THE BOUNDARIES OF LITIGATING UNCONSCIOUS DISCRIMINATION: FIRM-BASED REMEDIES IN RESPONSE TO A HOSTILE JUDICIARY

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ABSTRACT

In answering the question of how judges should approach unconscious discrimination claims, scholars ignore a practical solution to this problem: by putting the burden on the firm to reduce the incidence of unconscious bias ex ante, as opposed to putting the burden on the employee of proving it in court ex post. The means of accomplishing this is multifaceted, whereby firms that have been previously exposed to extensive employment discrimination litigation use their market power to force their smaller competitors to adopt a new diversity norm. Delaware law then steps in and memorializes the new norm in the case law, transitioning the norm into a rule of law enforceable through the duty to monitor (a species of the duties of care and loyalty). While this may sound a little unusual, this article will show that it is a meaningful alternative to combating discrimination primarily addressed through Title VII of the Civil Rights Act of 1964 (Title VII) by forcing firms incorporated within the state to create an environment amenable to diversity. Such initiatives could address overt discrimination and also unconscious discrimination, which is more prevalent and the focus of this study. While unconscious discrimination is actionable under Title VII (presumably), scholars are in agreement that court regulation of it has failed. Contrary to the alternatives suggested in the literature, placing the burden on the firm to regulate discrimination ex ante is more likely to minimize unconscious, discriminatory behavior, at least more than tinkering with the ex post remedies available for those few violations that can be proven through Title VII.

This article first explains why courts have failed to address unconscious discrimination, a failure that has emerged largely out of respect for employment at will and an unwillingness to infer differential treatment where other explanations are possible. Courts can address

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only the most extreme cases of unconscious discrimination, which require the presence of certain factors that will allow the court to isolate the bias. Second, this article proposes other mechanisms for addressing unconscious discrimination that account for its peculiar nature, mainly firm-based remedies that will be more successful than the courts have been in addressing this problem. The difficulty comes in giving the Delaware courts an incentive to become involved in the controversy over unconscious discrimination, or in the alternative, convincing firms to address unconscious discrimination without the impetus of litigation. This article demonstrates that such incentive can come from an unlikely blend of the duties of care and loyalty, corporate norms, and economic pressure from corporate giants like Wal-Mart.

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I. INTRODUCTION

In *Glass v. Philadelphia Electric Co.*,[1] the majority concluded that the district court abused its discretion by barring the plaintiff from introducing evidence at trial that the defendant created a hostile work environment based on unconscious discrimination that contributed to the plaintiff's negative work performance and subsequent poor work evaluations.[2] In dissent, then-Judge Alito put aside "the question of whether, as a matter of law, a plaintiff in a disparate treatment case may prevail based on evidence of 'unconscious' discrimination" and stated that the plaintiff's reliance on such an "unconventional theory substantially diminished the probative value of the evidence of harassment" by the defendant.[3]

The idea that unconscious discrimination is viewed by a sitting United States Supreme Court Justice as "unconventional" and that it diminishes the credibility of the plaintiff's case stands in stark contrast to admonitions by scholars that Title VII reaches such discrimination.[4] While commentators never tire of discussing racism and sexism in all of their varied forms, courts appear to be tired of talking about them. Perhaps this fatigue explains the perceived novelty of unconscious discrimination and the overwhelming failure of courts to address its prevalence in the workplace. Maybe such fatigue can be lessened if we rename or recharacterize the problem. This article argues that the time has come to recraft the remedy.

Unconscious discrimination is based on a subconscious aversion to minorities, women, and other individuals protected by antidiscrimination statutes, such as older workers and those with disabilities. There is considerable disagreement about which term is appropriate—subtle bias or unconscious discrimination.[5] The definition of "subtle bias" could be read to involve a certain level of intent on the part of the

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[1]34 F.3d 188 (3d Cir. 1994).

[2]*Id.* at 195.

[3]*Id.* at 200 (Alito, J., dissenting).

[4]*See, e.g.*, Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 743 (2005) (arguing that Title VII encompasses claims of unconscious discrimination); Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 420 (2000) (analyzing the different proof mechanisms developed under Title VII discriminatory treatment doctrine in order to demonstrate Title VII's ability to identify conscious and unconscious discrimination). *See also* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (advocating a new theory under the Equal Protection Clause to resolve claims of unconscious racism). *But see* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1134 (1999) (arguing that Title VII should not be expanded to resolve claims of unconscious discrimination).

[5]*See* Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 658-59 (2003).

employer, or the term could refer to the act of discrimination, rather than the employer's intent, as being covert. However, for purposes of this article, the terms "unconscious discrimination," "unconscious bias," "implicit bias," and "subtle bias" are used interchangeably to refer to the fact that the employer is not aware that any impermissible motivation influenced the employment decision.[6] This definition credits the employer's testimony that he did not have any racial or gender-based animosity, which is common in these cases. Unlike conscious discrimination, the perpetrator, and in some cases the victim, may not be aware of its presence, although its effects are still felt.

Unconscious discrimination is a challenge for the current Title VII framework because the law does not give judges the tools to police behavior that does not mimic the traditional prejudices that most are familiar with such as racial epithets, off-color jokes, or patterns reflecting the lack of minority advancement that can be easily explained by racial or gender animus.[7] As a result, many judges apply the burden-shifting framework of *McDonnell Douglas Corporation v. Green*,[8] which allows plaintiffs to raise an inference of discrimination based on circumstantial evidence. Yet these judges still anticipate some type of dispositive smoking gun evidence that would illustrate that the protected characteristic is the motivating factor behind the employment decision.[9]

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[6]Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) ("The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."). *See also* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1196 n.88 (2003) (using the term "unconscious discrimination because that is the terminology employed by unconscious bias critics"). "Implicit bias" is the term used in the social psychology literature when referring to this phenomenon. *See infra* Parts III.A and IV.D. Many legal scholars use the term "subtle bias" when referring to unconscious discrimination. *See infra* Part III.A.

[7]*See* Wright v. Southland Corp., 187 F.3d 1287, 1290 (11th Cir. 1999) ("A discrimination suit (unlike, for instance, an action for negligence or breach of contract) puts the plaintiff in the difficult position of having to prove the state of mind of the person making the employment decision."); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Professor Sturm has aptly described the demise of more formal policies of discrimination:

> Smoking guns—the sign on the door that "Irish need not apply" or the rejection explained by the comment that "this is no job for a woman"—are largely things of the past. Many employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies. Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality.

Id. at 459-60. The downside is that discrimination is now harder for courts to police.

[8]411 U.S. 792, 802-03 (1973).

[9]*See, e.g.*, Johnson v. Louisiana, 351 F.3d 616, 624 (5th Cir. 2003) (reversing the district court's grant of summary judgment in favor of the employer where the district court

Consequently, plaintiffs alleging unconscious discrimination have limited options. Class action suits alleging disparate impact or systemic disparate treatment may cause such embarrassing publicity and extensive liability exposure that firms are forced to adopt diversity initiatives to appease shareholders.[10] While this is one way of addressing unconscious discrimination, such widespread class action litigation is rare.[11] In fact,

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found that the plaintiffs did not meet the employer's objective requirements for the position despite evidence that the objective requirements were not applied to the employees who were actually hired for the position). The district court judge in *Johnson* decided that the qualifications of the hirees were irrelevant at the prima facie case stage, despite the fact that plaintiffs presented proof that the objective criteria was being applied in a disparate manner, and disparate treatment is the hallmark of any discrimination claim. *See* Johnson v. Med. Ctr. of La., No. 01-0191, 2002 U.S. Dist. LEXIS 24065, at *19-20 (E.D. La. Dec. 12, 2002) ("At the prima facie stage of inquiry, the qualifications, or lack thereof of the hirees, is not pertinent."), *rev'd in part, aff'd in part*, 351 F.3d 616 (5th Cir. 2003). The judge attempted to limit the plaintiffs' claim through a formalistic application of the *McDonnell Douglas* framework, which is the problem for many alleging unconscious bias because their claims do not fit the same mold as traditional employment discrimination cases. The lack of smoking gun evidence dooms many discrimination claims at the trial level, although plaintiffs are occasionally successful in getting the decision reversed on appeal. *See, e.g.*, White v. Baxter Healthcare Corp., No. 07-1626, 2008 U.S. App. LEXIS 14188, at *31 (6th Cir. July 3, 2008) (finding that a jury could reasonably infer that race was a motivating factor in the decision not to promote the plaintiff because "any evaluation of [the plaintiff's] interview performance is an inherently subjective determination, and thus easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision" and "it would be highly inappropriate for us to assume, as [the dissent] does, that [the defendant's] own subjective perceptions of [the plaintiff] were accurate"); *see also* Tademy v. Union Pac. Corp., 520 F.3d 1149, 1158-59 (10th Cir. 2008) (finding that a hostile work environment existed where an employee hung a noose on a wall clock given that it is "deeply a part of this country's collective consciousness and history, any [further] explanation of how one could infer a racial motive appears quite unnecessary"; the district court originally found that "the alleged noose could not be evidence of racial discrimination because it was merely 'an industrial rope with a slip knot tied in it'").

[10]In *Griggs v. Duke Power Company*, the Supreme Court held that Title VII prohibits "practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This theory of disparate impact does not require the same "smoking gun" evidence of intent that judges look for in individual disparate treatment cases. Furthermore, in individual disparate treatment cases, the burden of persuasion is always on the plaintiff whereas in disparate impact, the defendant must persuade the court that the challenged practice is job related. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (2000)). The other category of cases involve systematic disparate treatment claims, which are not as commonly litigated, and arise when "discrimination [is] the company's standard operating procedure–the regular rather than the unusual practice." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Section 707 of Title VII allows the federal government to bring a lawsuit alleging that an employer has "a pattern or practice of resistance to the full enjoyment of any of the rights secured by [Title VII]," a section which allows the government to challenge the disparate treatment of individuals or the application of neutral factors that have a disparate impact on a certain group. 42 U.S.C. § 2000e-6a (2000).

[11]*See* Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1633 (2007) (discussing class action litigation against Wal-Mart, Home Depot, and Costco challenging the "excessive subjectivity" in its decision making that entrenches gender stereotypes).

most litigation under Title VII will not have the same deterrent effect as class action suits despite the statute's potential to address this problem.[12] Unconscious discrimination claims are usually brought by individual plaintiffs, suing based on facts that obscure rather than reveal the existence of any potential bias, thus leaving the court in the position of trying to craft a remedy that is necessarily limited to the facts of the particular case before it.

However, two factors have emerged from the case law that reveal when judges can successfully resolve these claims: (1) by eliminating every nondiscriminatory reason from the record, and (2) finding that the plaintiff's behavior is more reasonable than that of the employer. The best example of these two factors at work is a First Circuit case, *Thomas v. Eastman Kodak Company*.[13] There, the court denied summary judgment on the grounds that the plaintiff had raised an issue of material fact as to whether her performance evaluations were motivated by unconscious racial animus and therefore constituted unlawful discrimination in violation of Title VII.[14] Both of these factors were integral to the plaintiff's success because they allowed the court to isolate the unconscious bias in the record as a viable motivation for the allegedly discriminatory employment actions.

The *Thomas* decision indicates that unconscious discrimination can be actionable pursuant to Title VII. Consistent with then-Judge Alito's skeptical remarks in *Glass*, however, such suits have limited potential because of the unwillingness of courts to abrogate the doctrine of employment at will. Because of employment at will, courts are able to provide relief to unconscious discrimination plaintiffs in only the most extreme cases. Furthermore, courts are ill-equipped to resolve employment disputes, and are more likely to defer to the employer. When applying the *McDonnell Douglas* framework, the courts' deference to employment at will explains why the employer only has to provide a legitimate business reason for its action, without the corresponding

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[12] *See* County of Washington v. Gunther, 452 U.S. 161, 180 (1981) (stating that Title VII prohibits "all practices in whatever form which create inequality in employment opportunity due to discrimination . . . [including] the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes") (quoting Franks v. Bowman Trans. Co., 424 U.S. 747, 763 (1976)); *McDonnell Douglas*, 411 U.S. at 801 (stating that "Title VII tolerates no racial discrimination, subtle or otherwise"); Hopkins v. Price Waterhouse, 825 F.2d 458, 469 (D.C. Cir. 1987), *aff'd in part*, 490 U.S. 228, 250-52 (1989) (stating that if the plaintiff has shown that she was treated less favorably because of her gender, "the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it"). *See also* Thomas v. Eastman Kodak Co., 183 F.3d 38, 59 (1st Cir. 1999) ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.").

[13] 183 F.3d 38 (1st Cir. 1999).

[14] *Id.* at 42.

burden of persuasion. This "legitimate business" reason functions as a complete bar to recovery unless the plaintiff can meet the very difficult burden of proving that the employer's proffered reason is a pretext for discrimination.

Thus, the focus of the current debate should shift to how we can avoid lawsuits that are, at best, inefficient and costly and, at worst, losing propositions. This article proposes that adopting internal firm compliance standards that increase diversity, in inter-group cooperation, and awareness among employees ex ante have the potential to do far more towards addressing the problem of unconscious discrimination than bringing a lawsuit pursuant to Title VII ex post. Given the courts' overwhelming failure to address this issue, firm-based remedies are necessary to address this problem. And if the firm fails to implement programs and standards that address unconscious bias, stereotypes, and other covert means that result in disparate treatment across employees, it may be more effective to view this, not as a Title VII problem, but as a breach of the duty of care.

As the Delaware Court of Chancery held in *In re Caremark International, Incorporated Derivative Litigation*,[15] in order for corporate boards to satisfy their obligation to be reasonably informed concerning the corporation, they have to make sure:

> that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.[16]

Thus, noncompliance with the mandates of Title VII, where an employee has complained to management about disparate treatment, could be actionable as a breach of the duty of care if high level management and the board of directors fail to adequately address these concerns by ensuring that there are regulations within the firm that promote the type of debiasing and diversity needed to address both conscious and unconscious discrimination.[17] It is, however, not clear if, outside of a desire to

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[15]698 A.2d 959 (Del. Ch. 1996).

[16]*Id.* at 970.

[17]Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998) ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would

self-police, corporate boards can be otherwise induced to adopt these initiatives or if Delaware courts have an incentive to force them to do so. An alternative proposal is for firms that already have been subject to extensive Title VII litigation and have modified their behavior accordingly to force their business partners to adopt similar initiatives by applying economic pressure. One firm in particular, Wal-Mart, has faced extensive Title VII liability and has initiated diversity initiatives in response to this litigation. Because of their considerable sway in the business world, Wal-Mart can induce other firms, including its suppliers, to do the same.

This proposal is novel in many ways, and it is also timely. Legal scholarship has not focused specifically on the issue of when and under what circumstances unconscious discrimination claims are successful, knowledge which helps to develop viable alternatives to solve the problem, i.e., that the firm could be successful in remedying unconscious discrimination.

The article proceeds in four parts. Part II provides background information on the nature of unconscious discrimination and describes how scholars have approached this issue. Part III discusses the limitations on courts in greater detail. In seeking to deconstruct unconscious discrimination claims, Part III answers two questions: first, when are unconscious discrimination claims successful? Second, why is their success so limited if Title VII is designed to reach unconscious discrimination? From the case law, it is clear that unconscious discrimination claims are successful only where the employee can dispel every nondiscriminatory reason from the record and also has behaved reasonably in the face of the employer's discriminatory behavior. The idea is that the court must be able to successfully isolate unconscious bias in the absence of any direct evidence of discrimination. While it is difficult for a court to justify deferring to employment at will when an employment decision is clearly discriminatory, a court is unlikely to find for the plaintiff where the discrimination is based on the plaintiff's subjective perception and if other reasons exist that may explain the allegedly discriminatory action. By recognizing that, courts are laboring within a framework that focuses on intent and defers to employment at will. Part III sheds new light on when an unconscious discrimination claim can actually survive summary judgment, rather than simply concluding, as much of the literature does, that liability is possible.

Part IV answers the normative question: why the firm, as opposed to the judicial system, should have the responsibility of addressing unconscious discrimination. First, it asks what obligations firms have to

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effect Congress' intention to promote conciliation rather than litigation in the Title VII context . . . .").

their shareholders to reduce the incidence of unconscious discrimination by focusing on the reputational harms caused by Title VII litigation. Next, Part IV focuses on whether firms should be required under Delaware law to address this issue, and what incentives Delaware courts have to enforce Title VII through the duty to monitor. Last, this section discusses how, if Delaware courts are not incentivized to act, firms that have already been subjected to Title VII litigation and/or sanctions could put economic pressure on their business partners to force them to adopt diversity initiatives. Part IV also discusses the cost and benefits of such initiatives, a relevant consideration for both Delaware courts and firms, and concludes that the firm would be at least marginally better in ensuring Title VII compliance than the courts.

II. THE NEW GENERATION OF DISCRIMINATION

Placing the burden on the firm to address unconscious discrimination is, in some ways, an unremarkable suggestion. It is undisputed that courts have failed to address both unconscious and overt discrimination, despite a statutory mandate that gives them power to counteract various types of discriminatory behavior. What is extraordinary is the means by which this can be accomplished. First, it is useful to start with the statute and how unconscious discrimination fits within this framework. Title VII prohibits employers from treating employees differently on the basis of race, sex, religion, or national origin, and from retaliating against an employee if the employee opposes any practice deemed unlawful under Title VII.[18] By enacting Title VII, Congress partially abrogated the doctrine of employment at will, which allowed an employer to discharge an employee for any reason or for no reason, by specifically rejecting an employer's right to discriminate on the basis of certain protected characteristics. There is no language within the statute limiting Title VII to conscious discrimination. Additionally, no court has explicitly stated that unconscious discrimination claims cannot be brought pursuant to Title VII, and indeed, a few courts have found that the statute encompasses such claims.[19] Yet most courts focus their

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[18]42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (2005).

