of variables concerning the crimes. See Blair et al., *supra* note 8; Eberhardt et al., *supra* note 8, at 385.

271. See Kaiser & Pratt-Hyatt, *supra* note 8, at 443–44; Cheryl R. Kaiser et al., *Nonverbal Asymmetry in Interracial Interactions: Strongly Identified Blacks Display Friendliness, but Whites Respond Negatively*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 554 (2011).

272. See Kaiser & Pratt-Hyatt, *supra* note 8, at 443–44.

273. See Krieger, *supra* note 238, at 393.

In the end, this “common sense” account is too simplistic and incomplete to support legitimate legal doctrine that has material consequences on those who experience discrimination. Indeed, there are countless internal and external reasons for hiring a woman or a minority that have no bearing on whether one “likes” or “dislikes” protected groups.

*B. Epistemological Tension Between the “Economic Rationality”
Underpinnings and Psychological Science on Moral Licensing*

The same-actor doctrine has also been justified on grounds of economic rationality. This implicit theory has two strands. In the first, an employer engages in economically irrational conduct when terminating an employee for discriminatory reasons. Therefore, it would be exceedingly unlikely for an employer to discriminate when firing an employee. After all, the transaction costs required to hire and train a new employee would disincentivize arbitrary discrimination in the workplace. Under this view, after hiring a female or minority employee, a rational employer would not terminate that female or minority employee for discriminatory reasons. This economic rationality argument, therefore, bridges from an implicit normative theory of behavior (economic rationality) to the implicit descriptive behavioral theory that employers, as a matter of fact, do not engage in workplace discrimination. In the second strand, because the marginal cost of discrimination increases at later stages in an employment relationship (e.g., rehiring and retraining), a rational racist (or sexist) would discriminate at hiring rather than at later employment stages. Both strands underpin the belief that discrimination against women and minorities within American workplaces is extremely unlikely. To be sure, there are many flaws with these arguments, and the theory animating this concern is not new. Indeed, these arguments were quite en vogue in the 1960s and have been contested ever since.²⁷⁴ Psychological science conducted over the past two decades underscores additional reasons to discredit the economic irrationality underpinnings of the same-actor inference of nondiscrimination.

To begin, even if discrimination should be irrational as a normative matter, decades of behavioral economics have demonstrated that people systematically vary from the idealized accounts of economically rational decision making. Humans are boundedly rational: they may behave in economically rational ways in some contexts, but they systematically and routinely act irrationally across many contexts as a result of heuristics, stereotypes, biases, and prejudices. There are systematic pitfalls and

274. See BECKER, *supra* note 61; GEORGE EATON SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION (rev. ed. 1958); Howard Schuman & John Harding, *Prejudice and the Norm of Rationality*, 27 SOCIOLOGY 353 (1964).

shortcomings in social judgment.²⁷⁵ As such, whether employers, in fact, engage in workplace discrimination is a descriptive empirical question, one that need not be deduced a priori from normative theories about how rational actors ought to behave under idealized conditions.²⁷⁶

On this score, the descriptive theory of *homoeconomicus* fails to connect with the pervasive, accumulated evidence of discrimination against members of stereotyped groups in the current American workplace. While actors should behave as if discrimination is economically irrational, within American workplaces discrimination nevertheless persists. Troublingly, recent social psychological research has evidenced that between 20 percent and 40 percent of employers discriminate against members of a legally protected class.²⁷⁷ Further, a study of the American public revealed that, from 1997 to 2001, 18 percent to 21 percent of African Americans reported that they were discriminated against at their place of work within the last thirty days.²⁷⁸ In this study, “[31 percent of blacks and Hispanics] reported being ‘passed over for a promotion which went to a white [employee]’ because of racial discrimination.”²⁷⁹ Indeed, African Americans and Hispanics with higher levels of education reported experiencing higher levels of discrimination compared to other respondents.²⁸⁰ Further, within the United States, gender- and race-based income inequities persist.²⁸¹ Female wage earners have an average salary of \$33,900 per year, whereas males average \$47,700 per year.²⁸² African American households earn an average salary of \$22,500 less per year than white households, while Latino households earn about \$16,500 less than whites.²⁸³ Moreover, rates of unemployment are more than twice as high for African Americans relative to whites, and unemployment rates are significantly higher for Latinos compared to whites.²⁸⁴

Further, psychological science reveals the error of presupposing that actors avoid discrimination by making economically rational decisions. As discussed in Part I.B and Part IV.A, bias against women and minorities operates in less blatant ways than theorized especially when decision makers

275. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); ROSS & NISBETT, *supra* note 30; Smith & Collins, *supra* note 30.

276. See SEN, *supra* note 121, at 176–78; see also BEHAVIORAL LAW AND ECONOMICS 11–58 (Cass R. Sunstein ed., 2000); Kahneman & Tversky, *supra* note 255.

