"YOU DON'T HAVE TO CALL ME DARLIN, DARLIN": HOW EVIDENTIARY PROOF MODELS HAVE CONFUSED COURTS IN EMPLOYMENT DISCRIMINATION CASES

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I. INTRODUCTION

Henry Ortiz brought a discrimination suit against his employer, Werner Enterprises, after Werner terminated him for allegedly falsifying records.[1] Ortiz argued that the practice was commonplace and the employer's real reason was racially motivated.[2] To prove his claim, Ortiz cited rules placed on him but not on non-Hispanic workers, his stellar performance reviews and leading sales numbers, and the barrage of racial slurs such as "fucking beaner," "dumb Mexican," "taco eater," "fucking Puerto Rican," and more, that he endured on a regular basis over his seven-year career at Werner.[3] Ortiz alleged that he could show direct proof of racial discrimination through circumstantial evidence allowing an inference of intentional discrimination.[4] He also alleged discrimination shown through the indirect method of proof by showing both that (1) similarly situated non-Hispanic employees received preferential treatment, and (2) that the employer's reason for termination was unworthy of credence.[5]

The District Court found for the employer on summary judgment, citing Ortiz's failure to meet all "the elements" of either the direct method of proof or the indirect method of proof.[6] Instead of viewing all the evidence as a whole to answer the fundamental question of whether Ortiz would have lost his job given the same circumstances had he been non-Hispanic, the district court set out subcategories of evidence.[7] It then forced evidence into rigid proof models with their own elements and rules.[8] The Seventh Circuit

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1. Oritz v. Werner Enter. Inc., 834 F.3d 760, 761 (7th Cir. 2016).
2. *Id.* at 762.
3. *Id.* at 763.
4. *Id.*
5. Amended Complaint at 11-12, Ortiz v. Werner Enter. Inc., 834 F.3d 760 (7th Cir. 2016).
6. Ortiz v. Werner Enterprises, Inc., No. 13-cv-8270, 2015 WL 3961240, at *6-7 (N.D. Ill. June 25, 2015).
7. *Id.* at *5-6.
8. *Id.*

reversed and remanded, sharply criticizing this district court and others for turning the evidentiary proof models from frameworks for analysis into required legal standards.[9] Seeking to bring uniformity to the district courts and to do away with the confusion underlying direct and indirect proof models,[10] the Seventh Circuit overruled two lines of case law spanning thirty years.[11] It mandated that courts stop separating direct from indirect evidence and subjecting them to different evaluations.[12] Rather, "all evidence belongs in a single pile that must be evaluated as a whole."[13]

Ortiz exemplifies the complexity and uncertainty plaguing employment discrimination law.[14] Widespread confusion exists, and courts, scholars, and attorneys have expressed the need for a unified method of analyzing such cases.[15] Despite acknowledgement of the disunity, Congress and courts have failed to provide an adequate alternative. Rather, in attempting to do so, Congress only increased the confusion and asymmetry among the courts.[16] *Ortiz* began to rectify the situation by bringing into focus the ultimate issue that must be addressed and minimizing the use of frameworks that muddle the issue.

This comment argues that the Supreme Court should adopt the *Ortiz* holding and clarify that evidence is evidence and should not be sorted, labeled, and applied by its perceived place in a direct or indirect proof framework. By "putting evidence into a box"[17] the courts are perpetuating unnecessary complexity, neglecting the fundamental question, and disproportionally "squeeze[ing]-out"[18] plaintiffs' claims. Part II of this

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9. *Ortiz*, 834 F.3d at 765.
10. Under the strictest interpretation of the direct proof model adopted by some courts, the plaintiff proves discrimination with an employer's statement explicitly attributing the adverse employment action to the employee's protected characteristic: "I fired her because she is a woman." The more lenient standard of direct evidence utilized by other courts, direct evidence is evidence that is strong enough on its own to meet the preponderance of the evidence standard. Contrarily, the indirect model is used when a plaintiff needs to create an inference of discrimination via a prima facie case. The four elements of the prima facie case eliminate the most common nondiscriminatory reasons for an adverse employment action, thus creating a presumption of discrimination. An example of an indirect case of discrimination is when a woman, performing her job satisfactorily, was fired for being late to work one day, but a man in her same position who was late to work was not fired.
11. *Ortiz*, 834 F.3d at 765.
12. *Id*.
13. *Id*. at 766.
14. *See* William Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683 (2010).
15. *See* Transcript of Oral Argument at 29, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), (No. 08-441), http://www.supremecourts.gov/oral_arguments/argument_transcripts/08-441.pdf ("I will say in 25 years of advocacy before this Court I have not seen one area of the law that seems to me as difficult to sort out as this particular one is." Statement made by attorney Carter Phillips); *See also* Sandra Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); Martin Katz, *Gross Disunity*, 114 PENN. ST. L. REV. 857 (2010).
16. Sperino, *supra* note 15, at 102.
17. Cheryl L. Anderson, "Thinking Within the Box": How Proof Models are Used to Limit the Scope of Sexual Harassment Law, 19 HOFSTRA LAB. & EMP. L.J. 125, 126 (2001).
18. Sperino, *supra* note 15, at 71.

article beings with a historical overview of employment discrimination law and the origin and evolution of the direct and indirect frameworks. It then narrows its focus to the Seventh Circuit and examines case law dealing with the direct evidence methods and indirect evidence methods. This section then analyzes *Ortiz* and follows with a brief overview of the variety of interpretations of the direct and indirect methods employed by courts outside of the Seventh Circuit. Lastly, Part III of this article suggests a solution: the Supreme Court should adopt the Seventh Circuit's position in *Ortiz* and affirm the ultimate causation question in employment discrimination cases, which asks whether discriminatory animus caused the adverse employment action.