[19]*See, e.g.*, Thomas v. Cal. State Dep't of Corr., No. 91-15870, 1992 U.S. App. LEXIS 20346, at *8-9 (9th Cir. Aug. 18, 1992) ("Were we to hold that the unsupported claim that a particular candidate was a 'superior' interviewee was sufficient without more to require summary judgment for an employer, we would immunize from effective review all sorts of conscious and unconscious discrimination."); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) ("Age discrimination is often subtle and 'may simply arise from an *unconscious* application of stereotyped notions of ability . . . .'") (quoting Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154-55 (7th Cir. 1981)); Pitre v. W. Elec. Co., 843 F.2d 1262, 1273 (10th Cir. 1988) ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than

inquiry on "intentional" discrimination, which severely limits the success of unconscious discrimination claims.[20]

The persistence of unconscious discrimination in the workplace has been documented in numerous studies.[21] This form of discrimination

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are applied to their male counterparts.") (quoting Sweeney v. Bd. of Trs. of Keene State Coll., 604 F.2d 106, 114 (1st Cir. 1979)); Namenwirth v. Bd. of Regents, 769 F.2d 1235, 1243 (7th Cir. 1985) (alleging discrimination in a tenure decision, the court noted that "faculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars"); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1235-36 (9th Cir. 1984) (holding disparate treatment occurs where decision maker applies subjective wage-setting policy in racially discriminatory and subtle manner even absent malice); Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (finding that an employer's employee evaluation forms were potentially constitutionally defective because they were potentially "vulnerable to conscious or unconscious discrimination by the evaluating supervisors") (quoting Wade v. Miss. Coop. Extension Serv., 528 F.2d 508, 518 (5th Cir. 1976)); Sperling v. Hoffman-La Roche, Inc., 924 F. Supp. 1346, 1362 (D.N.J. 1996) ("Disparate impact analysis addresses the effects of unconscious discrimination in addition to conscious or intentional discrimination."); Green v. U.S. Steel Corp., 570 F. Supp. 254, 276 (E.D. Pa. 1983) (finding that the defendant's hiring process "masked subtle and perhaps unconscious discrimination against black applicants" where after the implementation of an affirmative action program, the amount of blacks in the apprenticeship program increased, but the quality of the applicants did not change).

[20] *See* EEOC v. Century Broad. Corp., 957 F.2d 1446, 1466 (7th Cir. 1992) ("'[A] plaintiff who proves only . . . subtle and unconscious discrimination has not shown willful discrimination.'") (quoting Brown v. M & M/Mars, 883 F.2d 505, 514 (7th Cir. 1989)). For more on the intent requirement, see Costa v. Desert Palace, Inc., 299 F.3d 838, 854 (9th Cir. 2002) ("Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate."), *aff'd*, 593 U.S. 90 (2003); Oest v. Ill. Dep't of Corr., 240 F.3d 605, 611 (7th Cir. 2001) ("To prevail on a Title VII disparate treatment claim, a plaintiff must establish that she is the victim of intentional discrimination."); Sorensen v. Aurora, 984 F.2d 349, 351 (10th Cir. 1993) ("When alleging disparate treatment on the basis of sex, the plaintiff must prove by a preponderance of the evidence that the defendant had a discriminatory motive or intent.") (internal citations omitted). *See also* Merriweather v. Ala. Dep't of Pub. Safety, 17 F. Supp. 2d 1260, 1267 (M.D. Ala. 1998) ("A plaintiff bringing a claim under Title VII must establish that the employer's actions were the result of intentional discrimination."); Siam v. Potter, No. C04-0129MHP, 2005 U.S. Dist. LEXIS 11893, at *29 (N.D. Cal. May 17, 2005) ("In cases alleging disparate treatment on basis of gender, Title VII requires a plaintiff to prove that the employer acted with a conscious intent to discriminate."); Hopkins v. Elizabeth Bd. of Educ., No. 03-5418, 2005 U.S. Dist. LEXIS 17031, at *8 (D.N.J. Aug. 5, 2005) (requiring plaintiff to carry the burden of proving intentional discrimination).

[21] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 736-38 (2000) (stating that blind auditions of new orchestra hires led to a one-third increase in the proportion of new female hires in major symphony orchestras); David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915, 925, 936 (1996) (explaining a study where identical resumes with male/female names were sent to high end restaurants, 61% of male resumes received callback interviews as compared to 26% of women); Carol Rapaport, *Apparent Wage Discrimination When Wages are Determined by Nondiscriminatory Contracts*, 85 AM. ECON. REV. 1263, 1266, 1273-74 (1995) (describing a study of wage discrimination against black teachers). For more on the psychology behind unconscious discrimination, see Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOLOGIST 1049, 1051 (1991) (noting that employees are often evaluated based on the stereotypes of the employee's racial or gender

can also be more harmful than overt discrimination in some situations.[22] In fact, one can safely argue that society's rejection of the aversive racist, or "a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly, and often unconsciously[,]"[23] has made unconscious discrimination more common

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group); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). As Professors Greenwald and Krieger have noted:

> [A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans. Consequently, when racially neutral causes and explicit bias can be rejected as causal explanations for racially disparate outcomes, implicit race bias must be regarded as a probable, even if not definitively established, cause.

Id. at 966-67; McGinley, *supra* note 4. There is considerable disagreement, however, about the prevalence of unconscious discrimination and how it should be defined—a debate that is beyond the scope of this study. *See* Anthony G. Greenwald, *Unconscious Cognition Reclaimed*, 47 AM. PSYCHOLOGIST 766 (1992); Michael Selmi, *Response to Professor Wax Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1240 (1999); Wax, *supra* note 4, at 1136-41. *See also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1245-46 (1995) (agreeing that a negligence approach would further Title VII's purposes and reach unconscious discrimination but ultimately rejecting the idea due to a lack of empirical testing).

[22]John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88 (2002). These commentators point out that:

> The different and potentially divergent impressions that Blacks and Whites may form during interracial interactions can have significant impact on their coordination and thus their effectiveness in task-oriented situations .... Besides manifesting itself in terms of different impressions and perceptions, contemporary bias can therefore also influence personal relations and group processes in ways that unintentionally but adversely affect outcomes for Blacks.

Id. at 97.

[23]Foster v. State, 614 So. 2d 455, 466 (Fla. 1992) (Overton, J., concurring) (quoting Sherri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1027-28 (1988)). *See also* Lawrence, *supra* note 4, at 322-23 (describing the aversive racist); Timothy Davies, *Racism in Athletics: Subtle Yet Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881 (1999). In discussing the role of aversive racism in explaining the pay and promotion disparities in professional and amateur sports, Professor Davies notes that aversive racists act based on emotions other than hate or ill will:

> [A]versive racism represents a subtle, often unintentional, form of bias that characterizes many white Americans who possess strong egalitarian values and who believe that they are nonprejudiced. Aversive racists also possess negative racial feelings and beliefs of which they are unaware or that they try to dissociate from their nonprejudiced self-images. The negative feelings that aversive racists have for blacks do not reflect open hostility or hate. Instead, their reactions involve discomfort, uneasiness, disgust, and sometime fear. That is, they find blacks "aversive," while, at the same time, they find any suggestion that they might be prejudiced aversive as well.

Id. at 883 (quoting John F. Dovidio & Samuel L. Gaertner, *On the Nature of Contemporary Prejudice*, *in* CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 3, 5 (Jennifer L. Eberhart & Susan T. Fiske eds., 1998)).

than conscious discrimination in today's workplace.[24] According to Professor Fiske, "[E]ven among relatively unprejudiced people, racial category labels automatically prime (increase the accessibility of) stereotypes."[25] In one study, for example, participants were asked to evaluate candidates for a peer counseling program at their university.[26] In situations where the black candidate was qualified for the position, or in the alternative, clearly unqualified, there was no discrimination—the black candidate was chosen 91% of the time in the former category and 13% in the latter.[27] Where the candidates' qualifications were more moderate, thereby allowing more discretion from the decision maker in whether to hire the individual, the black candidate was recommended significantly less often than the white candidate (45% to 75%).[28] According to Professors Dovidio, Gaertner, Kawakami, and Hodson, these findings support the general proposition that:

> [b]ecause aversive racists consciously endorse egalitarian values and deny their negative feelings about Blacks, they will not discriminate directly and openly in ways that can be attributed to racism. However, because of their negative feelings, they will discriminate, often unintentionally, when their behavior can be justified on the basis of some factor other than race (e.g., questionable qualifications for a position).[29]

Because unconscious discrimination often falls in a gray area in which the decision could be based on the impermissible motivation or some other neutral criteria, this makes it hard to detect and difficult to remedy.

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[24]*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) (discussing a study in which 5,000 identical resumes sent out to different employers, applicants with "Caucasian" names received 50% more callback interviews than those applicants with "African American" names); EEOC Initiative Highlights Persistence, *Changing Forms of Race Bias in Workplace*, 75 U.S.L.W. 2519, at 1 (Mar. 6, 2007) (discussing new national initiative launched by the EEOC to raise public awareness about the more subtle biases that continue to permeate the workplace because "bias based on race and color 'has changed form' as more subtle bias supplants the blatant practices that originally spurred the enactment of Title VII of the 1964 Civil Rights Act"); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 483-86 (2005) (summarizing several empirical studies that show that "unconscious bias is quite prevalent, often in sharp contrast to individuals' self-professed identity").

[25]Susan T. Fiske, *What We Know Now About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123, 124 (2002).

[26]Dovidio et al., *supra* note 22, at 90, 92.

[27]*Id.* at 92.

[28]*Id.*

[29]*Id.* at 90.

The elusiveness of unconscious discrimination is the biggest hurdle to a judicially crafted remedy, despite the legislative mandate of Title VII. Much of the difficulty is definitional. Conscious racism is based on "an instinctive, unexplained distaste at the thought of associating with the out-group as equals[,] or . . . reasons that are not based on established fact and are often contradicted by personal experience."[30] The manifestations of conscious discrimination through, for example, inappropriate remarks or racial epithets, make it easier to detect and define than unconscious discrimination. In contrast, unconscious discrimination is based largely on cultural, emotional, and motivational factors that might be unknown to the perpetrator, a premise that has been thoroughly explored in cognitive psychology literature, but has resulted in little agreement among scholars about how to define and address the problem. While what follows is, by no means, an exhaustive literature review, a brief survey of the scholarship is required in order to understand how unconscious discrimination works. Much of the social psychology and unconscious bias literature indicates that human beings categorize individuals to maintain a sense of order.[31] When people are categorized into groups, "actual differences between members of the same category tend to be perceptually minimized and often ignored" while the groups' differences from members of other categories (also referred to as individuals in the "outgroup") "tend to become exaggerated and overgeneralized."[32] Furthermore, people feel personally and emotionally invested in the categorization process because they insert themselves into a group, which "increases the emotional significance of group differences and thus leads to further perceptual distortion and to

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[30]Lawrence, *supra* note 4, at 332.

[31]*Id.* at 337. Professor Lawrence posits that:

> All humans tend to categorize in order to make sense of experience .... When a category—for example, the category of a black person or a white person—correlates with a continuous dimension—for example, the range of human intelligence or the propensity to violence—there is a tendency to exaggerate the differences between categories on that dimension and to minimize the differences within each category.

Id. See also Krieger, *supra* note 21, at 1217 (noting that even "a self-professed 'colorblind' decisionmaker will fall prey to the various sources of cognitive bias [because] . . . [i]n a culture in which race, gender, and ethnicity are salient, even the well-intentioned will inexorably categorize along racial, gender, and ethnic lines. And once these categorical structures are in place, they can be expected to distort social perception and judgment."); McGinley, *supra* note 4, at 423 ("Cognitive theory identifies common human information processing mechanisms as responsible for creating stereotypes and the resulting discrimination . . . [by] theoriz[ing] that stereotypes and discriminatory attitudes result from humans' natural cognitive processing system which allows persons to know the world through categorization.") (footnote omitted).

[32]Samuel L. Gaertner et al., *Reducing Intergroup Conflict: From Superordinate Goals to Decategorization, Recategorization, and Mutual Differentiation*, 4 GROUP DYNAMICS: THEORY RES. & PRAC. 98, 99-100 (2000) (citation omitted).

evaluative biases that reflect favorably on the in-group . . . ."[33] It is this categorization, combining stereotypes and societal programming about racial constructs gives rise to unconscious discrimination.[34] In other words, "Subtle prejudice comes from people's internal conflict between ideals and biases, both acquired from [conflict with] . . . culture."[35]

There is considerable disagreement in the social psychiatry literature about the nature and origins of unconscious discrimination, specifically whether it is an inevitable byproduct of the categorization process.[36] As evidence of the automaticity of stereotypes, commentators point to "[a]wkward social interactions, embarrassing slips of the tongue, unchecked assumptions, stereotypic judgments, and spontaneous neglect . . . [that] creates a subtly hostile environment for out-group members."[37] Much of the disagreement, however, lies in whether the impulse to stereotype can be controlled and if so, in what ways.[38] Professor Devine, for example, argues that "nonprejudiced responses require both the inhibition of the automatically activated stereotype [because of its long history of activation and greater frequency of occurrence] and the intentional activation of nonprejudiced beliefs[,]"[39] both of which involve

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[33]*Id.* at 100 (discussing the "social identity perspective").

[34]Lawrence, *supra* note 4, at 339 (stating that stereotyping makes individuals interpret and remember events in ways that "bolster and support" the stereotyped beliefs).

[35]Fiske, *supra* note 25, at 126.

[36]Selmi, *supra* note 21, at 1240 (discussing the debate). *See also* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 408 (1954) (discussing that prejudices cannot be explained by one ideal pattern); Mahzarin R. Banaji et al., *The Social Unconscious*, *in* BLACKWELL HANDBOOK OF SOCIAL PSYCHOLOGY: INTRAINDIVIDUAL PROCESS 134 (Abraham Tesser & Norbert Schwarz eds., 2003) (2001) (stating different components of social unconsciousness); Patricia G. Devine et al., *Prejudice With and Without Compunction*, 60 J. PERSONALITY & SOC. PSYCHOL. 817, 817 (1991) (discussing the different theories of prejudice responses); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995) (describing the indirect method of operations for stereotypes).

[37]Fiske, *supra* note 25, at 124. *See also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1503, 1506 (2005) (arguing that individuals "think through schemas generally, and through racial schemas specifically, which operate automatically when primed, sometimes even by subliminal stimuli" and "[o]nce activated, the racial meanings embedded within the racial schema influence interaction").

[38]Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOLOGIST 5 (1989); Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621 (1993); Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, 51 J. SOC. ISSUES 97 (1995); Samuel L. Gaertner et al., *Reducing Intergroup Bias: Elements of Intergroup Cooperation*, 76 J. PERSONALITY & SOC. PSYCHOL. 388 (1999). *See also supra* note 36 (discussing theories of prejudice and social unconsciousness).

[39]Devine, *supra* note 38, at 7. *But see* John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of the Automatic Stereotype Effect*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 361, 363 (Shelly Chaiken & Yaacov Trope eds., 1999) ("The mere perception of easily discernible group features [could] influence judgments of a

the use of controlled processes. Some commentators contend that the impulse to control stereotyping depends very heavily on the idea that such behavior may not be unconditionally automatic because it depends on "short-term motivations, which include immediate threats to self-esteem and focused efforts toward accurate understanding."[40] However, many agree that individuals "can compensate for their automatic associations with subsequent conscious effort,"[41] efforts that can be advanced through the legal system.

Professor Charles Lawrence was one of the first legal scholars to probe the courts' treatment of subconsciously held biases, although his study focuses on unconscious discrimination in equal protection jurisprudence rather than Title VII.[42] He argued that courts must acknowledge the cultural roots of racism and veer from a theory of discrimination that relies on the conscious animus of the discriminator.[43] Scholars have built on the psychological foundations laid by Professor Lawrence to explain the roots of unconscious racism and its effect on the legal system. Professors Christine Jolls and Cass Sunstein argue that the variation between conscious and unconscious racism is based on two systems of cognitive operations that test how individuals react to different proxies for race and gender.[44] "System I is rapid, intuitive, and error-prone;" while "System II is more deliberative, calculative, slower, and often more likely to be error-free."[45] Conscious racism is most closely aligned to System II where the decision to discriminate is

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group member in an unintended fashion, outside of a perceiver's awareness.").

[40]Fiske, *supra* note 25, at 124.

[41]*Id.* *See also* Gaertner et al., *supra* note 38, at 397 (noting that interaction between groups with a common fate can reduce bias).

[42]Lawrence, *supra* note 4.

[43]*Id.* at 325-26 ("Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication."). Professor Lawrence argues that heightened scrutiny should apply where the court can determine that the complained of action conveys a cultural meaning. Based on this approach, the court:

> would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny.

Id. at 356.

[44]Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 973 (2006).

[45]*Id.* at 974.

purposeful.[46] Unconscious racism correlates to System I, where individuals make quick deductions based on limited information. As a result, these deductions are usually erroneous because they are based on cognitive shortcuts such as stereotypes.[47] By using cognitive shortcuts that rely on previously formed stereotypes or encounters with members of the protected group, employers attempt to predict an individual's future behavior based on the protected characteristic.[48]

In another study, Professor McGinley discusses the role of attitude in influencing the creation of unconsciously held biases, indicating that individuals with a happy or positive disposition are more likely to rely on previously formed stereotypes than individuals who have a neutral affect.[49] Early childhood experiences, cultural biases, and personal disposition all influence an individual's reliance on stereotypes.[50] Furthermore, once the initial erroneous determination is made about a person in the out-group, the bias becomes more and more pronounced at each subsequent interaction between the two individuals.[51] The need for

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[46]*Id.*

[47]*Id.* at 975 (noting that when it comes to implicit bias, System I is likely the culprit in a scenario where an employer chooses a white employee over a black one on the grounds that customers will be more "comfortable" with the white employee because "the employer has no conscious awareness of the role race played in its decision").

[48]Michelle Travis, *Perceived Disabilities, Social Cognition, and "Innocent Mistakes,"* 55 VAND. L. REV. 481, 488-89 (2002) (noting that "[s]ocial scientists have discovered that our predictions of future performance and behavior are efficiently–but imperfectly–based on cognitive shortcuts that rely too heavily on prior causal theories and that systematically bias predictions in identifiable ways" and arguing that these cognitive shortcuts cause employers to commit errors when they try to evaluate the future impact of non-disabling impairments based on their past impressions).