277. Bendick & Nunes, *supra* note 116, at 244–45.

278. See Nielsen & Nelson, *supra* note 108, at 17 (citing TOM W. SMITH, UNIV. OF CHI., MEASURING RACIAL AND ETHNIC DISCRIMINATION 24 (2002)).

279. *Id.* (citing SMITH, *supra* note 278, at 28).

280. *Id.*

281. CARMEN DENAVAS-WALT ET AL., U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU CURRENT POPULATION REP. NO. P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 (2011); Nier & Gaertner, *supra* note 4.

282. DENAVAS-WALT ET AL., *supra* note 281.

283. *Id.*

284. News Release No. USDL-12-0012, Bureau of Labor Statistics, U.S. Dep’t of Labor, The Employment Situation—December 2011 (Jan. 9, 2012).

use subjective and ambiguous criteria, or when decision makers fail to exert the effort necessary to reach egalitarian decisions. Further, psychological science on moral licensing reveals the error of presuming that the psychology of hiring applicants is necessarily equivalent to an employer's behavior toward employees within the workplace. Studies on moral licensing reveal the hazard that a firing decision following a hiring decision stems from bias. The act of hiring a black candidate, even an exceptionally qualified one, as was the case in the Monin and Miller (2001) experiment,²⁸⁵ can result in subsequent racially biased decision making toward the same and other black candidates. A supervisor who feels licensed as egalitarian and nonprejudiced (because he or she hired the first black employee) may decide to fire or discipline the same or another black employee for an action (e.g., inadequate performance, negative interpersonal behavior, tardiness), but choose not to similarly fire or discipline a white employee who engages in the same action. Indeed, it is well established that supervisors provide more second chances to in-group members than out-group members.²⁸⁶

Research on moral licensing also reveals that the psychology behind hiring and firing decisions differs because these decisions are made on a case-by-case basis: when an individual employee's actions are considered in isolation, rather than in direct comparison to other employees. For example, when considering the scenario involving the firing of Jason, the manager, Mike, weighed the seriousness of Jason's actions and decided whether they were sufficient to warrant disciplinary action. Mike was not comparing Jason's actions to similar actions of others and determining which is worse; rather Jason's actions were considered in isolation. In these situations, managers have greater discretion to conclude that a given action requires disciplinary action or dismissal. This discretion can result in the manifestation of implicit bias against minorities who experience greater punishment than nonminorities although they both are engaging in similar negative actions.²⁸⁷ Indeed, it is much more difficult to recognize the operation of discriminatory animus in a case-by-case decision as compared to pool-based decision making.²⁸⁸ Thus, the moral licensing effect of hiring a black employee may increase the likelihood that a supervisor will make adverse decisions against that black employee, other black employees, or other members of stigmatized groups. At the same time, a supervisor may convince themselves and others that these disparities stem from

285. Monin & Miller, *supra* note 22.

286. See Nielsen & Nelson, *supra* note 108, at 18 (citing K.A. DIXON, DUKE STOREN & CARL E. VAN HORN, JOHN J. HELDRICH CTR. FOR WORKPLACE DEV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB (2002), http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/A_Workplace_Divided.pdf); see also Norton et al., *supra* note 58.

287. See George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554 (1998).

288. See Kaiser & Pratt-Hyatt, *supra* note 8; Kaiser et al., *supra* note 271.

rational reasons. In sum, well-intentioned people, even people who have made a decision that favors a black employee, are susceptible to engaging in biased decision making when they have discretion to justify their behavior in unbiased ways.²⁸⁹

Case law reveals many instances where bias operates after an employee is hired. Indeed, as the Seventh Circuit in *Johnson v. Zema* articulated, there are many reasons why someone who holds animus toward a protected group may nonetheless hire a minority-group member. For example, a manager might hire a person of a certain race expecting not to have frequent contact with them given their respective positions within the company. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender but then fire that employee if he or she fails to comply with the employer's gender-based stereotypes.²⁹⁰ Similarly, if an employee were the first African American hired, an employer might be unaware of his or her own stereotypical views of African Americans at the time of hiring.

Moreover, social scientists have demonstrated many circumstances in which employers behave as if discrimination is economically rational.²⁹¹ Sociological evidence reveals that employers discriminate against employees who fail to assimilate, including employees who exhibit a racially salient working identity in the workplace.²⁹² For example, employers rationalize their actions as economically necessary given the sensibilities of customers or employees.²⁹³ In addition, employers often assign female and minority employees more onerous or less prestigious assignments that lend less potential for advancement.²⁹⁴ In so doing, employers rationalize the allocation of scarce opportunities (or less prestigious assignments) by the need to invest in employees with the most leadership potential. Sociological evidence also reveals that employers often discriminate against women who become pregnant²⁹⁵ and employees who fail to conform to normative schemas,

289. See NANCY DiTOMASO, *THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM* (2013).

290. *Dasgupta v. Harris*, 407 F. App'x 325 (10th Cir. 2011).