II. BACKGROUND

Modern employment discrimination law began with the enactment of Title VII of the Civil Rights Act of 1964 (CRA)[19] and has since been both expanded and contracted by various judicial and legislative actions.[20] Since then, Congress has passed the Age Discrimination in Employment Act of 1967 (ADEA), the American with Disabilities Act of 1990 (ADA), the ADA Amended Act of 2008, and the Civil Rights Act of 1991.[21] Scholars have utilized a "construction project" metaphor in describing the evolution of employment law and specifically Title VII.[22] That metaphor characterizes Congress as the architect laying and revising the blueprints, the Supreme Court as the contractor tasked with "construing legal theories, proof structures and analytical frameworks," and finally the lower courts, employers, attorneys, and judges as the workers effectuating the grand plan brick by brick.[23]

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19. *See* 42 U.S.C.A. § SEC. 2000e-2(a) (West 1991).
    (a) Employer practices
    It shall be an unlawful employment practice for an employer—
        (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
        (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
    Id.
20. Corbett, *supra* note 14, at 684.
21. *Laws Enforced by EEOC*, EEOC.gov, https://www.eeoc.gov/laws/statutes/ (last visited Mar. 8, 2017).
22. Corbett, *supra* note 14, at 684–85.
23. *Id.*

A. *McDonnell Douglas Corp. v. Green* and the Indirect Proof Model

The Supreme Court first established an indirect method of proving discrimination for disparate treatment claims[24] in *McDonnell Douglas Corp v. Green*.[25] The need for an indirect method exists because the majority of employment discrimination cases do not involve the proverbial smoking gun.[26] Evidence such as an employer's admission, "I fired you because you are a woman and I don't like women," rarely exists.[27] Thus, the indirect method of proof provides a plaintiff the opportunity for justice despite the lack of strong, direct evidence of an employer's discriminatory animus.[28]

Under the *McDonnell Douglas* framework, the plaintiff has the initial burden to establish a prima facie case of discrimination, which requires a showing that (1) he belongs to a protected class, (2) he was qualified for the position, (3) he suffered an adverse employment action, and (4) he was replaced by someone outside of the protected class or was treated less favorably than a similarly situated person outside of his protected class.[29] The elements of the prima facie case eliminate the most common legitimate reasons for an employee's rejection, thus creating a presumption of discrimination at the initial stages.[30] The burden of production only shifts to the employer to create a genuine issue of fact that it had a legitimate non-discriminatory reason for the adverse employment action.[31] If the defendant meets this burden, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the proffered reasons are not worthy of credence and are pretext for discrimination.[32]

The Supreme Court, in *Texas Dept. of Community Affairs v. Burdine*, following *McDonnell Douglas*, clarified who carried which burden where, holding that the ultimate burden of persuasion remained with the plaintiff at all times.[33] Unfortunately, *Burdine* laid the foundation for confusion between direct and indirect evidence in its discussion of proof of pretext.[34]

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24. Disparate treatment claims are differentiated from disparate impact claims. The former requires the discrimination be intentional and based on a protected class characteristic, while the latter applies to employment practices that are neutral on their face but operate to adversely affect a protected class of people and are not a business necessity.
25. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
26. Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Or. 1970) (noting that direct evidence of discrimination "is virtually impossible to produce"), aff'd 492 F.2d 292 (9th Cir. 1974).
27. Thornbrough v. Columbus & G.R.R., 760 F.2d 633, 638 (5th Cir. 1985) ("Employers are rarely so cooperative as to include a notation in the personnel file" stating that the employee was fired for a discriminatory reason).
28. *See McDonnell*, 411 U.S. at 804–05.
29. *Id.* at 802.
30. Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
31. *McDonnell*, 411 U.S. at 802.
32. *Id.* at 804.
33. *Burdine*, 450 U.S. at 254–56.
34. Mariana C. Szteinbok, *Indirect Proof of Discriminatory Motive in Title VII Disparate Treatment Claims After* Aikens, 88 COLUM. L. REV. 1114, 1118 (June 1988).

Specifically, *Burdine* held that a plaintiff can prove that the employer's legitimate non-discriminatory reason was a pretext for discrimination "directly," by affirmatively showing that a discriminatory reason "more likely motivated" the employer's action, or "indirectly" by showing that the employer's proffered reason is "unworthy of credence."[35]

B. *Price Waterhouse*, *Desert Palace*, and Direct Evidence

The confusion left in *Burdine's* wake was compounded when the Supreme Court expanded Title VII to include "mixed-motive" claims in *Price Waterhouse v. Hopkins*.[36] In *Price Waterhouse*, a plurality of the Court set out the rule as interpreting "because of" to mean that the improper consideration (race, sex, national origin, etc.) need only be a motivating factor in the employer's adverse employment decision regarding the plaintiff.[37] The employer may defend by showing the decision would have been made despite the protected characteristic.[38] In and of itself, this ruling did not create the confusion, but, because the decision was only a plurality, it was Justice O'Connor's concurrence that lower circuits considered controlling.[39]

Justice O'Connor framed the issue through the lens of direct evidence, stating that, in order for a plaintiff to utilize a mixed-motive framework,[40] she must present direct evidence of discrimination.[41] Justice O'Connor thought that under the more plaintiff-friendly mixed-motive framework, the burden shift to the employer is only proper when the plaintiff presents direct evidence of discrimination.[42] Because race and gender always play a role in employment decisions "in the benign sense that these are human characteristics of which decision makers are aware and about which they may

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35. *Burdine*, 450 U.S. at 256. For example, racially derogatory remarks are "direct" proof of discriminatory motive. Compare this with proving discrimination "indirectly" by showing, for example if the employer's proffered reason for termination was tardiness, that the employee was not tardy, and the employer knew he was not tardy.
36. Price Waterhouse v. Hopkins, 490 U.S. 228, 229 (1989).
37. *Id.* at 244–45.
38. *Id.*
39. Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1910 (2004); *see also* Marks *v.* United States, 430 U. S. 188, 193 (1977) (holding that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
40. Under a mixed motive framework, if a Title VII plaintiff shows that discrimination was a motivating factor in the employer's action, the burden of persuasion shifts to the employer to show by a preponderance of the evidence that it would have taken the same action regardless of that impermissible consideration of race, sex, etc.
41. *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring).
42. *Id.* at 276.

comment in a perfectly neutral and nondiscriminatory fashion," anything less than direct evidence of discriminatory animus "effectively reads the causation requirement out of the statute and then replaces it with an 'affirmative defense.'"[43] Accordingly, if the plaintiff does not have direct evidence of discrimination, they cannot utilize the mixed-motive theory, but must use the *McDonnell Douglas* indirect proof model.[44]

Although *Price Waterhouse* was overturned by the Civil Rights Act of 1991 (CRA), the CRA did not clearly resolve whether mixed motive cases required direct evidence that the employer was motivated by an impermissible consideration.[45] Courts grappled with the issue until 2003, when the Supreme Court in *Desert Palace, Inc. v. Costa* unanimously struck down Justice O'Connor's requirement of direct evidence in order to obtain a mixed-motive jury instruction.[46] Despite *Desert Palace,* courts retained the distinction between the two types of evidence which has created problems amongst the courts.