[49]McGinley, *supra* note 4, at 424-25. The finding that individuals who have a pleasant disposition are more likely to rely on stereotyping indicates that, contrary to popular belief, individuals who engage in unconscious discrimination are not necessarily "bad" people. *See* Lu-in Wang, *Race As Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1018 (2004). As Professor Wang observes:

> We tend to see someone else's conduct as being mostly or even exclusively determined by character (the kind of person she is) while overlooking the context in which the person is acting. This . . . causes us to attribute another person's behavior to his or her enduring *dispositional* qualities (such as personality, beliefs, or attitudes) while overlooking the influence of *situational* factors (such as constraints or expectations introduced by the social context).

Id. at 1023 (footnotes omitted). Consequently, Title VII's focus on the "bad actor" undermines attempts at addressing unconscious discrimination.

[50]Greenwald & Krieger, *supra* note 21, at 959.

[51]Lee, *supra* note 24, at 482. *See also* Gary Blasi, *Advocacy Against the Stereotype: Lessons From Cognitive Psychology*, 39 UCLA L. REV. 1241, 1257-58 (2002) (discussing "cognitive dissonance," which is a psychological need to unconsciously adjust our principles to whatever stance we have been conditioned to take); Wang, *supra* note 49, at 1018-19 ("[S]tereotypes do not just influence how individuals categorize and perceive others based on race, but also can play a role in eliciting *from the target* objective 'evidence' to simultaneously confirm the stereotype and obscure its influence.").

coherence between the stereotype and the individual's actual perceptions of the minority explains the individual's continuing reliance on his or her first impressions.[52] This phenomenon can be partly explained by the connectivist models most recently advanced by scholars. According to this theory, "when people encounter conceptual combinations they find incoherent, they tend to invent causal stories that restore a sense of coherence, narratives with new information that 'explains away' the apparent inconsistency between the components of the concept."[53] Thus, individuals will explain away behavior that is inconsistent with a previously formed stereotype, thereby making the stereotype difficult to dispel.[54]

The underlying premises regarding the nature and prevalence of unconscious discrimination are bolstered by the widespread use of the Implicit Association Test (IAT), which is available on the Internet and measures implicit attitudes toward blacks and whites.[55] More than three million people have taken this test.[56] Respondents answer questions that help filter out any biases they have towards blacks, or in the alternative, preferences for whites, which is gauged by the individual's response speed when asked to associate certain words to a particular race.[57] Respondents were more likely to associate pleasant words with whites and negative words with blacks; the only exception was blacks, who did not show a substantial pro-white bias.[58] Scholars have used the IAT to measure discriminatory behavior and detect the pervasiveness of implicit bias in our society.[59] While the IAT has been used to unearth discriminatory attitudes among the public at large, many scholars question what, if anything, the test is actually measuring and argue that it

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[52]Wang, *supra* note 49, at 1018-19.

[53]Blasi, *supra* note 51, at 1261.

[54]*Id.*

[55]Project Implicit, https://implicit.harvard.edu/implicit (last visited July 11, 2008) (providing a number at Implicit Association Tests (IAT) based on various protected classes). *See also* Greenwald & Krieger, *supra* note 21, at 952-53 (discussing the IAT).

[56]Implicit Association Test, *available at* http://www.sciencenews.org/articles/20060422/bob9.asp (subscribers only cite) (last visited July 13, 2008).

[57]Greenwald & Krieger, *supra* note 21, at 952.

[58]*Id.* at 956. Twenty-seven percent of test takers have a strong automatic preference for white; 27% have a moderate automatic preference for white; 16% of a slight automatic preference for white; and 17% have little or no preference for white. The remaining 12% of test takers have a strong automatic preference for black (2%); a moderate preference (4%) and a slight preference (6%). *Id.* at 958.

[59]Blasi, *supra* note 51, at 1247-50 (describing experiments that test for the same variables as the IAT and noting the prevalence of implicit bias); Greenwald & Krieger, *supra* note 21, at 961-62 (discussing studies). *See also* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1552 n.29 (2004) (citing Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRAC. 101, 101-15 (2002)).

is deeply flawed.[60] Thus, any use of the IAT as a potential means of addressing the problem has to account for the limited use of such testing.

This brief review of the literature reveals, not surprisingly, that unconscious discrimination presents difficulties for the legal system because of its unique cognitive and psychological components.[61] To understand this point, it is important to put the problem in the context of employment litigation. To establish a race discrimination claim under the circumstantial method of proof outlined in *McDonnell Douglas*, a plaintiff alleging employment discrimination under Title VII must establish:

> (i) that he belongs to a racial [or gender] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[62]

The burden of production, not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment

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[60]*See, e.g.*, Hart Blanton & James Jaccard, *Arbitrary Metrics in Psychology*, 61 AM. PSYCHOLOGIST 27, 29, 38 (2006); Nilanjana Dasgupta et al., *The First Ontological Challenge to the IAT: Attitude or Mere Familiarity?*, 14 PSYCHOL. INQUIRY 238, 239 (2003); Michael A. Olson & Russell H. Fazio, *Reducing the Influence of Extrapersonal Associations on the Implicit Association Teset: Personalizing the IAT*, 86 J. PERSONALITY & SOC. PSYCHOL. 653, 665 (2004). *See also,* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1033 (2006) (arguing that the IAT has "serious psychometric flaws and an alarmingly high false alarm rate"). These commentators question the effectiveness of the IAT because:

> variations in the mere familiarity of the group categories activated by the IAT can lead to scores indistinguishable from those motivated by animus toward those groups; so too can egalitarian empathy for disadvantaged social groups; so too can performance anxiety linked to the fear of being labeled a bigot; so too can mere awareness of cultural stereotypes and depressing socio-demographic facts.

Id. at 1031 (footnotes omitted). *But see* Anthony G. Greenwald et al., *Consequential Validity of the Implicit Association Test: Comment on Blanton and Jaccard (2006)*, 61 AM. PSYCHOLOGIST 56 (2006) (defending the IAT).

[61]Note, however, that not everyone is convinced that the findings of social psychologists and legal scholars regarding unconscious bias mandate change within the legal system. *See* Mitchell & Tetlock, *supra* note 60, at 1030-34 (criticizing implicit prejudice scholarship not only for overlooking the flaws of the IAT but also for "ignore[ing] alternative explanations for alleged discriminatory behavior" and "suspend[ing] disbelief in judging the real-world implications of laboratory results on implicit prejudice").

[62]McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The facts vary depending on the claim alleged. *Id.* at 802 n.13.

action.[63] The plaintiff then must prove that the employer's articulated reason is a pretext for discrimination.[64]

In considering the employer's burden at stage two of the *McDonnell Douglas* burden-shifting formula, one must account for the fact that the employer might not know that his decision has been tainted by racial or gender bias, or that his bias might not be clear to the plaintiff or explicit from the record.[65] Unconscious discrimination, therefore, does not lack the "harm" that stage two of the *McDonnell Douglas* test is designed to uncover, but the test has difficulty eliciting any of the motivations that social psychologists and legal scholars have attributed to promoting unconscious bias. As one scholar has noted, "[M]ere social categorization can influence differential thinking, feeling, and behaving toward in-group and out-group members ... [with the result being] people favor in-group members in reward allocations, in esteem, and in the evaluation of the products of their labor."[66] Nevertheless, the employee will fail at the third stage of the *McDonnell Douglas* test because of the difficulty in proving what the employer himself might not have even known.

It is clear that unconscious discrimination claims, with their obvious proof problems,[67] undoubtedly have a higher rate of failure than traditional employment discrimination claims. Employees face an often insurmountable task of proving that an employer acted with

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[63] *Id.* at 802.

[64] *Id.* at 804.

[65] Fiske, *supra* note 25, at 124-25.

[66] Gaertner et al., *supra* note 32, at 100 (finding that people are less likely to cooperate with out-group members when it comes to the allocation of scarce common resources; that people retain more information about in-group members and remember less positive information about out-group members; and that people are more forgiving of behaviors of in-group members while ascribing negating outcomes to out-group members).

[67] *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CAL. L. REV. 1063, 1079 (2006) ("Ex post rights to sue have additional difficulties that can render them useless in the face of discrimination caused by implicit bias. Most obviously, they require the victim to perceive the discrimination ... even when a victim suspects discrimination, high transaction costs and difficult evidentiary burdens make litigation unlikely."). *See also* Krieger, *supra* note 21, at 1167.

> [D]isparate treatment jurisprudence ... is based on an assumption that decisionmakers possess "transparency of mind," that they can accurately identify why they are about to make, or have already made, a particular decision .... Equipped with conscious self-awareness, well-intentioned employers become capable of complying with the law's proscriptive injunction not to discriminate.

Id. *See also* McGinley, *supra* note 4, at 419 (noting that courts applying *McDonnell Douglas* erroneously assume that the proof mechanism serves the role of determining conscious intent when in reality it is designed to determine causation, regardless of the employer's conscious awareness); Wang, *supra* note 49, at 1018 ("[I]ndividuals are most likely *to* discriminate in situations in which their behavior is least likely *to be viewed* as discriminatory ....").

discriminatory intent.[68] These difficulties, as well as the diverging positions among scholars regarding employer liability for unconscious discrimination, reflect the possible futility of exposing employers to more liability by amending or expanding the reach of the statute or current doctrine.

III. EMPHASIZING THE IMPORTANCE OF THE FIRM: UNCONSCIOUS DISCRIMINATION AS A LOSING PROPOSITION

A. *The Sorry Plight of Title VII Plaintiffs*

This article argues that courts will not acknowledge the covert role that discrimination can play when the adverse employment action can be otherwise explained; the success of these claims is premised on the court being able to view the alleged unconscious discrimination as the equivalent of a claim based on intentional discrimination.[69] Much of this thesis is derived from the fact that employment discrimination plaintiffs asserting the more traditional Title VII discrimination claims overwhelmingly lose.[70] There is little to be gained, therefore, from

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[68]Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (arguing that employment discrimination cases are hard to win because of misperceptions that courts have about plaintiffs that stem from a "popular anti-employment discrimination rhetoric often financed by conservative interest groups"); *see also* Krieger, *supra* note 21, at 1212-13 (concluding that under the Supreme Court's decision in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), an employer must be a "'systematic' information processor" when making hiring decisions).

[69]*See* Selmi, *supra* note 5, at 662-63. As Professor Selmi noted:

> The doctrinal reality is that subtle discrimination can be a form of intentional discrimination, so long as it can be proved. The problem with subtle discrimination is that it is difficult to prove, not that it is inconsistent with existing doctrine. By the same measure, the difficulty of proving subtle discrimination does not stem principally from its unconscious nature, but rather from the gap in perspectives that exists between African Americans and whites over the continued relevance of discrimination.

Id.

[70]Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 557-58 (2003) (noting that the reversal rate after a plaintiff win is the second highest in employment discrimination cases than in any other class of cases, while the plaintiff reversal rate after a defendant win is the third lowest); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1944 (2004) ("The 5.8 percent reversal rate of defendant trial victories is smaller in employment discrimination cases than any other category of cases except prisoner habeas corpus trials."). *See also* Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L.L. REV. 99, 100 (1999) (looking at reported decisions from 1992-1998 and finding that defendants prevailed in more than 93% of the cases decided at the trial court level and were more likely to be affirmed on appeal); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1567 (1989) (noting that only claims filed by prisoners have a lower success rate than that of employment discrimination plaintiffs).

asserting a claim that is considered more "unconventional" and novel than the more customary Title VII claims.

Many scholars argue that the dismal success rates of Title VII claims result from a judicial bias against Title VII plaintiffs,[71] a bias that is illustrated by empirical evidence showing the low success rate of these claims.[72] For example, Professors Kevin Clermont and Stewart Schwab determined that most Title VII plaintiffs have to pursue their claims all the way through trial in order to prevail, and even then most lose.[73] Such plaintiffs also disproportionately lose more on appeal than defendants.[74]

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[71]McGinley, *supra* note 4, at 480 (noting that judges do not believe that discrimination is prevalent in today's workplace and that Title VII's purpose has become penal, aimed at punishing employers for conscious animus); Selmi, *supra* note 5, at 674 (describing social dominance theory in which "group inequality is seen as natural or at least inevitable, and many of our actions and beliefs can best be understood as an effort to justify and maintain the existing hierarchies"). Consistent with this theory, Professor Selmi notes that:

> [j]udges comprise a paradigmatic high status, high intellectual, and high power group, one that has a clear interest in preserving existing inequality through legitimating myths. Therefore, social dominance theory would suggest that judges are likely to think of themselves as products of a meritocratic system where individual talent is rewarded, and where inequality of opportunity does not significantly undermine the system.

Id. at 675. In my view, the social dominance theory is an inadequate explanation for the behavior of judges, for judges are more likely to ensure equality of opportunity than they are equality of results. *See infra* Part III.B.

[72]Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (claiming that employment discrimination plaintiffs (unlike many other plaintiffs) have always done substantially worse in judge trials than in jury trials). Professor Selmi also notes the dismal success rates of employment discrimination plaintiffs. From 1995-1997, plaintiffs in employment cases succeeded in only 18.7% of cases tried before a judge, whereas the success rates for plaintiffs in judge tried insurance cases and personal injury cases was 43.6% and 41.8%, respectively. Selmi, *supra* note 68, at 560-61.

[73]Clermont & Schwab, *supra* note 72, at 429. Professors Clermont and Schwab note that:

> [e]mployment discrimination plaintiffs ... manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.

Id.

[74]Clermont et al., *supra* note 70, at 564. In trying to determine why appellate courts are heavily pro-defendant, Professors Clermont and Eisenberg thoughtfully opined:

> The appellate judges may act on their perceptions of the trial courts' being pro-plaintiff. The appellate court consequently would be more favorably disposed to the defendant than are the trial judge and the jury.
>
> This appellate favoritism would be appropriate if the trial courts were in fact biased in favor of the plaintiff .... Indeed, as empirical evidence accumulates in refutation of trial court ... on the plaintiff/defendant axis, [any such judicial perceptions at the appellate level] appear increasingly to be misperceptions.
>
> Alternatively, unconscious biases may be at work. Perhaps appellate judges' greater distance from the trial process creates an environment in which

Professor Wendy Parker conducted an empirical study of 659 racial discrimination cases and concluded that the current perception of judges ignoring subtle discrimination and deferring to defendants is "a little too optimistic" and the current status of employment discrimination is "actually worse than previously told" because judges assume that most of these claims are unmeritorious.[75]

The presumption that racial discrimination claims are unmeritorious stems from the general consensus that employment discrimination cases are too easy to file and too easy to win, when, in reality, the opposite is true.[76] Based on these studies, one could argue that there is a bias against employment discrimination plaintiffs that is especially damaging to those alleging unconscious discrimination.[77] Most scholars

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> it is easier to discount harms to the plaintiff. In any event, the data on appellate leaning in favor of the defendant become a cause for concern.

Id. at 564 & n.18.

[75]Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 893 (2006). *See also* Selmi, *supra* note 68, at 556-57. According to Professor Selmi:

> When it comes to race cases, which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way. These biases, as well as others, inevitably influence courts' treatment of discrimination cases, and help explain why the cases are so difficult to win.

Id.

[76]Selmi, *supra* note 68, at 556-57 (arguing that employment discrimination cases are hard to win because of misperceptions that the courts have about plaintiffs that stem from a "popular anti-employment discrimination rhetoric often financed by conservative interest groups"). Professor Selmi also attributes this bias towards race discrimination claims to the anti-affirmative action mindset of the judiciary, which causes courts to view both the persistence of discrimination and the merits of the underlying claim with deep skepticism. *Id.* at 562-63 (stating that this skepticism makes "courts hesitant to draw inferences of racial discrimination based on circumstantial evidence"). Moreover, he also notes how Supreme Court rhetoric has a skeptical, anti-employment discrimination aura that promotes the belief that "many observed racial disparities represent the natural order of things." *Id.* at 563. *See also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997). Courts have a similar attitude toward gender discrimination, an area where it has created an affirmative defense for employers subject to sex discrimination claims "out of whole cloth, as there was very little precedent for the defense . . . [and] may signal a shift in judicial attitudes that portends more difficulty for plaintiffs to recover in cases of sexual harassment . . . ." Selmi, *supra* note 68, at 569.

[77]Parker, *supra* note 75, at 921. Professor Parker advances the "the defendants' settlement incentives theory" to explain why most race discrimination claims lose. Under this theory,

> plaintiffs alleging race discrimination in employment fare poorly when before federal district courts because their claims are weak. . . . [T]he defendants act on strong incentives to settle meritorious and even somewhat meritorious lawsuits. Defendants fear a trial, with its unpredictable outcome, and a public airing of their affairs. As a result, this theory contends, only particularly weak claims remain for federal court resolution, and this best explains plaintiffs' low win rate.

try to resolve this problem by manipulating aspects of existing doctrine in arguing that Title VII is more than capable of addressing unconscious discrimination. For example, Professor Terry Smith has argued that Title VII's retaliation provisions can be expanded to reach subtle discrimination.[78]

In another study, Professor Melissa Hart maintains that the mixed motive approach provides a means to address unconscious discrimination because it creates:

> a middle ground that will make courts comfortable with acknowledging the role that discrimination can play even in cases where employers can otherwise justify their decisions. And, by eliminating any argument that a finding of discrimination requires the conclusion that the employer is a liar, it reduces some of the "moral opprobrium" from a finding of Title VII liability in certain circumstances.[79]

Similarly, Professor Ann McGinley argues that Title VII reaches unconscious discrimination because "in most areas of Title VII the proof constructs already exist that make it possible to recognize as illegal at least some of the unconscious discrimination that is responsible for unequal treatment of women and minorities in the workplace."[80] She notes that although a legislative solution "would be preferable," under the current framework, trial courts could use summary judgment standards and jury instructions that explicitly state that employers can be liable for disparate treatment based on unconscious discrimination.[81]

Id. (footnote omitted).

[78]Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 533-34 (2003); *see also* Derum & Engle, *supra* note 6, at 1196 (noting that the legislative history of Title VII seems to endorse a definition of discrimination broad enough to encompass both overt and subtle forms of discrimination); Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1301 (1995) (stating that intentional discrimination should be broadened "to include a person's reliance on racial stereotypes, conscious or not").