291. See CARBADO & GULATI, *supra* note 8, at 77–78 (discussing plausible economically rational arguments describing bias exhibited in *Rogers v. American Airlines*).

292. See *id.*

293. See, e.g., *United States v. N.Y.C. Transit Auth.*, No. 04-CV-4237, 2010 WL 3855191 (E.D.N.Y. Sept. 28, 2010).

294. See *THE GLASS CEILING IN THE 21ST CENTURY*, *supra* notes 26 and 27.

295. See Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2012)); 29 C.F.R. § 1604.10(b) (2015); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2012)), *as recognized by Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). See generally Shelley J. Correll, Stehan Benard & In Paik, *Getting a Job: Is there a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1332–33 (2007) (“In this project, we make two main contributions. First, we isolate and experimentally evaluate a status-based discrimination mechanism that is proposed to explain some of the disadvantages mothers experience

stereotypes, and scripts about how women²⁹⁶ or members of stereotyped groups should present themselves in the workplace.²⁹⁷ Employers have rationalized discrimination against women and minorities as necessary to preserve the employer's corporate image.²⁹⁸ Finally, employers have rationalized discrimination against women who complain of masculine cultures in computer programming workplaces.²⁹⁹

Returning to our first hypothetical involving Betty who sought a promotion, if initial hiring decisions reflect a lack of bias, then one would anticipate that, all else being equal, women would climb the corporate ladder at rates commensurate with men. The well-documented dearth of women in top-level positions in all types of organizations, however, suggests that something along the career pathway impedes women from advancing as quickly and successfully as men.³⁰⁰ This top-level gender imbalance is undoubtedly multi-determined, with factors including disparate motherhood disadvantaging women's ascent. Even so, aside from motherhood penalties, discrimination against women also hinders their advancement. Compared to men, women are less likely to be thought of as leaders, further slowing their ascent up the ladder.³⁰¹ Further, when women display the behaviors people expect of leaders, such as self-promotion, their efforts are met with resistance and backlash, and

in the paid labor market. . . . The second contribution we make in this project is to show that real employers discriminate against mothers.”); Daniela M. de la Piedra, Comment, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275 (2008).

296. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m) (2012)), *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014). See generally Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL'Y 205 (2007).

297. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981). See generally Paulette M. Caldwell, *Intersectional Bias and the Courts: The Story of Rogers v. American Airlines*, in RACE LAW STORIES 571, 573 (Rachel F. Moran & Devon Wayne Carbado eds., 2008); Crenshaw, *supra* note 106, at 139–40; Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1093 (2010).

298. See, e.g., *N.Y.C. Transit Auth.*, 2010 WL 3855191.

299. See, e.g., Amy Gray, *'Titstare' App at Techcrunch: Women in Tech Deserve Better*, THE GUARDIAN (Sept. 8, 2013, 10:58 PM) <http://www.theguardian.com/commentisfree/2013/sep/09/titstare-app-women-tech-sexism> [perma.cc/UF3Q-TLLV] (“When developers are allowed to showcase apps which ‘let you stare at tits’ during a conference, you know gender inclusivity in the industry remains wishful thinking.”); *Interview with Julia Ann Horvath*, MODEL VIEW CULTURE (Sept. 15, 2015), <https://modelviewculture.com/pieces/interview-with-julie-ann-horvath> [perma.cc/NB8C-G8BQ] (“[T]he moment you raise your hand and say I think this is wrong, you are immediately excommunicated . . .”).

300. NANCY M. CARTER ET AL., CATALYST, PUB. NO. D121, HIGH POTENTIALS IN THE PIPELINE: ON THEIR WAY TO THE BOARDROOM (2013); ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS (2007).

301. EAGLY & CARLI, *supra* note 300; Richard F. Martell et al., *Sex Stereotyping in the Executive Suite: “Much Ado About Something,”* 13 J. SOC. BEHAV. & PERSONALITY 127 (1998).

they are perceived as pushy, bossy, and unkind—all attributes that are not attributed to men who engage in the same self-promotional behaviors.³⁰²

This extensive body of social-psychological research documenting barriers to women's ascent of the corporate ladder is relevant to understanding the same-actor doctrine. When women are initially hired, they are hired on the basis of whether their current skills fit a given position. As they build their careers within an organization, however, they increasingly target higher positions that demand greater leadership skills and agentic traits, characteristics stereotypically viewed as more characteristic of men than of women.³⁰³ This gendered context characterizing promotion and advancement opens the door for managerial subjectivity and discretion and can unleash bias against women. They may be disproportionately passed over because they do not “seem like leaders,” or because they are perceived as “too difficult” when they engage in behaviors that facilitate advancement. These stereotype-driven perceptions will become more salient and relevant the longer a woman stays in a position, showing how the delayed ascent of the corporate ladder may occur to women even though they were initially viewed as strong fits for a less agentic position. In other words, as work demands change in a given workplace context, so too do opportunities for the expression of implicit bias.