C. Other Circuits' Treatment of Evidence in the Direct and Indirect Proof Models

Confusing matters even more is the fact that other circuits interpret the direct and indirect frameworks in inconsistent ways. To return to the building analogy,[47] it is as if the contractor called for the workers to build a wall and the workers built walls of varying heights, with varying material, at varying locations. The Circuit Courts' misinterpretations are inconsistent, leading to more confusion and greater need for clarity and uniformity. Given the circuits have continued to build these walls for years, getting deeper and more nuanced, the Supreme Court should bulldoze them all down and start over.

1. The Eleventh Circuit's Problems

The Eleventh Circuit similarly struggled with defining "direct evidence" after a district court granted summary judgment against the plaintiff due to the lack of direct evidence supporting the direct method of proving discrimination.[48] In an effort to tease out the proper definition of "direct evidence" in the employment discrimination context, the court traced the history of employment law across the federal circuits by analyzing

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43. *Id.* at 276–77.
44. *Id.* at 278.
45. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified as amended 42 U.S.C. § 2000e-2(m) 2006)).
46. Desert Palace, Inc., v. Costa, 539 U.S. 90 (2003).
47. Corbett, *supra* note 14, at 684–85.
48. Wright v. Southland Corp., 187 F.3d 1287 (11th Cir. 1999).

fourteen cases beginning in 1980.[49] The court's extensive opinion ended with a holding that overturned the lower court's decision and set forth what the court concluded were the proper methods and definitions within employment discrimination cases.[50]

According to the Eleventh Circuit, the confusion stemmed from courts failing to differentiate between the dictionary definition of direct evidence and how the term is used in employment discrimination law.[51] Those two terms represent vastly different concepts, but were used interchangeably, causing confusion and disunity amongst the districts.[52] The court reasoned that, unlike the dictionary definition of direct evidence, which is evidence that proves a fact "without inference or presumption,"[53] the correct definition in employment discrimination cases was "evidence from which a reasonable factfinder could find, by a *preponderance* of the evidence, a causal link between an adverse employment action and a protected personal characteristic."[54] The court termed the latter definition "the 'preponderance' definition," saying it is evidence from which an improper motive could be inferred.[55]

Despite the long and extensive opinion, however, the court did little to add to the understanding of how courts should evaluate evidence under the direct and indirect methods.[56] The court treated the indirect *McDonnell Douglas* model as wholly distinct from the preponderance model and separated evidence accordingly.[57] Further, the fact that two judges concurred in the result but dissented in judgment, noting that they agreed with the outcome reached by the majority, but disagreed with everything else, shows the court as deeply divided as to the proper legal standard.[58]

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49. *Id.*
50. *Id.* at 1303.
51. *Id.* at 1302.
52. *Id.* at 1298.
53. *Id.* ("evidence, which if believed, proves existence of fact in issue without inference or presumption." (quoting *Black's Law Dictionary* 460 (6th ed.1990)). The Eleventh Circuit pointed out that "[d]irect evidence is the opposite of 'circumstantial' (or 'indirect') evidence, which is '[e]vidence of facts or circumstances from which the existence or nonexistence of fact in issue may be inferred.'" *Id.* at 1294 (quoting *Black's Law Dictionary* 243 (6th ed.1990)).
54. *Id.* at 1294 (emphasis added).
55. *Id.*
56. *Id.*
57. For instance, in Jones v. Bessemer Carraway Medical Center, the court held that the plaintiff, an African-American nurse, failed to prove by a preponderance of the evidence that her race caused her termination despite evidence that the head nurse twice told her, "You black girls make me sick," and said once, "You black girls get away with everything." 137 F.3d 1306, 1313 n.10 (11th Cir. 1998). The court held these statements showed "at most that the head nurse had some inappropriate racial attitudes." *Id.* The court did not analyze these statements under the *McDonnell Douglas* indirect model of proof, despite the fact they show pretext for discrimination.
58. *Id.* at 1306.

2. The Eighth Circuit Goes the Other Way

Similar to *Ortiz*, the Eighth Circuit has struggled with labeling and sorting evidence in employment discrimination.[59] The confusion is reflected in *Torgerson v. City of Rochester*, where the district court's grant of summary judgment was reversed by a panel of the circuit court, which was again reversed by the circuit en banc.[60] In *Torgerson*, the Eighth Circuit upheld the separate frameworks and condoned the labeling and sorting of evidence into these frameworks as opposed to viewing it in its totality.[61]

In *Torgerson*, David Torgerson, a Native-American, and Jami Mundell, his wife, brought suit for racial and sex discrimination (respectively) after the city's fire department failed to hire them both for vacant positions.[62] The court utilized the direct and indirect evidence models to evaluate the couples' claim.[63] The court defined direct evidence as that which "show[s] a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion 'actually motivated' the adverse employment action."[64]

The court analyzed two key pieces of evidence to determine whether they qualified under the direct evidence view.[65] The first piece of evidence was a statement made by the city commissioner explaining that he would not have taken federal grants had he known that in so doing, he would be required to hire applicants from a protected class.[66] Because the court was doubtful he was a decision maker, the court found this statement insufficient to constitute direct evidence.[67] Moreover, even if he was a decision maker, the court reasoned that the statement does not "demonstrate a discriminatory animus because Congress explicitly commands that Title VII shall not be interpreted to require preferential treatment."[68]

Second, the court struggled to categorize a statement made by a different city commissioner who was in fact a decision maker.[69] Referencing another male candidate, the commissioner stated he is a "big guy" and "he'd make a good firefighter."[70] The court refused to categorize this under the direct evidence method as the statement was made in reference to another

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59. *See* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).
60. *Id.* at 1036.
61. *Id.* at 1044.
62. *Id.* at 1043.
63. *Id.* at 1044–49.
64. *Torgerson*, 643 F.3d at 1044 (quoting Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)); *see also id.* ("Thus, 'direct' refers to the causal strength of the proof, not whether it is 'circumstantial' evidence").
65. *Id.* at 1044.
66. *Id.*
67. *Id*
68. *Id.* at 1045.
69. *Id.*
70. *Id.*

candidate, not Ms. Mundell.[71] Finally, the court rejected Torgerson and Mundell's indirect method of proof because they could not show that they were similarly situated to the firefighters who had been hired, due to their lower ranking on the eligibility list.[72] The court did not look again at the statements it had rejected in the direct method evaluation. Given that these statements did not fit within either the direct or indirect evidence framework, the Court disregarded them outright and at no point in their decision considered them.[73]