[79]Hart, *supra* note 4, at 762. *See also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. L. Rev. 91, 145 (2003) (suggesting that workplace discrimination can be remedied through a legal regime that "requires employers to manage diversity within their organizations and to minimize the operation of discriminatory bias" by focusing "on the ways in which discriminatory bias, whether conscious or unconscious, operates in the larger context of group dynamics, organizational structure, and institutional practices rather than solely in isolated individual states of mind").

[80]McGinley, *supra* note 4, at 446.

[81]*Id.* at 480-81.

Professor Michael Selmi makes a similar point to Professor McGinley's,[82] arguing that traditional disparate treatment doctrine under *McDonnell Douglas* remains the best model for proving claims of discrimination, regardless of how the discrimination is characterized.[83] The problem, from his perspective, is that scholars focus on the differences between subtle discrimination and intentional discrimination; engaging in an analysis that is based "on an outmoded definition of intentional discrimination, one that largely exonerates employers . . . so long as they do not engage in acts of discrimination that do not depend on inferential determinations."[84] This focus on the traditional definition of intent, however, reflects the reality of judicial decision making—i.e., the need for smoking gun evidence in order to be "convinced" of the plaintiff's position. Any theory that claims to shed light on how unconscious discrimination is treated has to consider this reality. This problem cannot be solved through theoretical compromises or by using evidentiary means to elicit unconscious discrimination; rather, the problem is the reluctance of judges to employ those means liberally to find in favor of this particular class of plaintiffs.

In contrast, there are those who argue that employers should not be liable for unconscious discrimination under Title VII.[85] Professor Amy Wax suggests that, at the very least, there is "some doctrinal uncertainty as to whether 'intentional' discrimination encompasses unconscious as well as conscious 'motives'" for an adverse employment action.[86] Applying principles of accident law, she argues that employers should not be liable for unconscious discrimination because "it is unlikely to serve the principal goals of a liability scheme—deterrence, compensation, insurance—in a cost effective manner."[87] Professor Wax believes that employers will respond to the increased threat of liability by over-investing in measures that likely will have no impact on reducing implicit bias.[88] The current proposal is similar to Professor Wax's thesis because it questions the ability of a Title VII liability scheme to address unconscious bias; however, rather than focusing on how increased liability could result in over-deterrence, this study relies on direct and

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[82] *See* Selmi, *supra* note 5, at 661-63.

[83] *Id.* at 672 (stating that "the Court in *McDonnell Douglas Corp. v. Green* created a process for establishing a case of individual discrimination based on an awareness of the changing nature of discrimination, but has failed to adopt this awareness with appropriate judicial sincerity, continuing instead to search for signs of overt discrimination").

[84] *Id.* at 673.

[85] *See* Wax, *supra* note 4, at 1134.

[86] *Id.* at 1146.

[87] *Id.* at 1132-33.

[88] *Id.* at 1133.

indirect debiasing through diversity initiatives and affirmative action, as discussed in Part IV.[89]

This scholarly debate, while interesting, is largely irrelevant to the extent that it focuses on whether Title VII should be amended or expanded to encompass claims of unconscious discrimination, a position that has failed to sway the courts. A legal system that reaches unconscious discrimination would, in theory, be able to elicit the illegal motivations in the employer's decisionmaking, but the plaintiff generally has to rely on inference, innuendo, and speculation, making these claims inherently problematic and difficult to win. Moreover, it is unlikely that an efficient legal rule can be designed under Title VII that will be able to address the harm experienced by every person who claims to have been subjected to unconscious discrimination, or in the alternative, provide a roadmap for employers seeking to avoid this type of liability.[90] As Professor Sturm noted, even if the discriminating behavior is the same across employers, individuals "experience the same conduct quite differently, depending on their position in relation to the conduct, their power, their gender, their mobility, their support networks, and the degree of their cross-gender interaction."[91] Thus, unconscious discrimi-

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[89]Professor Wax argues that such proposals would be inefficient because "the amount expended on 'precautions' against liability will fall short of abating the targeted harm to a degree that justifies such expenditures." Wax, *supra* note 4, at 1133. However, treating unconscious discrimination as "accidental" has the obvious flaw of ignoring the harmfulness of this behavior. Moreover, as I point out in Part IV, such expenditures do not have to be costly, but can still be effective.

[90]Sturm, *supra* note 7, at 475-76. Professor Sturm states that:

> Any rule specific enough to guide behavior will inadequately account for the variability, change, and complexity characteristic of second generation [unconscious discrimination] problems. General rules, unless linked to local structures for their elaboration in context, provide inadequate direction to shape behavior. This is particularly true for more subtle and less familiar problems, such as second generation discrimination. Externally-imposed solutions also founder because they cannot be sufficiently sensitive to context or integrated into the day-to-day practice that shapes their implementation.

Id. *See also* Selmi, *supra* note 5, at 663 (highlighting that subtle discrimination claims are difficult to win because of the disconnect between blacks and whites over the pervasiveness and definition of discrimination).

[91]Sturm, *supra* note 7, at 472. *See also* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1108 (2008) (discussing a study in which 3,000 employees were interviewed on issues relating to workplace equality and concluding that "race is the most significant determinant in how people perceive and experience discrimination in the workplace, as well as what they believe employers should do to address such incidents and attitudes.") (internal quotations omitted). Professor Robinson believes that black and white employees have different views on workplace equality because they "interpret allegations of racial discrimination through substantially different perceptual frameworks . . . ."

> I call the typical white perspective the "colorblindness perspective." This perceptual framework views discrimination as an aberration from a colorblind norm, and it regards most forms of race-consciousness as socially disruptive. I call the typical black perspective the "pervasive prejudice perspective," and it

nation is heavily influenced by the organizational structure of the workplace and the allocation of power between individuals within it. Courts have made some attempts to limit the discrimination that festers as a result of workplace structure, culture, or norms by recognizing that subjective employment practices are especially vulnerable to being impermissibly influenced by race or gender.[92] Nevertheless, they have refused to find that subjective evaluations alone are sufficient to create an inference of discrimination.[93]

There are also other explanations for a plaintiff's limited ability to succeed on an unconscious discrimination claim under Title VII that is unlikely to be fixed by amending the statutory framework. Similar to the

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> views discrimination as a commonplace event, rooted in daily social dynamics. Given this understanding, it is rational—rather than strategic or paranoid—for blacks to be attentive to racial dynamics and to view some conduct that many whites would see as benign as in fact discriminatory. Because most instances of perceived discrimination contain some ambiguity, a person's overarching framework may be more determinative than the facts of the particular incident in forming the person's initial opinion.

Id. at 1117.

[92] *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990 (1988) ("We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."); Crawford v. W. Elec. Co., 745 F.2d 1373, 1384-86 (11th Cir. 1984) (affirming district court's finding that employer's review system that was based in part on wholly subjective evaluations by white foremen of black employees' "skill" had a disparate impact on black employees); Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (holding that a promotion system that relied on supervisor's subjective opinion concerning qualities such as "'adaptability,' 'bearing, demeanor, manner,' 'verbal expression,' 'appearance,' 'maturity,' 'drive,' and 'social behavior' [violated Title VII because] [s]uch high-level subjectivity subjects the ultimate promotion decision to the intolerable occurrence of conscious or unconscious prejudice") (quoting Rowe v. Gen. Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972)); Wade v. Miss. Coop Extension Serv., 528 F.2d 508, 518 (5th Cir. 1976) (holding that evaluation form violated Title VII where "the questions on the evaluation form were in part subjective and vulnerable to either conscious or unconscious discrimination by the evaluating supervisors"; "the evaluation scores themselves were not consistently used as a basis for . . . promotion"; and "the defendants wholly failed to make a showing that the test was substantially related to the particular jobs of the individual being evaluated.").

[93] *See, e.g.*, Denney v. City of Albany, 247 F.3d 1172, 1185 (11th Cir. 2001) ("Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII or other federal employment discrimination statutes."); United States v. City of Northlake, 942 F.2d 1164, 1169 (7th Cir. 1991) (noting that the government is not arguing that subjective hiring practices are per se discriminatory, but rather that they "provide a ready mechanism for discrimination"); Grano v. Dep't of Dev. of Columbus, 699 F.2d 836, 837 (6th Cir.1983) (stating that "the legitimacy of the articulated reason for the employment decision is subject to particularly close scrutiny where the evaluation is subjective and the evaluators themselves are not members of the protected minority" but finding that "[s]ubjective employment evaluations, however, are not illegal per se.").

debate among commentators,[94] judges also struggle with determining an appropriate remedy for victims of unconscious discrimination that reflects the proper distribution of liability, without causing the employer to engage in behavior that is both costly and overly deterrent.[95] After all, what is the appropriate standard of "fault" when the employer is not aware that he has committed an actionable wrong? The remedy in the face of deliberate acts is unquestionable: monetary damages, front and back pay, compensatory damages, or some combination thereof. The global effects are also evident if such actions are costly because this encourages deterrence and gives the employer an incentive to institute programs and policies to regulate and reduce the incidence of discrimination claims. The remedy, however, is less clear when the wrong involves co-workers or supervisors reinforcing negative stereotypes or unknowingly slighting minority employees. Such actions are difficult to deter with monetary damages.[96]

The focus on the "ultimate" employment decision further undermines Title VII's ability to address most unconscious discrimination claims. Many actions that would form the basis for these claims involve employment decisions that do not constitute an adverse employment action in some circuits.[97] Generally, courts require an employee to

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[94]For example, some scholars argue that employers should be held liable for unthinking stereotypes based on a negligence standard. *See* David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 967 (1993) (arguing that employers who engage in unthinking stereotypes should be liable for negligent discrimination as they breach the duty to treat all employees equally regardless of the presence of a protected characteristic). *But see* Wax, *supra* note 4, at 1132-33 (arguing that employers should not be liable for unconscious discrimination which is, arguably, an accident).

[95]Wax, *supra* note 4, at 1224-25. According to Professor Wax:

> [A system of liability] that requires assigning a precise probability to the elements—including unconscious discrimination—that contribute to any workplace decision would strain the fact-finding capacity of a liability system to the breaking point .... [Further,] requiring employers to pay even actuarially sound compensation could produce perverse effects by tempting employers to reduce activity levels and take wasteful "pseudo-precautions," or by shifting costs away from the cheapest cost avoiders. Thus, internalization of all costs of unconscious bias to the employer, even if it could be achieved, is not an unalloyed good.

Id. *See also* Travis, *supra* note 48, at 482-83 (highlighting that judges resolve ADA claims by viewing the issue solely in terms of full liability or no liability for the employer, and arguing that "[f]raming the issue [in these terms] is at once both overinclusive and underinclusive, imposing too great a punishment on some forms of discrimination, while leaving other forms completely unchecked").

[96]Sturm, *supra* note 7, at 468 ("Conscious remedies tended not to focus on the organizational and cultural dimensions of bias that were operating along with more visible and blatant forms of exclusion.").

[97]*See, e.g.*, O'Neal v. Chicago, 392 F.3d 909, 913 (7th Cir. 2004) ("'[B]eing shifted to an essentially equivalent job that [an employee does] not happen to like as much does not a Title VII claim create.'") (quoting Place v. Abbott Labs., 215 F.3d 803, 810 (7th Cir. 2000)); Tucker v. Merck & Co., 131 F. App'x 852, 857 (3d Cir. 2005) ("A negative evaluation, by

show a serious and material change in the terms, conditions, or privileges of employment before a discrimination action is deemed viable.[98] Unconscious discrimination tends to be more cumulative—a series of isolated incidents that in the aggregate illustrate that minorities and women are treated differently—but much of this behavior would not rise to the level of a hostile work environment. While a class action suit alleging disparate impact might generate an appropriate remedy, the vast majority of unconscious bias remains largely unaddressed.

In single plaintiff litigation, many courts frame an adverse employment action as encompassing a variety of behavior, but in reality, they apply the standard very narrowly.[99] Other courts have allowed some flexibility in cases where the plaintiff alleges retaliatory discharge, finding conduct that falls short of an ultimate employment decision must meet "some threshold level of substantiality" in order to be actionable.[100] The narrow reading embraced by most courts, however, stems from the idea that an adverse employment action has to have tangible consequences. This illustrates that the focus of the courts is on outcome rather than the procedure by which a decision is reached. If the deliberations are less important doctrinally than the actual decision, then unconscious bias does not lend itself to an adequate resolution by the judicial system.[101]

B. Thomas v. Eastman Kodak Company*: Isolating the Bias*

Thomas v. Eastman Kodak is one of those rare cases in which an individual plaintiff successfully survived summary judgment on her unconscious discrimination claim. This case is illustrative not only of what factors are required in order for a plaintiff to make it past summary judgment, but also of why most plaintiffs will inevitably fail to prevail

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itself, is not an adverse employment action. Indeed, even a negative evaluation that leads to a lower than expected merit wage increase or bonus probably does not constitute an adverse employment action.").

[98]Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).

[99]*See* Hillig v. Rumsfeld, 381 F.3d 1028, 1033 (10th Cir. 2004) ("Even though we do not require the plaintiff to show the loss of a specific job, we do not define 'adverse employment action' as encompassing every 'action taken by a plaintiff's employer . . . that may affect the plaintiff's future employment opportunities . . . .'") (quoting Aquilino v. Univ. of Kan., 268 F.3d 930, 935 (10th Cir. 2001)).

[100]Wideman v. Wal-Mart Stores Inc., 141 F.3d 1453, 1456 (11th Cir. 1998) ("Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions.").

[101]Krieger, *supra* note 21, at 1213 ("Cognitive sources of intergroup bias corrupt decisionmaking not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made. . . . Decisionmaking is not, as the 'moment of decision' fallacy assumes, structurally disjoined from those perceptual and inferential processes which comprise it.").

on their claim. The plaintiff, Myrtle Thomas, was the only black customer service representative (CSR) in Kodak's Wellesley, Massachusetts office.[102] For ten years, Thomas's supervisors, coworkers, and customers provided glowing praise of her work product, ethic, and professionalism, praise which was reflected in her annual performance reviews.[103] To evaluate the work of its employees, Kodak used annual performance appraisals that graded on a curve with a median score of four out of seven.[104] Thomas's appraisals for 1988 and 1989 had scores of five or better out of seven and included positive feedback from her supervisor.[105]

In 1989, Kodak created a new customer support manager (CSM) position that Thomas asked to be considered for, but was told she was not qualified.[106] Instead, Kodak hired Claire Flannery, "a former CSR who had been working as a division secretary."[107] Both Thomas and Flannery denied having any problems with each other—in fact, Flannery denied having any problems with Thomas's job performance—yet Flannery's appointment as CSM marked a significant decline in Thomas's career. As CSM, Flannery treated Thomas differently from the other five white CSRs. Among other things, Flannery graded Thomas lower on her appraisals and failed to provide the same training the other CSR's received.[108] After receiving extremely low scores on her 1990 and 1992 appraisals, Thomas refused to sign them and she signed the 1991 appraisal, which was also "inappropriately low," only because she considered it "a joke."[109]

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[102]Thomas v. Eastman Kodak Co., 183 F.3d 38, 42 (1st Cir. 1999).

[103]*Id.* at 43. The court noted, in fact, that individuals within the corporation were so impressed with Thomas's work that another sales representative who worked with Thomas "sent a memorandum to Thomas's supervisor praising her 'continuous professionalism,' 'very high level of commitment,' and 'total dedication.' The sales representative later noted that he was particularly impressed with the way a certain customer 'really went out of his way' to emphasize his satisfaction with Thomas's support." *Id.* Another customer expressed a similar sentiment, stating that his primary reason for selecting Kodak copiers was because of his dealings with Thomas. *Id.*

[104]*Id.* at 44 n.1.

[105]*Id.* at 44.

[106]*Thomas*, 183 F.3d at 44.

[107]*Id.*

[108]*Id.* at 45. The court noted that:

> after receiving only 5s and 6s in 1988 and 1989, Thomas received a 2, four 3s, and a 4 from Flannery in 1990, for an overall score of 3. This was a below-average rating, appropriate for employees who had "need for further improvement to achieve a middle rating [of 4]" .... Thomas's performance appraisal scores in 1991 and 1992, while higher than her 1990 scores, were also inappropriately low, in Thomas's estimation-especially when compared to the higher scores that Flannery gave to other CSRs

Id.

[109]*Id.* at 45-46

On a number of occasions, Flannery damaged Thomas's professsional standing with customers by taking over customer training sessions where Flannery was supposed to be observing Thomas's work.[110] She also told Thomas the wrong time for a training session that Flannery scheduled, and then refused to explain the mix up to an irate customer.[111] On another occasion, Flannery became angry with Thomas and attempted to physically block her "from leaving a CSR meeting which had been scheduled at the same time as an important training session for one of Thomas's customers."[112]

While none of Thomas's salary raises given during Flannery's tenure as CSM differed significantly from those of other employees, Thomas complained about the appraisals to Flannery and to management within Kodak, including a regional vice president and a human resources representative. "However, fearing retaliation from her new boss, she did not file a formal charge against Flannery with the Human Resources Department, and Kodak did not take any action in response to her informal complaints."[113] Ultimately, in 1993, Kodak relied upon the low appraisal scores that Flannery gave Thomas in deciding to lay Thomas off.[114]

The court found that Thomas had presented enough evidence that a trier of fact could conclude that the evaluation process was tainted with racial bias.[115] Among the factors that the court considered were: Flannery was at times "inappropriately upset" with Thomas;[116] some of Thomas's performance scores were lower than one would expect given her past performance;[117] and Flannery's actions in treating Thomas differently from the other CSRs in training and professional development, all of which could be inferred as Flannery having a problem with Thomas's race.[118]

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[110]*Thomas*, 183 F.3d at 45.

[111]*Id.*

[112]*Id.*

[113]*Id.* at 46.

[114]*Thomas*, 183 F.3d at 46.

[115]*Id.* at 65 ("Thomas has presented 'evidence from which the trier of fact reasonably could conclude that [her] abilities and qualifications were equal or superior to employees who were retained.'" (quoting Goldman v. First Nat'l Bank at Boston, 985 F.2d 1113, 1119 (1st Cir. 1993)).