Finally, we turn to the second strand of the economic rationality doctrine: the theory that an economically rational racist (or sexist) individual would discriminate at the hiring stage rather than at later stages of the employment relationship given the higher marginal costs of discrimination. This theory is troubled on its own terms for two reasons. First, focusing exclusively on marginal costs, the theory fails to consider marginal benefits, even to actors with a “taste for discrimination,” by hiring women and minorities into a workplace—a diversity premium. Because female and minority hires diversify

302. Laurie A. Rudman & Peter Glick, *Feminized Management and Backlash Toward Agentic Women: The Hidden Costs to Women of a Kinder, Gentler Image of Middle Managers*, 77 J. PERSONALITY & SOC. PSYCHOL. 1004 (1999); Laurie A. Rudman & Kimberly Fairchild, *Reactions to Counterstereotypic Behavior: The Role of Backlash in Cultural Stereotype Maintenance*, 87 J. PERSONALITY & SOC. PSYCHOL. 157 (2004); Laurie A. Rudman et al., *Status Incongruity and Backlash Effects: Defending the Gender Hierarchy Motivates Prejudice Against Female Leaders*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 165 (2012).

303. Linda Krieger and Susan Fiske have reasoned that disparate treatment doctrine incorporates the descriptive behavioral theory that biased decision makers discriminate consistently across contexts. See Krieger & Fiske, *supra* note 7, at 1042. As both they and we have argued, the context in which a decision maker chooses to hire a woman is markedly different from the context in which a decision maker chooses to promote that woman to a leadership position. These contexts entail different norms, different kinds of information, different experiences with the employee, different criteria, and different schemas, scripts, and stereotypes applicable to the employee to be hired or promoted. As a result, a biased decision maker will likely discriminate differentially across contexts. See Kaiser & Wilkins, *supra* note 8, at 462, 465 (“[S]trongly identified group members are more likely to be the recipients of prejudice and discrimination than weakly identified group members. . . . In situations in which majorities and minorities have frequent contact with each other, majority group members can use behavioral observations to draw inferences about identification.”).

the workplace, these marginal benefits operate primarily at the hiring stage. Second, the theory assumes that there are economically rational racist (and sexist) individuals in American workplaces who seek to cost-benefit maximize their “taste for discrimination.” The chief difficulty is that for these actors the doctrine modifies the ex-ante default rule and creates a license to discriminate against female and minority employees whom they have hired. For these actors, the doctrine reduces the effectiveness of discrimination claims by members of protected groups—a meaningful deterrent. The license, therefore, reduces the marginal cost of discrimination at later stages of the employment relationship. As such, bias against women and minorities becomes more economically rational, which is a troubling implication, especially if one presupposes that managers with “a taste for discrimination” lurk in American workplaces.³⁰⁴

C. Closing the Circuit Split on the Same-Actor Inference

Having called into question the epistemological tension between the lay theories animating the same-actor doctrine and the vast psychological science available to jurists and scholars, we now turn to closing the circuit split on the same-actor inference.³⁰⁵

To begin, the same-actor inference is not codified in any federal civil rights statute. That is, no federal court has squared the same-actor doctrine with the text of Title VII itself or the legislative history of federal civil rights enactments. Instead, the same-actor doctrine is an interstitial doctrine, first invented by the Fourth Circuit, and since adopted by other circuits into the evidentiary framework for disparate treatment claims. Indeed, the only positive law supporting the same-actor inference is, in effect, the weight of prior elaboration of the doctrine without congressional support. Because there is no legitimate textual or purposive justification for the doctrine, courts have largely relied on common sense and economic rationality to predicate the doctrine.³⁰⁶

304. As described in Part I.B, *supra*, we caution that psychological science on stereotyping, prejudice, and discrimination reveals that bias does not operate in this blatant manner. Nevertheless, we have chosen to expose the flaws of the economic rationality theory on its own terms.

305. In short, the flawed doctrine has been contrasted against, and shown to be manifestly inconsistent with, wide bodies of empirical inquiry in the fields of psychology and sociology. This gap between theory and empirical reality poses a problem, one prompting the need for critical reflection and adaptation of the doctrine. See, e.g., WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING (Cosmo Inc. 2008) (1907).