By contrast, the dissent in *Torgerson* disagreed with the majority's handling of the evidence, viewing the disregarded pieces as fact issues for the jury.[74] The dissent argued that the majority was conclusively doing away with relevant evidence under the guise of fitting evidence in to their framework.[75] Instead of viewing it as a piece of the bigger picture, the majority viewed it in the "vacuum" of the direct and indirect models. The dissent objected that by "compartmentaliz[ing] evidence" and "look[ing] at categories of evidence narrowly," the majority overstepped its authority and ignored the fundamental issue of causation.[76]

D. The Evolution of Employment Discrimination Law in the Seventh Circuit

For the past thirty years, the district courts within the Seventh Circuit, and the Circuit Court itself, have more or less operated on the theory that there are two methods of proving discrimination at the summary judgment stage.[77] First, the employee can prove discrimination "directly" with an admission by the employer or with a "convincing mosaic" of circumstantial evidence inferring discrimination.[78] Second, the employee can prove discrimination "indirectly" by using the *McDonnell Douglas* burden-shifting test.[79] However, the lower courts not only confused the direct and indirect

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71. *Id.* at 1046.
72. *Id.* at 1049.
73. *Id.*
74. *Id.* at 1058. (Smith, J., dissenting).
75. *Id.*
76. *Id.* at 1056.
77. *See, e.g.*, Sylvester v. SOS Children's Villages Ill., Inc., 453 F.3d 900 (7th Cir. 2006); Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (concurring opinion joined by entire panel); Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 680 (7th Cir. 2012); Harper v. C.R. England, Inc., 687 F.3d 297, 314 (7th Cir. 2012); Hitchcock v. Angel Corps, Inc., 718 F.3d 733, 737 (7th Cir. 2013); Perez v. Thorntons, Inc., 731 F.3d 699, 703 (7th Cir. 2013); Chaib v. Indiana, 744 F.3d 974, 981 (7th Cir. 2014); Bass v. Joliet Pub. Sch. Dist. No. 86, 746 F.3d 835, 840 (7th Cir. 2014); Hutt v. AbbVie Prod's LLC, 757 F.3d 687, 691 (7th Cir. 2014); Simpson v. Beaver Dam Cmty. Hosp's, Inc., 780 F.3d 784, 789–90 (7th Cir. 2015); Castro v. DeVry Univ., Inc., 786 F.3d 559, 564 (7th Cir. 2015).
78. Oritz v. Werner Enter. Inc., 834 F.3d 760, 763 (7th Cir. 2016).
79. *Id.* at 766.

proof models with direct and indirect evidence itself,[80] but they also "treated each method as having its own elements and rules" and labeled and sorted evidence into one of the two frameworks.[81] By arbitrarily distinguishing between evidence and rigidly placing it within one of the frameworks, the lower courts failed to look at the evidence as a whole to decide whether the protected trait caused the adverse employment action.

1. Troupe v. May Dept. Stores Co.

Ironically, the convincing mosaic theory currently causing such confusion originated in *Troupe v. May Dept. Stores Co.* as a means of simplifying the inquiry into employment discrimination.[82] Troupe brought her pregnancy discrimination suit after her employer fired her the day before her maternity leave began.[83] Her employer argued that they fired her because of her chronic tardiness and not because of her pregnancy.[84] The district court found for the defendant on summary judgment, incorrectly holding that since the plaintiff chose the direct method of proof (as opposed to the indirect method under *McDonnell Douglas*), she must use direct (i.e., non-circumstantial) evidence prove discrimination.[85]

On appeal, the Circuit Court struck down this type of reasoning, holding that circumstantial evidence and the resulting inferences can directly prove an employer's discriminatory animus.[86] In an effort to promote clarity, the court jettisoned the indirect and direct methods of proof and replaced them with three types of circumstantial evidence an employee can use to prove

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80. "The conventional distinction is that direct evidence is testimony by a witness about a matter within his personal knowledge and so does not require drawing an inference from the evidence (his testimony) to the proposition that it is offered to establish, whereas circumstantial evidence does require drawing inferences." *Sylvester*, 453 F.3d at 903 (citing 1 Wigmore, *supra*, §§ 25-26, at pp. 953–65); Lyman R. Patterson, The *Types of Evidence: An Analysis*, 19 VAND. L. REV. 1, 11–14 (1965).

81. *Ortiz*, 834 F.3d at 763.

82. *See* Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994) ("In granting Lord & Taylor's motion for summary judgment, the district judge said that there is a 'direct' and an 'indirect' method of proving pregnancy discrimination, that the plaintiff used the direct method, that that method requires "direct evidence" of discrimination, meaning evidence that proves discrimination 'without the need for inference or presumption,' and that Troupe failed to produce any such evidence. Although language in some of our opinions, such as *Aungst v. Westinghouse Electric Corp.*, 937 F.2d 1216, 1221 (7th Cir. 1991), and *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 372 (7th Cir. 1992), could be read to support this way of framing and resolving the issue, we acknowledge the potential for confusion and will take this opportunity to try to clarify the circuit's position"); *see also Ortiz*, 834 F.3d at 764 ("This phrase originated in *Troupe* and was designed as a metaphor to illustrate why courts should not try to differentiate between direct and indirect evidence").

83. *Troupe*, 20 F.3d at 736.

84. *Id.*

85. *Id.* at 736–37.