[116]*Id.* at 64.

[117]*Id.* at 63.

[118]According to the court:

> In addition to the performance appraisals themselves, Thomas presents other evidence to show that Flannery treated her differently than she treated the other CSRs. According to Thomas, Flannery used flimsy grounds to prevent her from delivering an important presentation at a Kodak meeting, refused to provide her with computer training, failed to allow her appropriate developmental opportunities, and failed to evaluate her accurately on the basis

Thomas is a quintessential unconscious discrimination case because the underlying facts involve a black employee and a white supervisor who purport to have no problems with each other, but a significant decrease in the employee's performance scores ensues after the supervisor is hired. The case, however, is largely limited to its facts. It teaches us that the only time an unconscious discrimination claim will make it past the summary judgment stage is if the court can isolate the impermissible bias and ultimately give it the same legal status as intentional discrimination.[119] In this case, the court easily isolated the potential bias because (1) Thomas was the *only* black employee supervised by Flannery;[120] (2) she had an excellent track record prior to Flannery's arrival; (3) she was the only employee treated differently by Flannery; and (4) her performance appraisal scores significantly decreased after Flannery was hired. Furthermore, Thomas behaved "reasonably" by refusing to sign the appraisals and reporting Flannery's behavior to upper management. There are also hints of Kodak's unreasonableness in promoting Flannery from the position of division secretary (almost certainly a demotion given that she was previously a CSR prior to becoming a division secretary) to a supervisory position for which she may not have been qualified, and also by failing to heed the complaints of arguably one of their best employees. To prove the saliency of the factors raised by *Thomas*, this thesis will be applied to various other cases that can rightly be considered or recharacterized as

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> of her interaction with customers (since she never accompanied Thomas on site in order to observe that interaction, as she did with the other CSRs).

Thomas, 183 F.3d at 63.

[119]Hart, *supra* note 4, at 757. In fact, Professor Hart has noted that "discriminatory intent" can really be defined as "the absence of another explanation." *Id.* She notes:

> When courts assert that a successful plaintiff has proven discriminatory intent, what they mean is that, in the absence of another explanation, given the weight of the circumstantial evidence, they are inferring that the employer acted with bad intent. The widely accepted legal fiction in such cases is that while there may be little external evidence of discriminatory attitude or motivation in a supervisor's actions, if there were a way to discover what that supervisor actually was thinking, we would learn that his or her impulses were overtly racist or sexist.

Id. (citations omitted). *See also* Selmi, *supra* note 5, at 662-63 (arguing that subtle bias can be a form of intentional discrimination, if proven, but noting that such proof is elusive).

[120]The importance of this factor should not be understated. The court specifically stated that:

> [o]ur assessment of the evidence would be quite different if Thomas had been one of several black employees supervised by Flannery . . . . Thomas was the only black CSR, and one can infer from the evidence that she was also the only CSR who was evaluated unfairly. Given this, it is reasonable to infer that race played a determinative role in the evaluation process . . . .

Thomas, 183 F.3d at 64-65. This factor, however, seems largely limited to the context of race, but not age or gender. *See* Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061 (8th Cir. 1988); Sweeney v. Bd. of Trs. of Keene State Coll., 604 F.2d 106 (1st Cir. 1979).

"unconscious discrimination" cases to illustrate the limitations of these claims. To reiterate, in order to find in favor of a plaintiff alleging unconscious discrimination, the court must be able to: (1) eliminate every nondiscriminatory reason from the record that could explain the adverse employment action, and (2) determine that the plaintiff's behavior is more reasonable than that of the employer. Once it is clear that one factor is missing, I will then discuss the relevance of employment at will in the court's decision, which serves as the default justification warranting dismissal in these cases.

1. Employment at Will and *Hicks*: Eliminating All Nondiscriminatory Reasons from the Record

Despite the deluge of scholarship in the area of unconscious discrimination, a study of the case law reveals that the scholarship on unconscious bias has failed to capture the attention of the courts because these claims are successful in only limited circumstances, restrained by the legally unsettled nature of the claim, the doctrine of employment at will, and a limited judicial competency to resolve employment disputes.[121] While some courts are willing to make the necessary inferences to hold an employer liable for unconscious discrimination, the margin of failure for these claims is so high that it ultimately makes the debate about Title VII's ability to reach them somewhat desultory. The courts' reticence comes from statutory concerns and from their belief that they are not qualified to resolve these claims. Thus, amending or expanding Title VII would serve very little purpose in aiding victims of unconscious bias as courts will find in favor of the employee in only the most extreme cases, regardless of statutory constraints.

Thomas demonstrates that a plaintiff's work record essentially has to be flawless because of the courts' deference to employment at will. Employment at will exists, in some form, in all fifty states and the District of Columbia.[122] The most famous formulation of the employment at will doctrine was advanced by the Tennessee Supreme Court in 1884: "All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[123]

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[121]Selmi, *supra* note 5, at 659 ("[T]he last decade or so of legal scholarship has concentrated on how discrimination is now more frequently subtle in form rather than overt in nature. At the same time, this concentration has failed to capture much support either in the courts or in our social conscience . . . .").

[122]*See* William R. Corbett, *The "Fall" of Summers, The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996).

[123]Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519-20 (Tenn. 1884).

The concept of good cause, bad cause, or no cause termination is the animating principle behind the first *Thomas* factor. Contrary to the admonition by scholars that employment at will has been subordinated by the antidiscrimination laws, if a plaintiff alleging unconscious discrimination does not eliminate every nondiscriminatory reason from the record, then his claim fails regardless of the possible existence of discrimination. Courts are reluctant to hold an employer liable for discrimination especially where the employer may be unaware of such impermissible motives and if there is another plausible reason in the record for the adverse action.[124] The idea is to avoid turning Title VII into a rule where employers could be held liable for "perceived slights" towards employees who happen to be in a protected category,[125] especially if the employee has committed sanctionable acts that render him or her worthy of termination.

To understand the hold that employment at will has on our courts and the flexibility that employers have pursuant to the doctrine, one must consider the rationale behind the rule. As one commentator noted, about half of all common law adoptions of employment at will addressed the significant number of employer-employee disputes over job terminations.[126] This type of dispute currently accounts for a large percentage of the litigation brought under Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).[127] Employment at will still remains the baseline for most private employment relationships. In fact, employees who are in the middle of their careers have "made the fewest contributions to the doctrinal erosion of at will employment,"[128] which suggests that the risk of being subject to the

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[124]Derum & Engle, *supra* note 6, at 1182 ("Even with an awareness of the pervasiveness of unconscious bias, courts are loathe to make a legal finding of discrimination in the absence of clear evidence.").

[125]Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) ("Title VII, we have said, does not set forth 'a general civility code for the American workplace.' An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.") (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (internal citation omitted).

[126]Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 697 (1994).

[127]Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 388 (2001) ("Just after Title VII came into affect, the majority of discrimination claims dealt with hirings. By 1985, however, there were six times more discharge cases filed per year than hiring cases.").

[128]Stewart J. Schwab, *Life Cycle Justice: Accommodating Just Cause and Employment At-Will*, 92 MICH. L. REV. 8, 48 (1993).

rule is highest for the subset of employees most likely to bring a Title VII, ADA, or ADEA lawsuit.

Any test that seeks to outline the legal perimeters of unconscious discrimination must acknowledge that employment at will takes precedence and work within its boundaries. Many scholars have discussed the reemergence of the doctrine,[129] but few have given it a permanent place as a factor in analyzing this species of employment discrimination claims.[130] In carving out exceptions to employment at will, courts have rejected certain preferences as legitimate, and by implication, have deemed themselves competent to gauge when these factors motivate the challenged behavior. This is necessarily in tension with the judiciary's belief that the employer, not the court, is more competent to analyze the employment relationship.[131] In fact, Professor Morriss argues that employment at will is largely related to concerns regarding institutional competency and was adopted by courts because of "the difficulty of setting a standard by which they could measure the employee's conduct."[132]

In Title VII lawsuits, the court has to conduct an evaluation of employee work performance to determine which party has departed from the socially and legally acceptable norms that define the employment relationship, a norm that encompasses the idea that decisions should be based on some combination of merit and business sense. This evaluation is significantly complicated when plaintiffs allege unconscious discrimination, which imposes liability by inference instead of direct proof, through evidence that is usually less substantial than the circumstantial evidence presented as a part of the *McDonnell Douglas* burden-shifting formula. If the plaintiff eliminates every nondis-criminatory reason

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[129]*See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990); Corbett, *supra* note 122; McGinley, *supra* note 4.

[130]Two scholars who discuss at length how the judicial commitment to employment at will has affected the court's ability to handle unconscious discrimination claims are Professors Derum and Engle. *See* Derum & Engle, *supra* note 6, at 1182 (examining the personal animosity cases to analyze employment at will and unconscious bias critiques of employment discrimination law; arguing that the *McDonald Douglas* framework is designed to reign in employment at will as well as attend to unconscious discrimination, but ultimately determining that the rise of the personal animosity presumption indicates a judicial commitment to employment at will). *See also* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1459 (1996) (noting that "three systemic causes responsible for the result in *St. Mary's* [*Honor Center v. Hicks*, 509 U.S. 502 (1993)]: the underlying employment at will doctrine, the plaintiff's burden of proof, and the requirement that the plaintiff prove discriminatory intent").

[131]*See* Corbett, *supra* note 122, at 317 (noting that employment at will was originally adopted by the courts as a gatekeeping rule because of institutional competency concerns about evaluating employee behavior).

[132]Morriss, *supra* note 126, at 752.

(legitimate or not) from the record, the court no longer has to worry about encroaching on the employer's prerogative to do as he pleases in his place of business, imposing a contract where there is none, or, most importantly, branding an employer with the stigma of being a discriminator.[133]

The importance of eliminating every nondiscriminatory reason from the record has become important in cases alleging conscious discrimination because of the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.[134] Because of the nature of unconscious discrimination, this case carries far greater implications for such claims.

In *Hicks*, the plaintiff, who is black, worked as a correctional officer for the defendant, St. Mary's.[135] In February 1980, Hicks was promoted to shift commander and enjoyed a satisfactory employment record until 1984, when the defendants hired a new supervisor, John Powell.[136] After the personnel change, Hicks became the subject of repeated and increasingly severe disciplinary actions.[137] On June 7, 1984, Hicks was discharged for threatening Powell during an argument, and Hicks subsequently filed a Title VII action.[138] After a bench trial, the district court found that Hicks was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations "committed by plaintiff's co-workers, were either disregarded or treated more leniently"; and that Powell followed Hicks and provoked the final verbal confrontation in which Hicks threatened him.[139] The district court concluded, however, that Hicks failed to carry his ultimate burden of proving that his race was the determining factor in the defendants' decision to first demote and then subsequently to dismiss

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[133]*See* Schwab, *supra* note 128, at 47-48, 54 (noting that courts defer to the employment at will scheme because the court presumes that "midcareer employees have an at will relationship with their employer because that contractual structure best deters opportunistic behavior" such as employee shirking or arbitrary terminations).

[134]509 U.S. 502 (1993).

[135]970 F.2d 487, 488 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

[136]*Id.* at 488-89.

[137]*Id.* at 489. The court of appeals agreed with the district court that defendant's reasons were pretextual because:

> [the] plaintiff was "mysteriously" the only one disciplined for violations actually committed by his subordinates; that the alleged policy of disciplining only the shift commander for violations occurring during a shift was only applied during plaintiff's shifts; and that, on numerous occasions, plaintiff was singled out for unusually harsh disciplinary treatment while others who committed more serious violations either were not disciplined or were treated more leniently.

Id. at 492.

[138]*Id.* at 488-89.

[139]Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1250-51 (E.D. Mo. 1991), *rev'd*, 970 F.2d 487 (8th Cir. 1992), *rev'd*, 509 U.S. 502 (1993).

him, and that plaintiff also failed to show that the crusade against him was racially, rather than personally, motivated.[140]

The Eighth Circuit reversed the district court's decision, finding that it was improper for the district court "to assume—without evidence to support the assumption—that the defendants' actions were somehow 'personally motivated.'"[141] Further, "[o]nce plaintiff proved all of defendants' proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law."[142]

The issue presented on appeal to the Supreme Court was whether a prima facie case of discrimination, coupled with proof that the employer's reasons for the employment action were determined to be false, required a verdict for the employee as a matter of law. In a 5-4 decision, the Supreme Court held that once a plaintiff succeeds in showing at trial that the defendant's proffered reasons are pretextual, the factfinder can still look for a nondiscriminatory explanation for the defendant's actions.[143] Specifically, the Court found that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, '[n]o additional proof . . . is required.'"[144] Rejection of the defendant's proffered reasons, however, did not compel judgment for the plaintiff.[145] Commentators have interpreted *Hicks* as adopting a pretext plus rule, where a plaintiff not only has to prove pretext once a defendant comes forward with a nondiscriminatory reason for the adverse action, but the plaintiff also has to disprove all possible nondiscriminatory reasons for the employment action.[146] The *Hicks* decision is also seen as a rejection of the "pretext only" rule, where evidence of falsity is sufficient to yield a verdict for the employee.[147]

If one views the events prior to the verbal confrontation between the plaintiff and his supervisor in isolation, *Hicks* could be categorized as an unconscious discrimination case. There is no indication in the record

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[140]*Id.* at 1252.

[141]*Hicks*, 970 F.2d at 492.

[142]*Id.*

[143]*Hicks*, 509 U.S. at 511.

[144]*Id.* (emphasis omitted) (quoting *Hicks*, 970 F.2d at 493).

[145]*Id.*

[146]Some commentators have interpreted the holding of *Hicks* to mean that a plaintiff has to prove intentional discrimination. *See, e.g.*, Stefanie Vines Efrati, *Between Pretext Plus and Pretext Only: Shouldering the Effects of Pretext on Employment Discrimination After* St. Mary's Honor Ctr. v. Hicks *and* Fisher v. Vassar College, 75 CHI.-KENT L. REV. 153, 155-56 (1999); JuLyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in* St. Mary's Honor Center v. Hicks, 14 HOFSTRA LAB. L.J. 177, 179 (1996).

[147]Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 31-32 (1996) (discussing pretext plus and pretext only rules).

that there were other minority supervisors, or minority employees supervised by Powell, who were subjected to the same treatment as Hicks. Similar to the plaintiff in *Thomas*, Hicks also had a satisfactory employment record prior to the personnel change, and there was no evidence of any blatant racial animus between him and Powell. But Hicks was treated differently than other shift managers in ways that were otherwise inexplicable.

The final verbal confrontation, however, caused serious problems for Hicks's claim. Once it occurred, it became impossible for the harm of which Hicks complained of to be traced to the defendant's actions. His threat to his supervisor was an intervening factor that ultimately prompted and justified his termination. His actions allowed the court to conclude that it was he, and not the employer, who caused the harm, and his verbal confrontation overwhelmed any evidence of discrimination, blatant or subtle. For example, Hicks used quantitative evidence at his bench trial to show the possible existence of institutional discrimination against blacks in supervisory positions in the defendant's institutions, but this evidence was ignored by the district court and later by the Supreme Court.[148] Hicks did not have a "legitimate" claim because of his unreasonable actions, even where there was evidence of pretext and statistical evidence of discrimination. Employment at will became a prominent focal point in this case because an untruthful employer, one who has likely discriminated, is still not obligated to employ an unreasonable (i.e., insubordinate) employee.

Hicks is viewed by some commentators as the reemergence of the doctrine of employment at will because it reasserts the ideal of good cause, bad cause, or no cause termination.[149] Contrary to this argument, *Hicks* does not necessarily represent a reemergence of employment at will and is more likely a reiteration of a doctrine that had long been utilized by the courts. Professor Corbett, for example, argues that the subordination of antidiscrimination law to employment at will began with the Supreme Court's decision in *Furnco Construction Corporation v. Waters*,[150] where the Court outlined the parameters of the second

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[148]*Hicks*, 970 F.2d at 490 n.6 (An in-house study was conducted of two Missouri correctional centers which concluded that "'too many blacks were in positions of power at St. Mary's, and . . . the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real.'") (citations omitted).

[149]Derum & Engle, *supra* note 6, at 1210. These commentators argue that:

> By giving employers more latitude in offering reasons for their decisions, the Court has moved closer to enforcing an at-will than a for-cause regime. *Hicks*, in particular, reemphasizes the extent to which employment at will is the background rule against which Title VII operates. It begins the replacement of the *Furnco* presumption with the personal animosity presumption.

Id.

[150]438 U.S. 567 (1978).

prong of the *McDonnell Douglas* burden-shifting formula in which the employer has to offer a legitimate, nondiscriminatory reason for its action.[151] Professor Corbett notes that the Court's decision to allow the employer to offer "'some legitimate, nondiscriminatory reason'" that neither has to be persuasive nor be best for hiring the maximum number of minority employees is reflective of the Court's belief that they are not competent to restructure the employer's business practices, "'and unless mandated to do so by Congress they should not attempt it.'"[152] Other language in *Furnco* supports this position. The Court, while acknowledging the presumption of discrimination that arises from the prima facie case, was clear that it "is not the equivalent of a factual finding of discrimination,"[153] a point that is self-evident given that the remaining two prongs of *McDonnell Douglas* are so deferential to the employer's prerogative.

It is apparent that the *McDonnell Douglas* burden-shifting formula has a built-in mechanism to ensure that the employer's autonomy is protected from government intrusion. Undoubtedly, when the employer has to present a legitimate, nondiscriminatory reason for the adverse action, it is likely that there is some other reason available to explain the adverse action, especially if the employer has unconsciously discriminated.[154] The reason may or may not be known to the employee or clear from the record, but in accordance with *Hicks*, the court is free to "discover" the reason on its own initiative.[155] Moreover, the third stage of *McDonnell Douglas*, in which the employee has to prove pretext, reflects the court's unwillingness to second guess the employer's business decisions. In some circuits, the plaintiff actually has to prove that the employer's justification is a lie, usually resulting in microscopic analysis of the plaintiff's credibility rather than the legal sufficiency of the employer's proffered reason.[156] *Hicks* illustrates that the "pretext is a lie"

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[151]*Id.* at 578. *See also* Corbett, *supra* note 122, at 333-35 (discussing the Court's decision in *Furnco*).