306. We have found one explanation that has attempted to square the same-actor doctrine with the purpose of federal antidiscrimination law. In *Proud v. Stone*, Judge Wilkinson explained that the same-actor inference of nondiscrimination advances the aim of the statute by incentivizing the hiring of qualified minority and female applicants because the doctrine blocks any future claims of employment discrimination. See 945 F.2d 796, 798 (4th Cir. 1991). That is, the doctrine has been justified on the lay theory that without the defensive-liability shield of the same-actor doctrine, employers would not hire women and minorities, or members of protected groups. This argument is quite obviously and shamefully flawed. As we have described in Part IV.A, *supra*, there are many legitimate reasons why employers choose to hire women, such as when women are the most highly

As we have revealed at length, both of these implicit descriptive accounts are empirically false. Further, insofar as the doctrine limits Title VII's reach to blatant animus by "old-fashioned" racists, the doctrine impermissibly abrogates the central purpose of Title VII, which was congressionally enacted to eradicate discriminatory behavior within the employment sector of the U.S. economy.³⁰⁷

The same-actor doctrine has operated as a judicial heuristic swiftly filtering out disparate treatment claims at summary judgment. The doctrine implicitly presumes that this filter largely screens out meritless cases. However, as the moral credentialing literature reveals, there is a hazard that firing a member of a protected class after hiring likely resulted from bias. As such, the judicially enacted filter is poorly engineered, screening out false negatives of potentially meritorious cases. At summary judgment, the dismissal rate for same-actor doctrine cases is 80 percent, and the scope of the doctrine is broadening in circuits that have adopted the strong inference of nondiscrimination standard.³⁰⁸ Part III suggests that organizations have responded to the moral credential and legal license by altering employment structures to harness this defense, widening and broadening applicability of the strong inference of nondiscrimination itself. In short, the judicial screen is manifestly unjust on its own terms and pernicious—forming a legal license that, like a vicious cycle, feeds back on itself to further erode the remedial scheme that Congress enacted.

Given the lack of textual support for the doctrine and its lack of a neutral and legitimate basis, as well as the psychological science amassed that powerfully reveals the errors laden within the doctrine, we recommend that federal courts resolve the circuit court split by adopting the Seventh Circuit's approach, most recently elaborated by Circuit Judge David F. Hamilton in *Perez v. Thorntons, Inc.*³⁰⁹ In that case, the Seventh Circuit concluded that although same-actor evidence may be argued to the jury, it was not a

qualified applicants. One need only compare and contrast across circuits (some of which adopt the strong inference of nondiscrimination, like the Second Circuit, and others that do not, like the Seventh Circuit) to discern that the same-actor inference of nondiscrimination is not necessary to ensure that women and minorities are hired into American workplaces. The doctrine, moreover, creates a legal license to disparately treat qualified minority and female candidates who have joined the workplace, affecting the potential for promotion and persistence in the workplace.

307. See *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015). When creating the same-actor doctrine, the Fourth Circuit selected one of many doctrinal possibilities to resolve the doctrinal ambiguity and indeterminacy within Title VII jurisprudence. Bell, *supra* note 10, at 367; Crenshaw, *supra* note 9 at 1341–46. Unfortunately, the Fourth Circuit's doctrinal choice subordinates the experiences of members of stereotyped groups. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 323, 324 (1987) ("[T]hose who have experienced discrimination speak with a special voice to which we should listen.").

308. See *supra* Part I.B.1 & Fig.2.

309. *Perez v. Thorntons, Inc.*, 731 F.3d 699 (7th Cir. 2013); see Krieger & Fiske, *supra* note 7, at 1046; Martin, *supra* note 133, at 1168–70; Martin, *supra* note 196, at 360 n.206; Moss, *supra* note 148, at 73.

conclusive presumption that applies as a matter of law.³¹⁰ Instead, this evidence is “for the trier of fact to consider.”³¹¹ Similarly, in *Johnson v. Zema*, the Seventh Circuit reversed the trial court’s grant of summary judgment in favor of the employer and deemed the same-actor inference inappropriate. The Seventh Circuit concluded that, “[T]he same-actor inference is not itself evidence of nondiscrimination. It simply provides a convenient shorthand for cases in which a plaintiff is unable to present sufficient evidence of discrimination.”³¹² The Seventh Circuit reasoned that

the same-actor inference is unlikely to be dispositive in very many cases. In fact, we have found no case in this or any other Circuit in which a plaintiff relying on circumstantial evidence to prove an improper motive was able to produce sufficient evidence to otherwise sustain his burden on summary judgment and yet was foreclosed from the possibility of relief by the same-actor inference.³¹³

In a subsequent decision, *Kadas v. MCI Systemhouse Corp.*, the Seventh Circuit reiterated that it had “emphatically rejected the ‘same-actor inference’ in the race-discrimination setting in *Johnson v. Zema Systems Corp.*, . . . and our conclusion there applies with equal force to proof of age discrimination.”³¹⁴