86. *Id.* at 736; *see* Sylvester v. SOS Children's Villages Ill., Inc., 453 F.3d 900, 903 (7th Cir. 2006) ("equating the direct method to direct evidence but defining direct evidence to include circumstantial evidence")

intentional discrimination.[87] Painting with a broad brush, the court first listed "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" as examples of circumstantial evidence possible to prove intentional discrimination.[88] Second, the court cited comparator evidence.[89] Discrimination is directly shown when a similarly situated employee not a member of the same protected class received better treatment than the plaintiff.[90] Lastly, the court described the *McDonnell Douglas* proof model, without referring to it by name, as a means of proof of intentional discrimination.[91] Each of these three types of evidence "is sufficient by itself . . . to support a judgment for the plaintiff."[92] However, if not individually sufficient in themselves, the evidence can be used together to "compos[e] a convincing mosaic of discrimination against the plaintiff."[93]

The Circuit Court's attempt to resolve confusion by doing away with direct and indirect frameworks in *Troupe* was undermined by its continued use of those terms, however, and in fact was more complicated by its addition of the "convincing mosaic."[94] Not only did courts retain the direct/indirect distinction and sorted evidence accordingly, they turned "convincing mosaic" into a legal standard by requiring plaintiffs to produce multiple pieces of evidence to prevail, regardless if one piece of that mosaic, standing on its own, was sufficient.[95] For example, although the Circuit Court warned

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87. *Troupe*, 20 F.3d at 736.
88. *Id.*
89. *Id.* at 737.
90. *Id.*
91. *Id.* at 736. ("evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination.").
92. *Id.* at 736.
93. *Id.* at 737.
94. *See Ortiz*, 834 F.3d at 765, ("Instead of simplifying analysis, the 'mosaic' metaphor has produced a form of legal kudzu.").
95. *See, e.g.*, Chaib v. Indiana, 744 F.3d 974, 984–85 (7th Cir. 2014), court requiring all three types of circumstantial evidence to be presented by plaintiff:

> Similarly, Chaib's claims do not pass muster under the direct method. She points out a number of actions she labels as adverse—the failure to train, refusal to transfer, and the poor performance evaluation—and certainly several incidents of boorish treatment by her co-workers, but she lacks any admission or statement by her employer, direct or ambiguous, that suggests that the actions she labels as adverse were motivated, even in part, on account of her gender or national origin . . . even under the broad 'convincing mosaic' direct test, Chaib fails to show any sufficiently suspicious timing, differently treated co-workers, or any treatment from any decision maker at the IDOC which would permit a reasonable jury to make an inference of discriminatory intent.

Id.

against doing that, and tried to clarify on multiple occasions the metaphoric nature of convincing mosaic, the Circuit itself continued to treat the convincing mosaic theory as rule of law.[96] Further complicating the matter, the Circuit Court vacillated between characterizing the convincing mosaic as falling under the direct framework theory and characterizing it as falling under the indirect method.[97]

2. Ortiz v. Werner Enter. Inc.*, 834 F.3d 760 (7th Cir. 2016).*

The confusion in the district courts, the resulting incongruent holdings, and the seeming inability of the Circuit to straighten matters out despite repeated explanations of the proper use of the frameworks reached boiling point after, despite extremely convincing evidence of discrimination, the district court held against the plaintiff in *Ortiz*.[98] Henry Ortiz brought suit under the Illinois Human Rights Act (IHRA) and the Civil Rights Act 1866, 42 U.S.C. § 1981 based on discrimination due to his national origin.[99] Werner fired Ortiz after seven years of employment as a freight broker.[100] As a freight broker, his main duty was to negotiate rates with carriers to transport freight for Werner's many clients and to monitor this freight, ensuring that pickup and delivery were completed in a timely manner.[101] Werner's clients paid Werner to arrange transportation for their freight. Werner compensated Ortiz by paying him a base salary as well as commission, which Werner based on the profit margin between what Werner's customers paid and what the freight company charged.[102] If the freight loads resulted in a loss, Ortiz alleged that it was not uncommon for the managers to allow the brokers to either put these losing loads in their names, or to completely remove their names from the loads altogether.[103] Not everyone received commission, but Ortiz received commission every

96. *Ortiz*, 834 F.3d at 764 ("To make matters worse, this court has itself occasionally treated 'convincing mosaic' as a legal requirement, even while cautioning in other opinions that it must not be so understood."); *See, e.g.*, Hatcher v. Bd. of Tr.'s of S. Ill. Univ., 829 F.3d 531 (7th Cir. 2016), slip op. 13; *Chaib*, 744 F.3d at 981; Cloe v. Indianapolis, 712 F.3d 1171, 1180 (7th Cir. 2013); Smith v. Bray, 681 F.3d 888, 901 (7th Cir. 2012); Good v. Univ. of Chi. Med. Ctr., 673 F.3d 670, 674 (7th Cir. 2012); Silverman v. Bd. Of Educ. of Chic., 637 F.3d 729, 734 (7th Cir. 2011); Phelan v. Cook Cty., 463 F.3d 773, 779 (7th Cir. 2006); Koszola v. Bd. Of Educ. of Chic., 385 F.3d 1104, 1109 (7th Cir. 2004); Rhodes v. Illinois Dep't of Transp., 359 F.3d 498, 504 (7th Cir. 2004); Cerutti v. BASF Corp., 349 F.3d 1055, 1061 (7th Cir. 2003); Robin v. Espo Eng. Corp., 200 F.3d 1081, 1088–89 (7th Cir. 2000).

97. *See, e.g.*, East-miller, ("East-Miller also attempted to prove discrimination through the indirect burden-shifting method set out in *McDonnell Douglas Corp. v. Green*, . . . However, she failed to 'construct[ ] a convincing mosaic of circumstantial evidence that allows a jury to infer intentional discrimination[.]'").

98. *Ortiz*, 834 F.3d at 761.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id*. at 761–62.

103. *Id.* at 762.

month of his employment except for his first and last months on the job, as well as consistently positive performance reviews.[104]

While employed, Ortiz alleged he regularly tolerated a barrage of racial epithets, "stupid bean eater," "Jew," "dumb Mexican," "fucking Puerto Rican," "taco," etc., in front of his coworkers and delivered by his manager Lass.[105] Ortiz claimed Lass also expressed his distaste for foreigners in general, stating "[I am] not giving that much money to those fuzzy foreigners."[106] Lass also allegedly showed a preference for white employees, allowing them to be habitually late for work while berating Ortiz for only one minute's lateness and threatening to fire him.[107] Lass also promoted a white freight broker to assistant manager, despite his alleged habitual tardiness and unprofessionalism, which included sleeping at his desk and ignoring work-related phone calls.[108]

The hostility culminated in June of 2012. The assistant manager and another broker entered into at least six contracts with carriers at a $6,000 loss and assigned these losing contracts to Ortiz's name without his knowledge.[109] That reduced his monthly profit margin by $6,000 as well as raised flags with upper management.[110] When Ortiz became aware of these contracts, he asked the culprits about their actions. The assistant manager replied, "Why won't you just quit already?"[111] Realizing the malice behind their actions, Ortiz corrected the records by removing his name from three of the losing loads.[112] The following week Ortiz went on a scheduled vacation, but Werner fired him the day he returned to work for falsifying records.[113] During the meeting in which Werner fired him, Ortiz attempted to explain, even offering to call others to verify his account of the situation, but Werner denied him this opportunity.[114] Ortiz never received any sort of reprimand prior to this incident or in relation to this incident,[115] nor did any non-Hispanic coworkers of Ortiz engaging in the same activities. Several of these co-workers admitted in declarations and depositions that Lass used racial epithets when referring to Ortiz, as well as the confirming common practice of changing records.[116]