[152]Corbett, *supra* note 122, at 334 (quoting *Furnco*, 438 U.S. at 577-78).

[153]*Furnco*, 438 U.S. at 579.

[154]Hart, *supra* note 4, at 747. Professor Hart observes that:

> [c]ompounding the effects of these unconscious cognitive processes is . . . a pervasive "conflict between the denial of personal prejudice and the underlying unconscious, negative feelings and beliefs." . . . [A]s a consequence of this conflict, discrimination is most likely to occur in contexts where it can be justified as something other than discrimination.

Id. (citations omitted).

[155]Catherine J. Lancelot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 130 (1991) (stating that in order to prove pretext, the plaintiff "must negate not only the defendants' articulated reasons but also secret reasons they failed to advance in court").

[156]*See* Cardoso v. Robert Bosch Corp., 427 F.3d 429, 435 (7th Cir. 2005) (finding that pretext is not a mere "business error" but rather "a lie or deceit designed to cover one's

formulation is not enough to guarantee victory for the plaintiff even if the plaintiff can meet this threshold because the employer can be dishonest about his motivations, which may or may not be impermissible, since it is his prerogative on how to run his business. Consequently, the defendant as business owner does not have to employ an unreasonable individual, and should he decide to fire the employee, the court will weigh whether the decision to terminate was racially motivated against the employee's unreasonable behavior. In unconscious discrimination cases, the latter always wins because these claims do not have the same legitimacy as intentional discrimination claims unless the plaintiff shows that no other reason exists to explain the adverse action; otherwise, the court will simply focus on the evidentiary gaps in the plaintiff's case to deny relief.[157]

Besides *Furnco*, other early Supreme Court cases indicate that employment at will was not far from the Court's mind when it initially formulated the prima facie case in *McDonnell Douglas* and *Texas Department of Community Affairs v. Burdine*.[158] In *Board of Trustees of Keene State College v. Sweeney*,[159] the Supreme Court reversed the First Circuit and reiterated that the burden on the employer is much lighter than that on the plaintiff in Title VII cases.[160] Initially, the district court found in favor of the plaintiff on her sex discrimination claim, and the

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tracks"); Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1261 (11th Cir. 2001) (utilizing the Seventh Circuit's standard that pretext is a lie); Chapman v. AI Transp., 229 F.3d 1012, 1050 (11th Cir. 2000) ("Demonstrating pretext by '[c]asting doubt on an employer's asserted reasons for an adverse employment action' is an indirect means of demonstrating 'that the employer acted with the forbidden animus.'"). *See also* Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1028-29 n.6 (9th Cir. 2006) ("A plaintiff may not defeat a defendant's motion for summary judgment merely by denying the credibility of the defendant's proffered reason for the challenged employment action."). For a thorough discussion of the "pretext is a lie" formulation, see Lancelot, *supra* note 155.

[157]*See, e.g.*, Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995) (granting summary judgment in favor of the defendant because even though "some of [the defendant's proffered] reasons were successfully called into question" by the plaintiff "does not defeat summary judgment if at least one reason for each of the actions stands unquestioned"). Many plaintiffs alleging discrimination also have problems surviving summary judgment because the court views their affidavits as "speculative" and "conclusory." *See* Quinones v. Buick, 436 F.3d 284, 290 (1st Cir. 2006) (finding that the plaintiff's affidavit and deposition testimony "reflects only [his] subjective speculation and suspicion" that he was paid less than his co-worker for discriminatory reasons "rather than from other possible causes that might just as easily have explained the discrepancy"); Ross v. Univ. of Tex. at San Antonio, 139 F.3d 521, 526-27 (5th Cir. 1998) (holding that the plaintiff's generalized statements about relative qualifications or treatment of similarly situated employees is insufficient to defeat summary judgment). This hurts plaintiffs bringing unconscious discrimination claims because many of their allegations are based on their own subjective interpretation of disparities within the workplace.

[158]450 U.S. 248, 252-53 (1981).

[159]439 U.S. 24 (1978).

[160]*Id.* at 25-26.

court of appeals affirmed.[161] The court of appeals found that the defendants had to prove the absence of a discriminatory motive because the defendant had better access to the evidence. The Supreme Court reversed and, relying on *Furnco* and *McDonnell Douglas*, found that the court of appeals had "imposed a heavier burden on the employer than *Furnco*, and the dissent here, require."[162] In dissent, Justice Stevens chastised the majority, noting that:

> [i]n this case, the Court's action implies that the recent opinion in *Furnco Construction Corp. v. Waters*, made some change in the law as explained in *McDonnell Douglas Corp. v. Green*. When I joined the *Furnco* opinion, I detected no such change and I am still unable to discern one. In both cases, the Court clearly stated that when the complainant in a Title VII trial establishes a prima facie case of discrimination, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[163]

Furnco and *Sweeney* both prove that very little evidence is required on the part of the employer to rebut what is supposed to be a *presumption* of discrimination.[164] Thus, the Court had already made it clear, prior to *Hicks*, that *McDonnell Douglas* was intended to place the burden of proving discrimination on the plaintiff and relieve the employer of having to defend his employment practices.[165]

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[161]Sweeney v. Bd. of Trs. of Keene State Coll., 569 F.2d 169 (1st Cir. 1978).

[162]*Bd. of Trs. of Keene State Coll.*, 439 U.S. at 25 n.2.

[163]*Id.* at 26 (quoting Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978)).

[164]Derum & Engle, *supra* note 6, at 1218 ("[T]he prima facie case creates a legal presumption so strong that 'if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff . . . .'" (quoting Tex. Dep't Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981))).

[165]St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 513 (1993). The majority opinion authored by Justice Scalia was clearly more concerned about the impact of the dissent's position on the employer than about fairness to the individual alleging discrimination. Consider this example given by Justice Scalia to prove that the *Hicks* decision is consistent with prior case law:

> Assume that 40 percent of a business' work force are members of a particular minority group, a group which comprises only 10 percent of the relevant labor market. An applicant, who is a member of that group, applies for an opening for which he is minimally qualified, but is rejected by a hiring officer of that same minority group, and the search to fill the opening continues. The rejected applicant files suit for racial discrimination under Title VII, and before the suit comes to trial, the supervisor who conducted the company's hiring is fired. Under *McDonnell Douglas*, the plaintiff has a prima facie

As this discussion illustrates, the first *Thomas* factor is important because employment at will makes it difficult for a plaintiff to establish an impermissible motivation where the discrimination occurs within the perimeters of legal behavior.[166] *Hicks* supports the proposition that courts can look for and ultimately rely on any reason, other than discrimination, to explain the adverse employment action. Arguably, the tension and subsequent altercations between Hicks and his supervisor could have been the result of unconscious racial animus, yet the court relies on what Professors Derum and Engle have termed the *personal animosity presumption* in finding against the plaintiff.[167] These scholars have persuasively argued that because of deference to employment at will, courts are more likely to rely on a presumption of personal animosity between the plaintiff and the defendant to explain away the discrimination.[168] Most telling is the fact that the district court in *Hicks*, not the defendant, raised personal animosity as a possible justification for the employment action.[169] At the trial level, both individual decision makers, including Powell, denied that they harbored any personal animosity towards Hicks.[170] Nevertheless, this case makes it clear that, despite the justifications offered by the employer, plaintiffs not only have to eliminate every nondiscriminatory reason from the record, but they

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> case, and under the dissent's interpretation of our law not only must the company come forward with some explanation for the refusal to hire (which it will have to try to confirm out of the mouth of its now antagonistic former employee), but the jury must be instructed that, if they find that explanation to be incorrect, they must assess damages against the company, whether or not they believe the company was guilty of racial discrimination. The disproportionate minority makeup of the company's work force and the fact that its hiring officer was of the same minority group as the plaintiff will be irrelevant, because the plaintiff's case can be proved "indirectly by showing that the employer's proffered explanation is unworthy of credence." Surely nothing short of inescapable prior holdings (the dissent does not pretend there are any) should make one assume that this is the law we have created.

Id. at 513-14 (quoting *Burdine*, 450 U.S. at 256) (emphasis and citations omitted). The whole point of *McDonnell Douglas*, however, is to aid the employee where there is no direct evidence of racial discrimination, evidence which Justice Scalia seems to require to the employee's detriment in order to protect the employer.

[166] *See generally* Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997) (identifying the source of unconscious discrimination as cronyism, social networks, unconscious stereotypes, and other attitudes that fall short of a conscious intent to discriminate against individuals in the protected class).

[167] Derum & Engle, *supra* note 6, at 1179.

[168] *Id.* at 1182.

[169] *Id.* at 1226.

[170] *Id.*

also have to anticipate potential justifications that might be raised by the court to explain the adverse employment action.[171]

As these examples indicate, employment at will has not been abrogated by the antidiscrimination laws.[172] Those alleging unconscious discrimination must, therefore, take this factor into consideration when attempting to prove their claim by ensuring that there are no nondiscriminatory reasons that may explain the adverse action in the record.

2. Reasonableness

The behavior of the *Hicks* plaintiff indicates that reasonableness plays a vital role in this analysis. In our legal system, rationality is a proxy for nondiscrimination.[173] The theory is that rational people do not discriminate, at least not in ways that are counterproductive, uneconomical, or inefficient.[174] Judges assume that employers are

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[171] *See also* McGinley, *supra* note 130, at 1459 ("[J]udges often rely on the employment at will doctrine to conclude that the mere fact that the plaintiff proved that he was wrongfully discharged is insufficient to establish illegal discrimination.").

[172] Early cases such as *Slack v. Havens*, No. 72-59-GT, 1973 U.S. Dist. LEXIS 12662 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975), seem to suggest otherwise. *Id.* (finding that an employee's discharge for refusing to perform a discriminatory work assignment violated Title VII); *see also* Smith v. Texas Dep't. of Water Res., 799 F.2d 1026 (5th Cir. 1986) (plaintiff was not insubordinate where she refused a discriminatory assignment as a relief secretary and her subsequent discharge violated Title VII). But as *Hicks* and later cases indicate, employment at will is alive and well.

[173] In analyzing the role of rationality in the *McDonnell Douglas* framework Professor Krieger observed that:

> [p]retext analysis thus rests on the assumption that, absent discriminatory animus, employment decisionmakers are rational actors. They make evenhanded decisions using optimal inferential strategies in which all relevant behavioral events are identified and weighted to account for transient situational factors beyond the employee's control. If an employer's proffered explanation for its decision is shown to be irrational or implausible in light of the relevant data set, the trier of fact may conclude, and to find for the plaintiff, must conclude, that the reasons given did not really motivate the decisionmaker, but were simply contrived to mask discriminatory intent. The presumption of invidiousness permits the trier of fact to infer discriminatory intent from flaws in a decisionmaker's inferential process. Without this presumption, one could only infer that an irrational decision was made; such a decision, in the absence of a duty to discharge only for good cause, would not be actionable.

Krieger, *supra* note 21, at 1181.

[174] In fact, some discrimination that we would consider especially egregious today can be justified on the basis of rationality. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 31 (1980). Professor Ely discussed the view that academic progress of children is greater when the races are segregated and concluded that:

> [i]ndeed, apartheid generally is a *rational*, if misguided, means of avoiding racial strife, and one might *rationally* distribute jobs on the basis of color—giving what we generally think of as the better ones to whites—in light of the

rational, while racists and/or misogynists are irrational, and for the most part, these things are mutually exclusive. This characterization is logically inconsistent with the concept of unconscious bias, but this is how much of the analysis employed by the courts proceeds. The second *Thomas* factor identifies unreasonable behavior by either party, which eliminates institutional competency concerns, as the court is no longer required to evaluate the employee's work performance. This factor is another way in which we can look at the relevance of at will employment, or the idea that the employer can fire an employee for good reason, bad reason, no reason, or for purposes of this subsection, perceived unreasonableness.

The Supreme Court has explicitly identified the reasonableness of both the behavior of the employer and the employee as factors in determining whether the employer can assert an affirmative defense to liability for a supervisor's perpetuation of a hostile work environment in violation of Title VII.[175] Similarly, absent some evidence of objectively unreasonable behavior on the part of the employer, the plaintiff will not be able to prove that the employer unconsciously discriminated.[176] The court views an employer who engages in blatant racial or gender animus as a statistical aberration and clearly irrational.[177] Blatant discrimination, therefore, rebuts the judge's presumption that the defendant is a rational employer. Where there is no overt discrimination, the court will feel legally justified in finding for the plaintiff only where the employer (and

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> statistical reality, however invidious its historical roots, that blacks by and large are not as well educated in our society as whites.

Id.

[175]Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) ("[A]n employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.").

[176]*Id.* at 787.

[177]*See generally* Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1243 (2006). One of the rationales underlying the "employers are rational, racists are not" idea stems from the focus on the individual, as opposed to systematic oppression, which allows the individual racist to be viewed as an aberration and everyone else as largely incapable of such behavior. This ties into a concept discussed by Professor Bracey, which he calls "which innocence":

> The claim of white innocence is animated by two key assumptions about the nature of racism. First, proponents of racial innocence assume that that [sic] racism is not a cultural or structural phenomenon but a product of individual racists. The rhetoric of racial innocence rests on the idea of the individual, intentional discriminator. According to this view, racism is the result of racist acts perpetrated by rogue individuals acting outside of society's rules or conventions. The focus is on the "perpetrator" as opposed to the victim of racism. The objective of antidiscrimination law, then, is to prevent the replication of racist acts by punishing the individual perpetrators of those acts.

Id.

not the employee) has exhibited behavior that is unexplainable from a market perspective. In analyzing the behavior of both parties, the court looks for the more rational actors.

Such arguments regarding employer rationality underestimate an employer's willingness to pay the associated costs of discriminating. Many judges, economists, and legal theorists assume that employers will not engage in discriminatory behavior because the market drives out discriminatory actors who are less efficient than their competitors.[178] In some cases, however, discriminatory employers can profit financially from discrimination.[179] Moreover, in some cases the structure of the firm is so complex that the market becomes an inefficient and inadequate means by which to police discrimination.[180]

As Professors Wilkins and Gulati concluded in their study on the lack of diversity in corporate law firms, employers who pay high wages are using "complex hierarchical employment structures in order to reduce the cost of acquiring information about worker performance.[181] As a result, these firms "can partially shield themselves from the kind of market pressures that neo-classical theorists assert will drive out discrimination."[182] A large pool of candidates and complex hiring structures further undermine the notion that employer rationality is contemporaneous with, and a proxy for, nondiscrimination because discrimination does not always come into conflict with the employer's economic well-being.[183] Supervisors who make hiring and firing decisions do not always consider the employer's financial well-being and

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[178]*See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 517-18 (1996); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139, 76 (1992) (arguing that perfect competition eliminates discrimination); John J. Donahue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1421-22 (1986) ("The basic argument is that discriminatory firms are not maximizing profits and therefore eventually will be driven out of the market."); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987) (arguing that over time competition will erode the effects of discrimination because white employers who are not averse to associating with blacks will have lower labor costs and will gain a competitive advantage over discriminatory firms).

[179]*See* Donahue, *supra* note 178, at 1418-19 (noting that discrimination against blacks reduces the demand for black labor and depresses black wages resulting in greater profits for discriminatory firms and less profits for nondiscriminatory firms); *see also* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d. ed. 1971) (arguing that discrimination by whites against blacks is the result of an aversion that whites have to associating with blacks and this aversion makes it more costly for whites to transact with blacks than with other whites); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 673-74 (2003) (noting "that employers may continue to discriminate even when they attempt to respond to the market").

[180]Wilkins & Gulati, *supra* note 178, at 517-18.

[181]*Id.*

[182]*Id.*

[183]*Id.*

their discriminatory actions are not always detectable because of the inflated candidate pool.[184] More importantly, employers may not be consciously aware that they (or anyone else) are acting against the employer's self-interest. In fact, if discrimination is defined based on these underlying concepts of deliberate behavior, intent, or self-interest, then any arguments about rationality are futile to the extent that they are used to justify it as a legitimate response to unconscious discrimination. Yet this assumption of rationality continues to thrive.

Winning an unconscious discrimination claim is more difficult than traditional employment discrimination claims because plaintiffs have to dispel these basic assumptions about the market, which can be done by relying on the reasonableness of their own behavior, but is otherwise difficult to rebut. Consequently, cases based on both unconscious and conscious discrimination have a better chance of success than pure unconscious discrimination cases because the presence of discriminatory remarks, for example, or evidence of other questionable behavior tends to discredit the assumption that the employer is rational.[185] Otherwise, plaintiffs alleging claims based solely on unconscious discrimination must rely on the two factors derived from *Thomas* in order to prevail.[186]

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[184]Wilkins & Gulati, *supra* note 178, at 517-18.

[185]*See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146, 153-54 (2000) (relaxing *Hicks*'s "permit but does not compel" standard where there is some direct evidence of discrimination).

[186]The combination of overt and unconscious racism would work for claims predicated on some type of tangible employment decision, but it is unlikely that a hostile work environment or constructive discharge claim based on a mixture of overt and unconscious racism would be successful. Unconscious racism, by nature, is not severe and pervasive, although it could still be quite damaging to a person's career and state of mind. Unfortunately, the bar for a successful hostile work environment claim is very high. *See, e.g.*, Tucker v. Merck & Co., 131 F. App'x 852, 859 (3d Cir. 2005) ("Isolated incidents of racial harassment will not create [a hostile work environment]."). In *Tucker*, the court found that the plaintiff could not establish a hostile work environment claim based on arguments that, among other things, Merck was discriminatory in deciding his benefits. The court found that the plaintiff failed to demonstrate he was the victim of intentional discrimination, and stated:

> In his hostile work environment claim, plaintiff cannot cite a single incident involving the utterance of a racial epithet, the use of a racist symbol, or *any* direct comment concerning race. Rather, plaintiff raises eight separate incidents where Merck made determinations regarding benefits issues raised by him. These incidents were each employment decisions or actions not linked directly with conduct regarding race . . . . He has no direct evidence of discrimination and points to no similarly situated individual treated more favorably. Plaintiff's subjective disagreement with these decisions, and even his opinion that they were racially motivated and were offensive, is insufficient as a matter of law to establish a hostile work environ-ment [sic].