Further, U.S. Courts of Appeals that have yet to consider the continuing viability of the same-actor doctrine should adopt the Seventh Circuit’s approach. In so doing, these courts would ensure that the burden-shifting framework at summary judgment and trial remains consistent with the psychological science that has accumulated over the past several decades. Those courts that have applied the same-actor inference should revisit their jurisprudence and adopt the Seventh Circuit’s jurisprudence recently elaborated in *Perez v. Thorntons, Inc.*³¹⁵ Further, if the U.S. Supreme Court sees fit to examine the circuit split on the issue, the Court should consider the robust psychological evidence that supports abrogating the inference.

In sum, we recommend that federal courts draw on the Seventh Circuit’s approach by narrowing the doctrine and essentially discontinue applying the doctrine at all stages of the federal litigation process: the pleading stage, summary judgment, and trial. When the same-actor hires and takes an adverse action against a member of a protected group, an employer may argue that hiring the claimant is evidence of nondiscrimination. Whether this same-actor

310. *Perez*, 731 F.3d at 709 (citing *Blasdel v. Nw. Univ.*, 687 F.3d 813, 820 (7th Cir. 2012)).

311. *Id.* (quoting *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002)).

312. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999).

313. *Id.*

314. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361 (7th Cir. 2001) (citation omitted). However, in at least two subsequent decisions, one of which was overruled, the court seemed to signal the continued viability of the same-actor inference within the Seventh Circuit. See *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 648 (7th Cir. 2006), *overruled by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013); *Nwanna v. Ashcroft*, 66 F. App’x 9 (7th Cir. 2003).

315. *Perez*, 731 F.3d at 699.

evidence is convincing should be for the trier of fact to weigh along with all other evidence. The same-actor doctrine should no longer trigger an inference that raises the plaintiff's evidentiary burden at the pleading stage, summary judgment, or trial. The issue is fundamentally an evidentiary matter for the jury to resolve. Moreover, scholars and jurists should continue to study how best to inform juries, when relevant, about the vast knowledge accumulated in the field of psychological science to guide juries in evidence-based decision making.³¹⁶

CONCLUSION

In this Article, we have demonstrated the profound epistemological tension between the lay psychological theories animating the same-actor doctrine and decades of psychological science on prejudice, implicit bias, aversive racism, moral credentials, and moral licensing. The same-actor inference, though nominally justified on the grounds of common sense and economic rationality, simply fails on those ostensible bases. The doctrine is inconsistent with the best science available in the field of psychological science. As such, this interstitial creation must be curtailed. No legitimate, neutral, nondiscriminatory policy sufficiently justifies the doctrine. Given the dearth of both textual support and legislative history supporting the same-actor doctrine, federal courts should reflect and reevaluate the interstitial doctrine. Same-actor evidence is fundamentally for the trier of fact along with all other potential evidence of discrimination.

As such, we return where we began, with the two instances of employees who challenge their employer's conduct as discriminatory. We revisit these hypotheticals to explore how their grievances would fare in light of our recommendation.

In the first hypothetical, Betty is a female computer programmer who works for a technology company in Silicon Valley. Betty applied for a promotion to a supervisory position, but Mike ultimately chose not to promote her. Instead, Mike promoted Carl as a supervisor under the assumption that Carl would be a better leader of computer programmers, despite being less qualified than Betty. In this first example, if a federal court applies the same-actor doctrine, the court would apply a strong inference of nondiscrimination at summary judgment and require Betty to provide powerful direct evidence of discrimination. In contrast, our recommendation would be that the same-actor

316. See, e.g., Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537 (2012); Sara Gordon, *What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking*, 81 TENN. L. REV. 751 (2014); Jessica M. Salerno & Shari Seidman Diamond, *The Promise of a Cognitive Perspective on Jury Deliberation*, 17 PSYCHONOMIC BULL. & REV. 174 (2010); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007); Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL., PUB. POL'Y, & L. 629 (2000).

doctrine should not apply. Instead, the fact that Mike was the manager who both hired and failed to promote Betty would be circumstantial evidence that the technology company could offer as evidence of a lack of discriminatory intent against women before the jury. On this evidence, a jury may find Betty's employer not liable after deliberating. However, there would be no mandatory inference, presumption, or heightening of the evidentiary burden foisted on Betty at summary judgment. Mike's status as the manager who both hired Betty and failed to promote her is simply one evidentiary datum in the entire context of the situation that Betty challenges as an unlawful failure to promote. The trier of fact would grapple with whether the technology company unlawfully imposed a glass ceiling on Betty, a female computer programmer.