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104. Amended Complaint at 6, Ortiz v. Werner Enter. Inc., 834 F.3d 760 (7th Cir. 2016), No. 13-cv-8270.
105. *Ortiz*, 834 F.3d at 763.
106. *See* Amended Complaint at 11, *Ortiz*, 834 F.3d 760.
107. *See* Amended Complaint at 7, *Ortiz*, 834 F.3d 760.
108. *Id.*
109. *See* Amended Complaint at 8, *Ortiz*, 834 F.3d 760.
110. *Id.*
111. *Ortiz*, 834 F.3d at 763.
112. *Id.* at 762–63.
113. *Id.* at 762.
114. *Id.* at 763.
115. *See* Amended Complaint at 11, *Ortiz*, 834 F.3d 760.
116. *Ortiz*, 834 F.3d at 766.

The district court found for the employer on summary judgment.[117] According to the court, Ortiz had to show discrimination either through the direct or indirect method, and the court sorted all evidence into one of these two categories and evaluated in light of that particular method.[118] Ortiz failed both methods because of the lack of "evidence that create[d] 'a convincing mosaic of discrimination'" (direct method) and lack of a showing of pretext given firing for falsifying records is a legitimate non-discriminatory reason (indirect method).[119] The district court "shoehorn[ed]" the evidence into the two methods and "treated each method as having its own elements and rules," and neglected to look at the evidence as a whole to answer the underlying question of causation.[120]

The en banc Seventh Circuit sharply criticized this approach and declared that any future decisions guilty of the same mistake would be subject to "summary reversal, so that the district court can evaluate the evidence under the correct standard."[121] The Seventh Circuit emphasized that evidence is evidence, and all relevant evidence "should be considered together to understand the pattern it reveals" and "[not] sorted into boxes."[122] Notably, the evidence frequently fits in both or neither framework, and "by forcing parties to consider the same evidence in multiple ways (and sometimes to disregard evidence that does not seem to fit one method rather than the other)," the frameworks complicate matters and divert attention from the ultimate issue.[123]

The court first did away with the convincing mosaic standard, which was created to "displace the unhelpful direct and indirect methods rather than to add to them."[124] However, this metaphor for viewing evidence evolved into a test of its own that district courts were requiring plaintiffs to show in order to prevail.[125] Despite the clarity of the court's rebuke and multiple reprimands, lower courts continued to use the convincing mosaic approach as if it were legal standard with its own legal requirements.[126] To finally put an end to the "rat's nest" of tests, the court overruled eleven cases spanning from 2000-2016 insofar as they utilized the convincing mosaic metaphor as its own legal test.[127]

The court then did away with the direct and indirect evidentiary frameworks by overruling ten more cases, the earliest from 1984.[128] Because

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117. Ortiz v. Werner Enter. Inc., No. 13-cv-8270, 2015 WL 3961240, at *6 (N.D. Ill. June 25, 2015).
118. *Id.* at *7.
119. *Id.* at *4.
120. *Ortiz*, 834 F.3d at 763–64.
121. *Id.* at 765.
122. *Id.* at 764.
123. *Id.* at 765.
124. *Id.* at 764.
125. *Id.*
126. *Id.*
127. *Id.* at 766.
128. *Id.* at 765.

of the confusion the frameworks were causing, the court directed that "district courts must stop separating "direct" from "indirect" evidence and proceeding as if they were subject to different legal standards."[129] Rather, as was the court's intention when creating the convincing mosaic, the direct and indirect methods should be "merge[d] . . . into a unified approach" and "evidence must be considered as a whole."[130] Having purged themselves of the extraneous frameworks, the court hoped that the lower courts could now focus on the ultimate issue at the heart of all employment discrimination cases: "simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action."[131]

Importantly, the court specifically noted that this decision did not affect the *McDonnell-Douglas* three-step framework.[132] Courts should still use that method as a means of showing discrimination, although, the court suggested they may wish to refer to it as something other than the indirect method.[133] However, "no matter what it is called as a shorthand" the court mandated that "evidence must [not] be sorted into different piles, labeled 'direct' and 'indirect,' that are evaluated differently."[134] When evaluating an employment discrimination claim, whether or not one utilizes the *McDonnell-Douglas* burden-shifting framework in doing so, "all evidence belongs in a single pile and must be evaluated as a whole."[135]

III. ANALYSIS

By stripping employment law down to its bare bones, the Seventh Circuit took the first step to a much-needed national overhaul. Given that circuits have developed a variety of theories, frameworks, lexicon, and precedent, *Ortiz*'s complete purge of all evidentiary frameworks in favor of viewing the evidence as a whole is the most useful approach. Considering the nuances amongst the circuits and between the district courts within the circuits, getting rid of the direct and indirect methods and replacing them with emphasis on the underlying issue of causation will provide clarity and symmetry, and allow for more efficient and just resolution of complicated claims. It also best comports with the Supreme Court's approach to evidentiary proof models elsewhere.

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129. *Id.*
130. *Id.* at 764.
131. *Id.* at 765.
132. *Id.* at 766.
133. *Id.*
134. *Id.*
135. *Id.*

The Supreme Court, aware of the confusion caused by the *McDonnell Douglas* framework, explicitly stated that the framework need not be plead in the plaintiff's complaint.[136] Rather, the *McDonnell Douglas* framework exists to simplify courts' inquiry into discrimination cases and assist them in evaluating the evidence.[137] By strictly adhering to direct and indirect models of proof, courts are breeding confusion the Supreme Court sought to eradicate. The Supreme Court should take a clear stance on these proof models just as it did on the *McDonnell Douglas* framework.[138]

Employment discrimination law as a whole is already complicated enough. There are multiple statutes addressing disparate treatment discrimination, with differing proof models, standards of causation, burden shifts, and defenses: Title VII, the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and 29 U.S.C. § 4301 et seq. addressing veteran status. Even within each statute multiple frameworks exist,[139] and the fact that many times plaintiffs raise claims under multiple statutes further complicates issues for judges and juries who must evaluate the claims under different standards.[140]

Claims under multiple statutes will likely become more prevalent given the heightened awareness of implicit biases and intersectionality, where a subcategory within a protected class faces discrimination because of the intersection of two protected categories. For example, the intersectionality of age and gender may lead an older woman to face stereotypes and discrimination in a way that differs from an older man or a young woman.[141] Discarding the direct and indirect models of proof is a first and meaningful step to untangling the web.