Id. Undoubtedly, there is some requirement of conscious discrimination for a hostile environment claim to succeed, as proof of the requisite discriminatory intent. While the actions that plaintiff advances as evidence of discrimination—denial of certain benefits—are prototypical acts in which unconscious discrimination can be present, these actions certainly

Because of the presumption of employer reasonableness, courts assume that in the face of illogical behavior espousing racism or discrimination, the employee should react "reasonably," as the word is defined by the judge or trier of fact. The idea that the employer must demonstrate reasonableness, however, does not account for the aversive racist or sexist employer which, as explained in Part II, is one who outwardly self-corrects but inwardly discriminates,[187] especially when there are no elements of overt discrimination present. Nor does this idea of reasonableness account for the variety of responses exhibited by plaintiffs who are exposed to discriminatory behavior. The *Hicks* plaintiff, for example, might have reacted negatively to his supervisor out of frustration for being unfairly targeted. Weighing the reasonableness of the employee's response against actions that could have either a permissible or impermissible motive hurts plaintiffs, making any decision that has a sound business justification appear reasonable. Courts often try to personalize the alleged discrimination by searching for a reason why the employer has problems with a particular employee, rather than considering that the employer may have a bias against persons of the same race or sex as the plaintiff. Unless the employer has behaved unreasonably, in which case the court will be more willing to believe that discrimination is the reason for the action, then the "rational" employer will always win because he is unrealistically viewed by the court as lacking the characteristics that define a racist or a sexist and as one who makes decisions driven solely by profit.[188]

Thus, employment at will is closely tied to the idea that the employer will make effective business decisions and not act in a manner that is contrary to its business interests.[189] In *Brown v. M & M/Mars*, for example, Edward Brown sued Mars alleging that he was fired from his position as the "B shift manager" "because of his age in violation of the [ADEA]."[190] Brown's immediate supervisor, Richard Vincent, fired Brown allegedly because of an incident (the down-time incident) that occurred during the B shift in which workers had to shut down

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do not meet the requirement of pervasiveness that is a prerequisite for establishing a hostile work environment.

[187]Lawrence, *supra* note 4, at 335.

[188]Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 468 (1997). A reasonable person "could be seen as a human being without group-related identification. Although people live in a world influenced by social construction, the reasonableness standard disavows group-based sources of identity; the reasonable person is supposed to be free of distracting memories, political commitments, and group loyalties." *Id.*

[189]*See, e.g.*, McCullough v. Real Foods, Inc., 140 F.3d 1123, 1125, 1129 (8th Cir. 1998) (holding that employer's use of subjective and informal criteria to promote a white woman with a sixth grade education over a black woman with a college education could have been influenced by racial bias and was not motivated by sound business judgment).

[190]Brown v. M & M/Mars, 883 F.2d 505, 506-07 (7th Cir. 1989).

production when a relief operator flooded the caramel cookie production line because of an incorrectly positioned water valve.[191] Mars claimed that Brown was fired for a series of performance problems, culminating in the down-time incident.[192] Brown introduced testimony at trial that he was a loyal worker and an effective manager, evidence that the jury apparently credited over Mars's version of events because the jury found in Brown's favor.[193] On appeal, the court found that the jury could have believed that Vincent's reasons for firing Brown were pretextual because there was also evidence that there were other down-time incidents similar to the one that led to Brown's firing, but Mars did not fire the other managers of those shifts, who were younger than Brown.[194]

The *Brown* court hinted at the importance of reasonableness in diminishing the employer's credibility, stating that "[e]liminating Brown's performance and the down-time incident as reasons for firing Brown leaves the 'antagonistic' relationship between Brown and Vincent as a reason for firing Brown. Firing Brown because of his inability to get along with Vincent would not violate the ADEA."[195] Here we see the operation of the personal animosity presumption. The *Brown* court later discounted the antagonistic relationship between Brown and Vincent, and found that there were sufficient doubts as to Vincent's other reasons for firing Brown since Brown outperformed younger shift managers whose performance statistics were inferior to Brown's yet he was the only one fired.[196] Thus, unreasonableness on the part of the employer can also be used to discount the personal animosity presumption that so often dooms these claims. Since it is unreasonable to fire the superior employee and keep an inferior one, Vincent's unreasonable behavior affected his credibility in other areas and allowed the court to safely discount the "antagonistic" relationship between the two. Furthermore, unlike the plaintiff in *Hicks*, there is no indication that Brown behaved unreasonably at any time, even during the notorious down-time incident. Unlike the *Hicks* plaintiff, Brown's credibility never became an issue.

If one compares *Brown* with the *Thomas* case, one can see many parallels. As mentioned previously, the court viewed Thomas's behavior as "reasonable" because she refused to sign the discriminatory appraisals and she reported her supervisor's behavior to upper management. Kodak, however, was not a rational employer because it laid off a more worthy

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[191] *Id.* at 507.

[192] *Id.*

[193] *Id.* at 508, 511.

[194] *Brown*, 883 F.2d at 510-11.

[195] *Id.* at 510.

[196] *Id.* (stating that "given that there was reason to doubt Vincent's other asserted reasons for firing Brown, the jury was entitled to look askance at the theory that Vincent fired Brown because of his 'antagonism'").

employee in the face of evidence that she was being treated unfairly by a supervisor who may not have been qualified for their position. Furthermore, there is no evidence that Kodak investigated Thomas's steep decline.

Another case that is very instructive of how a court distinguishes between employer and employee reasonableness is *Edwards v. Foucar, Ray & Simon, Inc.*[197] and Professor Terry Smith's corresponding discussion of how the case sheds light on Title VII's treatment of subtle discrimination.[198] In *Edwards*, the plaintiff, who is black, was fired for gross insubordination after a white supervisor called him "sunshine," to which the plaintiff responded, "Don't call me 'sunshine,' you motherfucker. My name is Donald Edwards."[199] This exchange ultimately resulted in a physical altercation between the plaintiff and the supervisor, who fired him.[200] Prior to this incident, the plaintiff warned the supervisor not to call him "sunshine," a word which could be interpreted as being racially charged.[201] The court noted that there is conflicting testimony that prior to the beginning of the fight the supervisor stated to Edwards, "I finally got you, you nigger bastard."[202] Furthermore, Edwards had previously complained of disparate treatment at the hands of the supervisor.[203] Despite this evidence, the court found that the termination was justified because of the physical altercation.[204] Although this case involved interpreting the terms of a collective bargaining agreement and not Title VII, Professor Smith notes that this case can be refashioned as a Title VII retaliation case, in which:

> Edwards's earlier, pre-altercation request to Johnson that he not be called "sunshine," as well as his complaints regarding Johnson's supervision of him, would qualify as opposition to unlawful employment practices under Title VII's anti-retaliation provision. Johnson's continuation of the name-calling, and his announced firing of Edwards contrary to the

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[197] 23 Fair Empl. Prac. Cas. (BNA) 1644 (N.D. Cal. 1980).

[198] Smith, *supra* note 78, at 531.

[199] *Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1645.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 1645 n.1.

[203] *Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1648 ("There was also evidence that Johnson had been accused of harassing Edwards in the manner in which he worked, the allotment of overtime, the routes which he was assigned and available overtime.").

[204] *Id.* at 1649. In adopting the magistrate's report, the court stated, "Our review of all of the testimony, particularly Edwards' admission that he engaged in a violent fight with Johnson following the vocal coffee room confrontation, establishes Edwards was terminated because he was insubordinate and violated the terms of the collective bargaining agreement his union had with Foucar." *Id.*

> collective bargaining agreement, would constitute penultimate retaliation for Edwards's past protests as well as a necessary foreground to his retaliatory coup de grace, the discharge for the physical altercation. Although this altercation might provide a legitimate justification for Edwards's dismissal, since the fight was so intertwined with the provocation which set it in motion, the employer, under a mixed-motive regime, would have to show that it would have reached the same decision to fire Edwards whether or not he engaged in the protected activity.[205]

Notwithstanding Professor Smith's analysis of the case, let us assume, for purposes of argument, that there was no collective bargaining agreement. It is likely that, even under a mixed motive regime or if applying Title VII's antiretaliation provision, the employer still would have prevailed, as the physical altercation places this case in the same realm of unreasonableness exhibited by the plaintiff in *Hicks*.[206] Thus, expanding Title VII's antiretaliation provisions or applying a mixed motive analysis would not have changed the outcome, especially where the court discounts the unreasonable behavior of the employer where the employee has responded in a manner that the court deems inappropriate.

With the exception of the supervisor's racial epithet ("nigger bastard"), a statement the court did not seem to credit, there is no indication that the court appreciated the racial undertones of the word "Sunshine."[207] What animates the court's decision is that the employer does not have to retain an unreasonable employee, a fact that has less to do with the limitations of Title VII than it does with deference to employment at will or in this case, the collective bargaining agreement

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[205]Smith, *supra* note 78, at 532 (citations omitted).

[206]*See* Selmi, *supra* note 5, at 658. Selmi criticizes Professor Smith for arguing that this behavior should be actionable under Title VII because

> [i]t certainly cannot be the case that any response to the use of a derogatory name should constitute protected activity under Title VII, and at one point Professor Smith concedes as much by noting that the response must be reasonable under the circumstances. This observation is not meant to condone the use of the term, or to suggest that Edwards should have shrugged it off, but it appears that other avenues of complaint were available and it is difficult to conclude that Edwards's response in this instance should be excused, particularly since it represents the kind of behavior that would typically result in dismissal from a workplace.

Id. (citations omitted). *Edwards* demonstrates the reasonableness of the employee's response is the ultimate consideration, a consideration that trumps the more subtle insults, as well as the most egregious racial epithets.

[207]*Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1645.

which allowed discharges if an employee is insubordinate. *Thomas*, *Hicks*, and *Edwards* all indicate that the employee must always be reasonable in order to prevail. Despite the supervisor's unreasonable use of the word "Sunshine," the plaintiff's earlier admonition to refrain from using the term, and the supervisor's later use of a racial epithet, the *Edwards* court overlooked these factors because of the plaintiff's confrontation with his supervisor. Arguably, employment at will gives the employer significantly more room to be unreasonable, but the doctrine limits the employee's ability to do the same.

IV. USING THE FIRM TO SOLVE THE CONUNDRUM OF UNCONSCIOUS DISCRIMINATION

From the foregoing discussion, it is clear that unconscious discrimination claims may be better addressed by placing the burden on the firm to reduce the incidence of unconscious bias ex ante, as opposed to putting the burden on the employee of proving it in court ex post. In other words, this section advocates for the creation of a firm-based diversity norm, where firms implement programs, training, and inter-group cooperation that increase diversity in the workplace and address conscious and unconscious discrimination. The goal is for these initiatives to become an industry standard that furthers antidiscrimination and workplace equality principles.

There are, however, some difficulties in implementing this proposal. As the previous section acknowledges, unconscious discrimination claims rarely rise to the level of actionable discrimination. Why then should firms modify their behavior to address this problem? One possibility is the fear of litigation and its corresponding reputational harms but, as the next section discusses, the harm is, at best, speculative. Pressure from the Delaware courts is another alternative, but this suggestion is hampered by the lack of incentive that these courts have to become involved in this dispute. Another possibility is that firms may be more responsive to economic pressure from a company that has already been subjected to extensive Title VII litigation rather than from lawsuits that have little chance of success, but the idea here is for less, rather than more, Title VII litigation. It is apparent that all of these options have their weaknesses, but this proposal imagines a role for each of these alternatives in creating a coherent solution to the problem of unconscious discrimination. The idea is that big firms (previously subjected to Title VII litigation) will put market pressure on their suppliers and, to some extent, their smaller competitors to implement workplace diversity programs. The courts then would further the creation of this new norm

by immortalizing it in the case law. The remaining sections deconstruct this premise and provide a roadmap for firm involvement in this area.

A. *What Incentives Does the Firm Have to Act?: Reputation and Speculative Harms*

The goal of this article is to induce firms to adopt diversity initiatives unilaterally without the impetus of a Title VII lawsuit. Ironically, more (rather than less) litigation and the public relations blitz that follows to repair the firms' damaged reputation is the first step towards the creation of the new norm, which ultimately will result in less Title VII litigation overall. Although companies rarely face extensive Title VII litigation, the lawsuits that do occur, especially those involving huge, multinational corporations, lay an important foundation that can serve as an impetus for industry change. Moreover, it is unlikely that firms will implement any new diversity initiatives ex ante without the bad press that comes from litigation already underway. This change comes about because of the impact of the litigation on the firm's reputetion.

Reputation, defined as officer or director prestige among the corporation's shareholders and the public at large, has concrete value which, when diminished, can affect the firm's profitability. One would think that if a company's reputation is truly "damaged," then shareholders would sell their stock, or there would be some other appreciable short-term effect on stock price that reflects the reputational harm. For example, when the Enron scandal broke, its stock plummeted from about $84 per share to pennies on the dollar, and this damage occurred without an actual prosecution for any wrongdoing.[208] While corporate officers and directors may experience shame and harm to their reputations as a result of corporate criminal prosecutions, the deterrent and punitive effect is not the same in the context of civil litigation because of the lack of criminal sanctions. In reality, reputational damage does not necessarily affect the overall value of the firm where the potential liability is civil, as opposed to criminal, unless the events surrounding the claims are especially salacious.[209] For example, Texaco's stock dropped 2.6%[210]

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[208]James K. Glassman, *Diversify, Diversify, Diversify*, WALL ST. J., Jan. 18, 2002, at A10 (stating that Enron stock price plummeted from $84 per share to practically zero); Michael Lietdke, *Proud "Papa" Recognizes Some Faults in 401(k)s*, HOUSTON CHRON., Sept. 23, 2002, at B3 (stating that Enron employees lost $1.3 billion in retirement accounts).

[209]Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 945-46 (2005) (stating "the negative publicity from reaction to public reports of potential criminal acts or liability can weaken an entity's competitive position and increase the cost of doing business to the point of bankruptcy or even liquidation").

on the New York Stock Exchange after the *New York Times* published a story, later determined to be erroneous, of a secretly recorded meeting in which management officials allegedly used racial epithets.[211] Such events, however, are not the norm.

In fact, one can actually test whether the negative publicity garnered by discrimination lawsuits actually affects shareholder confidence as reflected by changes in the stock price. If there is minimal or no movement in the price of a company's stock in relation to various milestones in the litigation, then one can safely assume that short-term shareholder confidence in the corporation was not shaken by the pending litigation as it would be in the case of a criminal prosecution. Of course, this method is faulty, for there are various factors that can affect share price, but it gives us some indication of whether the litigation had any impact on the firm's stock price.

We can test this theory on Wal-Mart. This company best illustrates the harm that Title VII litigation can cause to the reputation of a huge, multinational corporation, and this factor (harm to a market giant) is a necessary step in the creation of the proposed diversity norm. In 2004, a sex discrimination lawsuit filed against Wal-Mart resulted in the certification of the largest class ever, with an estimated 1.5 to 1.6 million women claiming that Wal-Mart discriminated against them in pay and promotion.[212] The district court found that Wal-Mart created a corporate culture in which women were routinely passed over for promotion, and when combined with the subjective evaluation process and the statistical evidence indicating the disparities between men and women employees, the court found that this evidence was sufficient to create an inference of sex discrimination under Title VII.[213] In 2007, the Ninth Circuit affirmed the district court's decision.[214]

The idea that Wal-Mart's corporate culture contributed to the discrimination at issue in *Dukes* is tantalizing, for it raises the question of whether corporate officers and directors have a duty to their shareholders to create a culture amenable to diversity to avoid liability under Title VII. Commentators had concluded that the retail giant's enormous growth has been overshadowed by the sex discrimination litigation against it.[215] If one looks at the overall drop in Wal-Mart's share price from right before

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[210]Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and Its Effects*, 81 TEX. L. REV. 1249, 1270 (2003).

[211]Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A-1.

[212]Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142, 162 (N.D. Cal. 2004).

[213]*Id.* at 166.

[214]Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1244 (9th Cir. 2007).

[215]Ann Zimmerman, *CEO Scott Rebuts Critics of Pay Scales, Outlines Workplace-Diversity Moves*, WALL ST. J., Oct. 6, 2004, at B1.

the litigation was filed in 2001 (selling for roughly $60 per share) to its selling price in 2007 (selling at about $44 per share) to its current selling price of about $56 per share, it is undisputed that something affected Wal-Mart's stock price short-term, but it was not necessarily the Title VII litigation.[216] First, if one looks at Wal-Mart's daily stock price and compares it to the corresponding dates of notable events over the course of the litigation, such as the day the lawsuit was filed,[217] or the day the class was certified,[218] Wal-Mart's share price was largely unaffected.[219]

Second, the drop in Wal-Mart's stock price could be attributed to allegations that Wal-Mart is underpaying its employees and refusing to allow its workers to unionize, allegations that have received a large amount of media coverage that may have taken precedence over the sex discrimination litigation.[220] There have also been other notable incidents that have had a negative effect on the economy overall, including Y2K, the September 11th tragedy, the more recent housing market crisis, and the overall fall in the stock market. These events likely have impacted Wal-Mart's stock price. Thus, harm to a company's reputation as a result of pending civil litigation may not have an impact on stock price, a finding that is consistent with Professor Selmi's empirical analysis of class action lawsuits in employment discrimination cases and their corresponding effect on a corporation's stock price.[221] From the Wal-Mart example, we can conclude that there was some factor, other then purely financial concerns regarding the bottom line, which prompted the firm to implement diversity initiatives.[222]

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[216]A review of Wal-Mart's share price over the past ten years shows drop from upper $50s per share in 2001 to mid $40s per share through 2007, recovering only in 2008. Wal-Mart Stores, Inc. Historical Prices, http://finance.yahoo.com/q/hp?s=WMTGA=07GC=1998Gd=066e=14GF=2008Pg=MG2=668Y=66 (last visited July 13, 2008) (providing Wal-Mart's monthly stock price from 1998-2008).