In the second hypothetical, Jason is an African American unloader for a logistics company in Tuscaloosa, Alabama. Mike hired Jason three years ago. Although Jason complained to Mike about Dan's disparate write-ups, rather than investigating Jason's complaint, Mike fired Jason after several incident reports. Applying the same-actor doctrine, a court would apply a strong inference of nondiscrimination, requiring Jason to combat this inference of nondiscrimination with direct evidence of bias. In contrast, our recommendation would be that the same-actor doctrine should not apply. Again, the fact that Mike was the manager who both hired and fired Jason would be circumstantial evidence of nondiscrimination. That is, the jury could decide to draw on this circumstantial evidence if it wishes to do so. There would be, however, no heightening of the evidentiary requirement on Jason at summary judgment. Again, Mike's role as the same supervisor who hired and fired Jason would be one evidentiary data point in the entire fabric of the chronology leading to Jason's claim of unlawful termination.

In this Article, we have introduced a body of psychological science that speaks directly to how prejudice and discrimination operate in modern American workplaces. An important finding in this body of research is the psychological phenomena of moral credentialing and moral licensing.³¹⁷ People feel more comfortable acting in ethically questionable ways when they can point to evidence that previously demonstrated a lack of prejudice.³¹⁸ After making a decision that favors a member of a stereotyped group, such as by hiring or promoting an applicant (even if that employee was eminently qualified to be hired or promoted), a subsequent decision about a member of a stereotyped group is more likely to result in the manifestation of bias. When making the subsequent decision, people are less likely to self-monitor to ensure that they act in egalitarian and unbiased ways. Troublingly, the same-actor

317. See Merritt et al., *supra* note 32; Miller & Efron, *supra* note 32.

318. See Bradley-Geist et al., *Moral Credentialing*, *supra* note 33; Efron et al., *supra* note 20; Efron et al., *Inventing Racist Roads*, *supra* note 33; Efron, *supra* note 33; Mann & Kawakami, *supra* note 33; Monin & Miller, *supra* note 22.

doctrine materially reinforces and reifies this psychological license into a legal license to engage in bias.

In conclusion, the assumptions of human nature embedded within the same-actor doctrine are contrary to psychological science. The same-actor inference presupposes that the same-actor who hires and takes adverse action against a member of a stereotyped group is bias free. Yet, psychological science reveals the error of this flawed account of human nature. Federal courts must remain cautious and vigilant about the possibility of bias in the same-actor context. Indeed, circuit courts that apply the strong inference of nondiscrimination at summary judgment have the matter scientifically in reverse and have created a manifestly unjust, and behaviorally unrealistic, judicial heuristic. In curtailing the same-actor doctrine, the Seventh Circuit has applied the most sound and appropriate jurisprudential approach and should be justly applauded.

APPENDIX

TABLE 1

ALL U.S. DISTRICT COURT DECISIONS, REFERENCING THE SAME-ACTOR INFERENCE DOCTRINE IN TITLE VII CASES AT SUMMARY JUDGMENT

Year	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total	0	0	0	0	0	2	6	14	6	16	20	25	17	17	27	32	44	56	38	59	66	51	64	63

TABLE 2
 ALL U.S. DISTRICT COURT DECISIONS CATEGORIZED BY U.S. COURT OF APPEALS CIRCUIT, REFERENCING THE
 SAME-ACTOR INFERENCE DOCTRINE IN TITLE VII CASES AT SUMMARY JUDGMENT

Circuit	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
1st	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	0	1	1	1	1
2nd	0	0	0	0	0	0	0	3	1	3	8	9	5	7	13	8	12	10	12	17	21	14	14	11
3rd	0	0	0	0	0	0	0	0	0	1	0	1	0	1	0	0	0	0	0	2	2	1	3	3
4th	0	0	0	0	0	0	0	1	0	0	0	1	1	2	0	2	2	2	3	3	4	1	6	11
5th	0	0	0	0	0	1	1	3	2	4	5	7	2	1	6	7	7	10	4	6	10	13	10	15
6th	0	0	0	0	0	0	1	3	0	2	1	1	2	3	1	7	5	8	6	9	5	6	9	7
7th	0	0	0	0	0	1	4	2	2	3	4	3	1	0	2	2	5	1	1	1	5	3	1	1
8th	0	0	0	0	0	0	0	0	0	0	0	0	1	2	2	2	0	2	3	1	1	2	2	0
9th	0	0	0	0	0	0	0	0	1	1	0	2	1	1	1	2	11	13	6	14	13	6	14	11
10th	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	4	1	3	1	3	4	3
11th	0	0	0	0	0	0	0	1	0	2	1	1	3	0	2	1	0	3	1	3	3	1	0	0
D.C.	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	3	1	0	0	0	0	0
Total	0	0	0	0	0	2	6	14	6	16	20	25	17	17	27	32	44	56	38	59	66	51	64	63