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136. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (reversing defendant's summary judgment ruling based on plaintiff's lack of facts establishing a prima facie case under *McDonnell Douglas* in the pleading.) ("For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss.").
137. *Id.* at 512.
138. *Id.*
139. For example, sexual harassment, which falls under Title VII sex discrimination, can be proven by hostile work environment or by quid pro quo harassment. Disparate treatment can be proven by the pretext model, the mixed motive model, pattern and practice, or systemic claims. Sex discrimination can be defended with a general bona fide occupational qualification defense (BFOQ) which has a two-part test, or with a privacy BFOQ defense which has a three-part test, or with a business necessity defense.
140. Katz, *supra* note 15, at 868 (citing Gross v. FBL Fin. Servs., 557 U.S. 167, 187 (2009) (Stevens, J., dissenting) (stating the causation standard held by the majority in this ADEA case which differed from the standard in Title VII cases "will further complicate every case in which a plaintiff raises both ADEA and Title VII claims.")).
141. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracial Politics*, 1989 U. CHI. LEGAL F. 139.

A. The Problems Caused by Utilizing Direct/Indirect Evidence Frameworks

As seen in *Ortiz* and *Torgerson*, by labeling and sorting evidence according to its perceived place in the direct or indirect framework, viable claims get "squeezed out."[142] This is partially because courts view the direct and indirect proof frameworks as both mandatory and rigid, and refuse to allow plaintiffs the opportunity to prove discrimination without using one of the frameworks.[143] Although plaintiffs may indeed suffer intentional discrimination, they will not make it past summary judgment if their evidence does not fit neatly within one of the boxes. As emphasized in the Seventh Circuit, the overarching question in employment discrimination cases is whether the adverse employment action was due to the employee's protected trait.[144] When courts follow the rigid direct and indirect frameworks, they can lose sight of this question and formalistically funnel their analysis into one of these two categories.[145] By limiting cases to those with evidence that squarely fit in one of the two rubrics, courts are missing the overarching question of causation and ignoring pertinent facts as well as and the broad statutory language of Title VII.[146]

Another reason potentially cognizable claims suffer under the frameworks is the tendency of courts to view the frameworks as mutually exclusive and thus forcing evidence into one of the two frameworks and evaluating it.[147] Although the point of the frameworks is to assist in answering the question of causation, courts rarely view them as different parts of a whole.[148] Rather, courts treat them as distinct and analyze the direct and indirect methods and the corresponding evidence separately.[149] Although the circuits differ as to which elements they place where, many of

142. Sperino, *supra* note 15, at 86.

143. *Id.* at 98; *see e.g.* Cerutti v. BASF Corp., 349 F.3d 1055, 1060 (7th Cir. 2003) ("a plaintiff may prove discrimination . . . using either the 'direct method' or 'indirect method.'"); Hatcher v. Bd. of Trs. of S. Ill. Univ., 829 F.3d 531, 540 (7th Cir. 2015) ("A plaintiff can survive summary judgement on a Title VII gender discrimination claim by providing either direct or indirect evidence of discrimination.")

144. *See* Ortiz v. Werner Enter. Inc., 834 F.3d 760 (7th Cir. 2016).

145. Sperino, *supra* note 15, at 104.

146. *See, e.g.*, Thomas v Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309–10 (M.D. Ala. 2004) (judge admits that a candidate may not have received adequate consideration for a job as a result of his race but that *McDonnell Douglas* required the judge to grant summary judgement for the defendant).

147. Sperino, *supra* note 15, at 102–03.

148. *Id.*

149. *See, e.g.,* Silverman v. Bd. of Educ., 637 F.3d 729, 734 n.3 (7th Cir. 2011) (denying the plaintiff had presented a prima facie case under the direct method despite the defense's stipulation that the plaintiff had a prima facie case "this stipulation makes sense only with respect to the indirect method of proof . . . the direct method of proof involves no burden shifting. . . Thus, it is relatively unusual to employ the term 'prima face case' in the context of the direct method.").

their opinions clearly delineate that there are two modes of finding intentional discrimination and place the evidence in one or the other. As the facts in *Torgerson* and *Ortiz* show, just because the evidence does not fit neatly into one of the frameworks, the frameworks failed to establish the lack of intentional discrimination; rather, evidence proving the discrimination did not fit the puzzle pieces required by the court. Unfortunately for plaintiffs, if evidence does not fit neatly in the direct or indirect framework, as defined by that particular circuit, it is disregarded.

Without uniformity amongst courts, predictability is lost. Litigants do not know what to plead and courts do not know how to rule. Turning back to *Ortiz*, the plaintiff's complaint clearly and separately delineated indirect and direct discrimination claims in the pleading.[150] However, Ortiz pleaded much of the evidence under both frameworks.[151] The District Court judge rearranged many pieces of the evidence, moving it out of the box Ortiz labeled it as.[152] Werner labeled some of the same evidence differently than the District Court and Ortiz.[153]

This confusion and lack of standards is inefficient and leads to unpredictable results. This is detrimental to the courts, who lose time, resources and credibility, trying to sort and explain the convoluted issues learned jurists cannot understand to jurors. It also hurts plaintiffs who suffered discrimination but cannot have their injuries redressed because of semantics. Lastly, it hurts employers' wasted time and money in their struggle to maintain a work environment that is appropriate and free from liability. Money is lost when employers take unnecessary measures they deem necessary to avoid a lawsuit, settle to avoid a lawsuit, or litigate to defeat a lawsuit. Without predictable standards, it is nearly impossible to know the best and most prudent business decision.

B. A Solution and Its Benefits

The Supreme Court should adopt the Seventh Circuit's holding in *Ortiz* and do away with labeling evidence as direct or indirect. Courts should not label evidence, nor should they categorize evidence into any framework. Rather, courts should view evidence as a whole and make all reasonable inferences therefrom. Following this approach, the Court instead emphasizes the only question is the appropriate causation standard: can a reasonable

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150. Amended Complaint at 11-12, Ortiz v. Werner Enter. Inc., 834 F.3d 760 (7th Cir. 2016).
151. *See id.*
152. Ortiz v. Werner Enter. Inc., No. 13-cv-8270, 2015 WL 3961240 (N.D. Ill. June 25, 2015).
153. Defendant's Memorandum of Law in Support of Summary Judgment's Answer at 5, Ortiz v. Werner Enter. Inc., 834 F.3d 760 (7th Cir. 2016).

factfinder conclude that the employee's protected class caused the adverse employment action? This approach, doing away with rigid proof models and evidentiary requirements, is more characteristic of what the Supreme Court generally does when presented with employment discrimination cases in which lower courts have adopted formalistic rules.[154]

By clearly establishing that, regardless of the proof model all evidence counts, the Supreme Court will not only begin the much-needed work of untangling the field of employment discrimination law, but perhaps more importantly will help the field evolve. Many of the proof models, theories, and standards of employment discrimination are antiquated and based on outdated values, assumptions, economics, family dynamics and social norms.[155] As discussed above, scientists better understand implicit biases, intersectionality between protected categories, institutional racism, structural racism,[156] negligent discrimination,[157] etc., that subtly affect protected classes.[158] Thankfully, the majority of society has evolved from the blatant forms of discrimination people faced in the past. However, the more insidious forms still plague us. Our lenses for evaluating discrimination must also evolve or else antidiscrimination statues will not serve their function. The direct verses indirect evidence distinction stands in the way of that evaluation.

The prevailing counterargument against *Ortiz*'s jettison of the direct and indirect evidence frameworks is that it "kills *McDonnell Douglas*."[159] In describing the legal standard in employment discrimination cases, the Seventh Circuit boiled down the inquiry at the summary judgment stage to "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's" protected characteristic caused the adverse employment

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154. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (the Court rejected lower courts' refusal to extend sexual harassment claims under Title VII to cases involving same-sex harassment claims: "[w]e see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims.").

155. Not to mention the evolution of gender and sexual orientation norms which the law lags far behind: antidiscrimination statues do not protect gay, lesbian, bisexual, and transgendered people from discrimination because of their sexuality or gender identity.

156. *See* Sperino, *supra* note 15, at 83-84 ("discrimination is not always a bad individual or a formal company policy but rather workplace structures that allow and encourage discrimination.").

157. For a discussion of negligent discrimination and unconscious discrimination, *see* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993) (defining it as an employer's failure "to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect or occur.").

158. *See* L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359 (2012) (discussing the pervasiveness of implicit bias, the science supporting its existence, and its contribution to discriminatory behavior, as well as the ineffectiveness of Title VII at redressing the harms); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (the landmark article on unconscious racism and its psychological roots).

159. Jon Hyman, *Did the 7th Circuit Finally Kill* McDonnell Douglas*?*, WORKFORCE (August 23, 2016) http://www.workforce.com/2016/08/23/did-the-7th-circuit-finally-kill-mcdonnell-douglas/.

action.[160] Admittedly, this simplified inquiry does not mention or necessitate a prima facie case, burden-shifting, a legitimate non-discriminatory reason, pretext, or comparators.[161] Despite this absence of the *McDonnell Douglas* framework in the Seventh Circuit's inquiry, their holding and that framework are reconcilable.

Ortiz specifically stated that the "decision does not concern *McDonnell Douglas* or any other burden-shifting framework . . . [the] conclusion is consistent with *McDonnell Douglas* and its successors."[162] The Seventh Circuit therefore did not intend for their holding to be incompatible with *McDonnell Douglas* nor render it useless; they simply do not want evidence to be sorted or labeled as direct or indirect and evaluated as such. There is no reason that the *McDonnell Douglas* framework is not usable without labeling and differentiating between evidence. The three-part burden shift is still viable and elucidates the ultimate question of causation. *Ortiz* merely held that when a court utilizes the *McDonnell Douglas* framework, they must view all evidence as a whole; none can be thrown out and none can be used for evaluating some purpose but not for another.

With *McDonnell Douglas* intact within the Seventh Circuit's simplified approach to disparate treatment discrimination, the Supreme Court should not hesitate to adopt that method. By doing away with one aspect of confusion within the infamously confusing employment discrimination law field, the Court would be taking a step in the direction of modernization and unification. Although many more changes are needed to simplify a needlessly doctrinally complex field, *Ortiz* gives the Court an opportunity to begin the process. Not only would simplifying and unifying benefit litigants, employers, and judges, by providing certainty and efficiency, it would be a major step forward for the employment discrimination jurisprudence as a whole and open the door to more changes reflecting modern understanding of social psychology and changing social norms.

IV. CONCLUSION

Widespread confusion exists, and courts, scholars, and attorneys have expressed the need for a unified method of analyzing such cases. The inconsistency across the district courts shows that these proof models muddle the issues. The lower courts' interpretations of the models vary, leading to

160. Ortiz v. Werner Enter. Inc., 834 F.3d 760, 765 (7th Cir. 2016).

161. For an argument against the *McDonnell Douglas* framework, *see* Sperino, *supra* note 15 ("employment discrimination law is held captive by this increasingly complicated web of frameworks, which facilitate a reflexive, formalistic view of discrimination. Rather than asking whether a particular set of facts establishes discrimination under the statutory scheme, courts and litigants now ask whether the fats fir with a court-defined structure.").

162. *Ortiz*, 834 F.3d at 766.

even more confusion and disunity which hurts both employees and employers. Categorizing evidence as direct or indirect and evaluating it accordingly perpetuates unnecessary complexity, neglects the fundamental causation question, disproportionally "squeezes-out" plaintiffs' claims, and prevents employers from making informed business decisions. Despite acknowledging the disunity, courts have failed to provide an adequate alternative. *Ortiz* began to rectify the situation by bringing into focus the ultimate issue that must be addressed and minimizing the use of arbitrary proof models that muddle the issue and pervade employment discrimination law more generally.

Disregarding the direct and indirect proof models refocuses employment discrimination cases on the critical issue of causation. As it has done in the past when presented with cases in which lower courts have adopted formalistic rules, the Supreme Court should adopt the *Ortiz* holding and clarify that evidence is evidence, and should not be sorted, labeled, and applied by its perceived place in a direct or indirect proof model framework. Whether the employee's protected trait caused the adverse employment action, the ultimate question underlying all employment discrimination cases, must be brought back into the forefront where it belongs.