TABLE 3

ALL U.S. DISTRICT COURT DECISIONS CATEGORIZED BY COURT OF APPEALS CIRCUIT, ADJUDICATING TITLE VII CASES AT SUMMARY JUDGMENT

Circuit	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
1st	16	16	16	18	33	35	48	46	46	60	43	56	59	61	60	102	70	91	70	104	102	96	101	86
2nd	93	88	101	107	113	161	224	292	307	304	330	262	293	273	312	386	408	419	385	456	376	435	450	411
3rd	64	56	74	73	97	104	119	146	124	139	131	151	129	108	163	216	269	322	354	308	343	248	254	286
4th	25	26	37	48	61	84	94	74	65	94	127	119	156	94	130	150	261	222	212	271	348	354	435	399
5th	31	29	35	45	62	87	130	190	182	189	172	188	163	167	186	305	377	323	306	314	359	377	339	336
6th	38	37	41	31	53	35	68	62	83	63	69	98	100	105	56	177	389	394	345	285	372	337	336	355
7th	117	111	93	117	161	235	249	293	300	248	313	313	314	272	280	289	397	337	282	303	304	339	425	323
8th	10	25	20	33	34	41	65	60	57	54	64	84	91	105	109	189	261	277	188	209	160	152	133	127
9th	22	21	40	50	50	84	64	60	79	70	73	88	59	54	99	147	283	301	284	286	324	338	299	325
10th	47	69	75	58	88	81	94	105	108	84	87	73	80	68	86	126	199	173	150	157	178	170	173	175
11th	38	28	29	37	56	84	97	108	107	123	125	88	88	79	67	187	309	313	279	232	246	255	332	366
D.C.	28	31	26	23	24	32	37	41	34	22	29	20	44	55	60	128	115	107	120	133	116	118	117	135
Total	529	537	587	640	832	1063	1289	1477	1492	1450	1563	1540	1576	1441	1608	2402	3338	3279	2975	3058	3228	3219	3394	3324

TABLE 4
 NUMERATOR/DENOMINATOR RATIO OF U.S. DISTRICT COURT DECISIONS, CATEGORIZED BY U.S. COURT OF APPEALS CIRCUIT,
 REFERENCING THE SAME-ACTOR INFERENCE DOCTRINE IN TITLE VII CASES AT SUMMARY JUDGMENT

Circuit	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
1st	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.022	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.010	0.000	0.000	0.000	0.000	0.010	0.010	0.010	0.012
2nd	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.010	0.003	0.010	0.024	0.034	0.017	0.026	0.042	0.021	0.029	0.024	0.031	0.037	0.056	0.032	0.031	0.027
3rd	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.007	0.000	0.007	0.000	0.009	0.000	0.000	0.000	0.000	0.000	0.006	0.006	0.004	0.012	0.010
4th	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.014	0.000	0.000	0.000	0.008	0.006	0.021	0.000	0.013	0.008	0.009	0.014	0.011	0.011	0.003	0.014	0.028
5th	0.000	0.000	0.000	0.000	0.000	0.011	0.008	0.016	0.011	0.021	0.029	0.037	0.012	0.006	0.032	0.023	0.019	0.031	0.013	0.019	0.028	0.034	0.029	0.045
6th	0.000	0.000	0.000	0.000	0.000	0.000	0.015	0.048	0.000	0.032	0.014	0.010	0.020	0.029	0.018	0.040	0.013	0.020	0.017	0.032	0.013	0.018	0.027	0.020
7th	0.000	0.000	0.000	0.000	0.000	0.004	0.016	0.007	0.007	0.012	0.013	0.010	0.003	0.000	0.007	0.007	0.013	0.003	0.004	0.003	0.016	0.009	0.002	0.003
8th	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.011	0.019	0.018	0.011	0.000	0.007	0.016	0.005	0.006	0.013	0.015	0.000
9th	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.013	0.014	0.000	0.023	0.017	0.019	0.010	0.014	0.039	0.043	0.021	0.049	0.040	0.018	0.047	0.034
10th	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.010	0.023	0.007	0.019	0.006	0.018	0.023	0.017
11th	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.009	0.000	0.016	0.008	0.011	0.034	0.000	0.030	0.005	0.000	0.010	0.004	0.013	0.012	0.004	0.000	0.000
D.C.	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.034	0.000	0.023	0.000	0.000	0.000	0.000	0.028	0.008	0.000	0.000	0.000	0.000	0.000
Total	0.000	0.000	0.000	0.000	0.000	0.002	0.005	0.009	0.004	0.011	0.013	0.016	0.011	0.012	0.017	0.013	0.013	0.017	0.013	0.019	0.020	0.016	0.019	0.019