[217]Equal Rights Advocates, *Dukes v. Wal-Mart Stores*, *available at* http://www.equalrights.org/professional/walmart.asp (stating that the suit was filed on June 19, 2001).

[218]*Judge Certifies Wal-Mart Class Action Lawsuit,* MSNBC.COM, June 22, 2004, http://www.msnbc.msn.com/id/5269131/ (describing certification of the class on June 22, 2004).

[219]Wal-Mart Stores, Inc. Historical Prices, http://finance.yahoo.com/q/hp?s=WMTGA=07GC=1998Gd=066e=14GF=2008Pg=MG2=668Y=66. *Cf.* Selmi, *supra* note 210, at 1270 (discussing the Home Depot litigation and the slight loss in share price upon the filing of the discrimination lawsuit, but noting that the loss was recovered the next day).

[220]Chuck Bartels, *Wal-Mart Touts Expansion at Annual Meeting*, WASHINGTONPOST.COM, June 2, 2006, *available at* http://www.washingtonpost.com/wpdyn/content/article/2006/06/02/AR2006060200840.html; Greg Edwards, *Vigil Targets Wal-Mart Work Conditions*, RICHMOND TIMES-DISPATCH, Dec. 15, 2006, at B.11.

[221]Selmi, *supra* note 210, at 1265.

[222]This is not to suggest that these lawsuits raise no financial concerns among management and shareholders, regardless of their low prospect of success or minimal impact on share price. If the firm decides to settle, these cases can cost millions. Texaco, for example, paid $176 million to settle its discrimination lawsuit and Coca-Cola paid $192 million; and more recently, Smith Barney paid $33 million. *See Class Action Alleges Race*

In other words, firm value concerns more than simply share price. There are indications that the sex discrimination litigation has affected shareholder perceptions of Wal-Mart, and that shareholders believe that Wal-Mart's practices negatively impact profits, despite the weak direct link between the litigation and the fall in Wal-Mart's share price. These concerns may be sufficient to prompt shareholders to bring suit against Wal-Mart's board for breaching their fiduciary duties, a concern that has likely prompted Wal-Mart's board to act despite the fact that there has been no official finding of any wrongdoing in the sex discrimination litigation.[223] Shareholders have directly urged Wal-Mart to "clean up its act" in the face of all of the employee scandals.[224] Some of its largest United States and United Kingdom investors wrote a letter, asking Wal-Mart to form an independent review board to analyze its employment practices because such practices are hurting stock prices.[225] In response to this criticism, at the 2004 shareholder meeting, Lee Scott, Wal-Mart's CEO, announced that Wal-Mart would be instituting company-wide computer postings of management openings, hiring a director of diversity and, most notably, cutting executive managers' bonuses if they fail to hit certain diversity targets. All of these initiatives were implemented at little or no cost to the company itself.[226] In fact, Scott stands to personally forfeit $600,000 if he fails to meet certain diversity initiatives.[227]

While there was no clear impact on stock price specifically because of the sex discrimination litigation, the perception of wrong-

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Discrimination at Coca-Cola Inc., LEGAL INTELLIGENCER, Apr. 26, 1999, at A1; Bob Egelko, *Smith Barney to Pay $33 Million in Bias Case*, SAN FRANCISCO CHRONICLE, Aug. 14, 2008, at B2; Jack E. White, *Texaco's High-Octane Racism Problems: Piles of Cash and Substantial Reforms Fail to Reverse the Call for a Boycott*, TIME, Nov. 25, 1996, at 34; Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, Nov. 17, 2000, at A1. Publix Supermarkets paid $81.5 million and Home Depot paid at least $104 million to settle sexual harassment or sex discrimination claims. *See generally* Steven M. H. Wallman, *Equality is More Than "Ordinary Business,"* N.Y. TIMES, Mar. 30, 1997, at 12; Robert S. Whitman, *Employment Liability: From the Courtroom to the Proxy Ballot*, 19 CORP. BOARD 11 (1998). This article suggests only that the impact of Title VII litigation on firm value encompasses more than just gauging the litigation's measurable impact on the bottom line, but also includes other intangibles that prompt firm management to act.

[223] *See* Reiner Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1738 (1994) (noting the different ways in which shareholder derivative suits can add "value" to the firm by not only "confer[ing] monetary benefits on shareholders . . . [but the] suit—or, more precisely, the prospect of suit—can add to corporate value by deterring wrongdoing").

[224] *"Wal-Mart Urged to "Clean up Act,"* BBC NEWS, June 3, 2005, http://news.bbc.co.uk/2/hi/business/4605733.stm.

[225] *Id.*

[226] *Big Plans Announced at Wal-Mart Shareholders Meeting*, 4029TV.COM, June 4, 2004, http://www.4029tv.com/news/3383806/detail.html

[227] Zimmerman, *supra* note 215.

doing attributed to the company from shareholders and the public at large was sufficient to force the Wal-Mart board to act.[228] It is clear that reputation, to some extent, involves intangibles that cannot be measured entirely by the litigation's impact on share price. Wal-Mart took steps while the litigation was still pending to mend what it, and others, viewed as a damaged reputation.[229] In fact, Scott acknowledged that the new initiatives came as a result of bad publicity stemming from the discrimination lawsuit.[230] Another such initiative came in 2005, when Wal-Mart took the unprecedented step of holding a press conference to revitalize its damaged reputation, a move that indicates it is not immune to reputational concerns despite its size and continued profitability.[231] One sees a similar result in the Texaco case, after the firm faced extensive Title VII litigation and

> committed itself to increasing its minority employees by the year 2000 to 29% of the firm's total (from its 1996 level of 23%), and to increase its employment of African Americans from 9% to 13%. The firm also pledged to increase the promotion of women and minorities throughout the firm, and to increase its spending with minority- and women-owned businesses to $200 million a year from its previous annual level of $135 million. To ensure the goals were met, the company agreed to tie a portion of its managers' bonuses to meeting diversity goals, and also agreed to enroll all of its employees in diversity training. Texaco also established scholarship programs for minorities and women interested in engineering, increased its recruiting of women and minorities, and became the principal sponsor of UniverSoul Big Top Circus, the nation's only circus owned by African Americans.[232]

Because the case settled, these actions were taken in the absence of any official finding of wrongdoing. Wal-Mart and Texaco have taken a number of the steps that indirectly combat unconscious discrimination, steps that are desirable of large, multinational firms, but the question is whether they have done so without the impetus of a lawsuit? Probably not. The perception of impropriety that was brought out by this lawsuit,

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[228] *Id.*

[229] Parija Bhatnagar, *Wal-Mart Invites the Media Home*, CNNMONEY.COM, Feb. 23, 2005, http://money.cnn.com/2005/02/22/news/fortune500/walmart_press/.

[230] *Big Plans Announced at Wal-Mart Shareholders Meeting*, *supra* note 226.

[231] Bhatnagar, *supra* note 229.

[232] Selmi, *supra* note 210, at 1274-75 (internal citations omitted).

and, on some level, the fear of being replaced by a new slate of officers and directors, is likely what induced the top executives of these companies to tie a significant portion of their bonus checks to meeting certain diversity initiatives. For example, among the allegations being made by the women suing Wal-Mart for sex discrimination is that the top executives at the firm, including CEO Lee Scott, "knew that female employees were paid less and promoted less."[233] This allegation is alarming because after all, no one wants to be called a racist or a sexist. It is likely that perceived reputational harms, both to a firm and its officers and directors, incentivizes a firm to adopt diversity initiatives, but only in response to litigation. Even then, adoption of these initiatives still depends on the circumstances of each case. The publicity has to be extensive enough that the corporation believes such steps are warranted to repair its image.[234] In any event, since the entire purpose is to avoid litigation, the question then becomes how can we use current and past litigation as a foundation for the new norm. One option, as discussed in the next section, is whether the legal system should step in and "encourage" firms to preemptively adopt these types of initiatives to avoid future litigation.

B. *Avoiding the Scandal: Should the Delaware Judiciary Induce Firms to Act?*

Even if litigation brought pursuant to Title VII has little or no effect on company share price, it is clear that these types of lawsuits have some ancillary benefits because they force firms to adopt new antidiscrimination measures to avoid bad publicity. The programs adopted by Wal-Mart as a response to its sex discrimination lawsuit are exactly the types of initiatives that can combat the effects of unconscious discrimination,[235] and companies can likely avoid costly litigation by adopting such initiatives. There are, however, a few problems. It is likely that no lawsuit will ever be on the same level as the Wal-Mart

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[233]Stephanie Armour, *Women Say Wal-Mart Execs Knew of Sex Bias*, USA TODAY, June 24, 2004, at B.01.

[234]*See* Selmi, *supra* note 210, at 1288-89. Professor Selmi contrasted the effect of adverse publicity in the Home Depot and Texaco cases, noting that:

> Home Depot has provided extremely limited information on its progress, and maintains that it never had any need for improvement. Unlike Texaco, the company has not sought any recognition as a "best place for women to work," though *Fortune* magazine continues to list the company as one of the most admired retailers in the country. This is in part due to the limited attention the lawsuit brought, which meant that Home Depot had less of a need to repair its public image than Texaco did.

Id. (footnote omitted).

[235]*See infra* Part IV.D.

litigation, and as discussed in Part III, single plaintiff litigation, which constitutes the bulk of unconscious discrimination cases, would not prompt the same industry-wide changes because most of these cases fail. Moreover, Wal-Mart is a megacorporation and there may be minimal fallout from this type of litigation in the long term. Its stock prices have already rebounded to close to its pre-9/11 selling price. Nevertheless, a corporation that is significantly smaller and could suffer serious, long-term financial damage from these suits might not rebound as quickly as Wal-Mart or other large corporations. Since smaller firms may not be able to absorb these losses, it makes sense for courts to induce firms to implement these programs because it may reduce the incidence of future litigation at a relatively low cost while providing a mechanism to address the problem of unconscious bias. Delaware courts are in a unique position to make this happen.

Delaware stands as a king among peasants in the corporate law arena. It has established itself as a haven for corporations, and its judges have become some of the foremost experts on corporate law matters. Delaware's judiciary has the ability to affect corporate norms in a way that cannot be replicated anywhere else. As one scholar noted, "[T]here are few substantive differences between Delaware law and that of other states,"[236] yet Delaware is far and away the leader when it comes to attracting corporate charters.[237] The evidence suggests that Delaware has advantages that other states will never have. If the responsiveness of the legislature to corporate concerns corresponds to franchise revenue share, as argued by Professor Roberta Romano, then corporations will be hard pressed to find a state that is as responsive as Delaware.[238] The Delaware court system is specialized when it comes to this area of the law—three-fourths of the cases pending before the Delaware Court of Chancery, which is a trial level court, are corporate in nature.[239] Unlike other states, Delaware has committed a substantial portion of its judicial and legislative resources to cultivating a regime designed to benefit

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[236]Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1062 (2000).

[237]Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 888-89 (1990) (noting that "the General Corporation Law of Delaware controls the internal affairs of thousands of corporations, including more than half of the 500 largest industrial firms in the United States"); *see also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240 (1985) ("We can comfortably conclude that if Delaware has not always been the leader in corporate law innovation, it is, with extraordinary consistency, the most sensitive to new ideas.").

[238]Romano, *supra* note 237, at 239-40.

[239]Fisch, *supra* note 236, at 1077-78 (citing Alva, *supra* note 237, at 903). Also of note is the fact that the decisions of one chancery court do not bind another and are readily overturned by the Delaware Supreme Court, given the decisions little stare decisis effect which, as Professor Fisch notes, makes the court "willing to revise previously announced legal doctrines on the theory that a different approach reflects sounder policy." *Id.* at 1077.

corporations.[240] These advantages may make it more favorable for directors to comply with adverse decisions rather than incorporate elsewhere.

Many commentators have characterized Delaware's successful attraction of corporate charters as a "race to the bottom," in which rules are promulgated that benefit management at the expense of shareholders.[241] This theory explains, in part, why decisions in which management lose to shareholders cause an outcry. Despite the alleged pro-management bias, there have been times where the court has failed to act according to the expectations of management. In *Smith v. Van Gorkom*,[242] for example, the Delaware Supreme Court found that the board of directors for Trans Union Corporation were not shielded by the business judgment rule and were liable for damages from a merger in which the board failed to completely inform itself about the transaction and failed to disclose all material facts to stockholders prior to securing their approval of the merger.[243]

Many corporate officers, directors, and scholars considered this finding of liability by the court unprecedented.[244] Therefore, it is possible that, despite the "race to the bottom" theory, a shareholder derivative lawsuit can make it far enough in the litigation process to win key motions and garner damaging publicity, inducing behavioral changes among officers and directors.[245] Specifically, if shareholders succeed at

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[240]Romano, *supra* note 237, at 226-27. Professor Romano also stated that:

> additional institutional features . . . precommit a state to a responsive legal regime and enable it to build a reputation for responsiveness and obtain first-mover advantages. These characteristics of the corporate charter market make it costly for a newcomer to break into the business and go some way in explaining one state's—Delaware's—preeminence.

Id. at 226.

[241]William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 703 (1974). In contrast, "race to the top" theorists posit that states compete against each other for corporate charters and the result is rules that maximize shareholder wealth. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (Ann Petty ed., 1993); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

[242]488 A.2d 858 (Del. 1985).

[243]*Id.* at 864. The business judgment rule is a presumption that the board of directors make business decisions "on an informed basis, in good faith, and in honest belief that the action taken was in the best interests of the company." *Id.* at 872.

[244]Fred R. Bleakley, *Business Judgment Case Finds Directors Liable*, N.Y. TIMES, Jan. 31, 1985, at D1 (noting that *Van Gorkom* is "one of the few times in modern corporate law history . . . that directors have been found liable for not living up to the standards of the business judgment rule."); Leo Herzel et al., *Next-to-Last Word on Endangered Directors*, HARV. BUS. REV., Jan.-Feb. 1987, at 38-39 ("The court's decision [in *Van Gorkom*] is more than a little strange .... Indeed, a good director avoids getting bogged down in technical details. Admittedly, Trans Union's board may have been a bit slapdash in its approach to business formalities . . . but being casual doesn't have to mean being careless.").

[245]*See* Charles M. Elson & Robert B. Thompson, Van Gorkom*'s Legacy: The Limits of*

making it past the motion to dismiss stage, then it is likely that the court's decision will have a lasting impact on board behavior.[246] For example, in 2005, the Delaware Court of Chancery determined that Disney's board of directors did not breach their fiduciary duties in connection with the $140 million severance package it awarded Disney's former president after roughly fourteen months of work.[247] Nonetheless, many corporate boards were alarmed when the court initially refused to dismiss the Disney shareholders' complaint after the defendants filed a motion to dismiss because, in the absence of accusations of self-dealing by the board, these cases usually do not make it past the motion to dismiss

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Judicially Enforced Constraints and the Promise of Proprietary Incentives, 96 NW. U. L. REV. 579, 584 (2002). The decision produced two notable changes in board behavior:

> 1) the widespread use of third-party advisers to give expert opinions to the board for various corporate transactions, and 2) the rise of elaborate decision-making procedures involving lengthy meetings, voluminous documentation and the like that today accompany board decisions, as compared to a simpler process in the pre-*Van Gorkom* era.

Id.

[246]Contrary to "race to the bottom" theory, Delaware has an incentive to consider the interests of shareholders in conjunction with, rather than subordinate to, that of management. *Cf.* Romano, *supra* note 237, at 231 ("A state with a small fiscal base, to whom franchise taxes may be a highly significant proportion of revenue . . . has little financial incentive to take account of shareholder interest.") (quoting Melvin Aron Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. MIAMI. L. REV. 187, 188-89 (1983)) *with* Winter, *supra* note 241, at 261 (rejecting the race to the bottom theory in part because while Delaware's law may be non-interventionist, this does not necessarily disadvantage shareholders; instead, the court weighs the cost of more regulation which "may reduce the yield to shareholders generally . . . against the benefits to be gained by the reduction of self-dealing or mismanagement."). Thus, in balancing the equities, the court may let a shareholder derivative suit proceed where the shareholders have presented a colorable claim that the management has breached their fiduciary duties. Yet, because Delaware courts are generally very receptive to the interests of management, any decisions that criticize management behavior are taken seriously regardless if the case is ultimately dismissed. After *Van Gorkom* and, later, *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005), there were serious changes in management behavior that continue to persist to this day. *See* Patricia A. Teren, *"It's Not Polite to Ask Questions" in the Boardroom:* Van Gorkom*'s Due Care Standard Minimized in* Paramount v. QVC, 44 BUFF. L. REV. 887 (1996). *See, e.g.*, Kris Maher, *Directors Are Poised to Focus on Growth Issues, Survey Says*, WALL ST. J., Oct. 12, 2004, at B.8 (discussing a survey of 1,279 corporate directors at large publicly traded companies who stated that directors "meet more frequently, spend more time in full board and committee meetings, and perceive more risk associated with their role"). These changes persist despite the fact the court rarely imposes liability for breaches of fiduciary duties:

> When faced with the same situation [as *Van Gorkom*] nine years later, in *Paramount*, the Delaware Supreme Court took the easy way out. Relying on precedents much less explosive than *Van Gorkom*, the *Paramount* court managed to hold the Paramount Board liable for breaching their duty of care, while tempering the impact of that analysis with an examination of the duty of loyalty.

Teren, *supra* note 246, at 921.

[247]*In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 779.

stage.[248] The actions of the court caused many boards to reevaluate and change their executive compensation structure.[249]

Given the expertise of the Delaware judiciary in resolving corporate law cases, the idea that the firm should be an outlet for addressing unconscious discrimination becomes even more attractive. Besides its experience in this area, Delaware can aid in the creation of the new diversity norm because of the means in which it articulates its case holdings. In its opinions, the court "makes statements" that have the ability to affect norms similar to when it announces binding propositions of law.[250] According to Professor Edward Rock, "despite the fact-specific, narrative quality of Delaware opinions, . . . the *process* . . . leads to reasonably precise standards . . . through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms."[251] Besides announcing binding propositions of law, the judges tell a story with either praise or criticism

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[248]*In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 291 (Del. Ch. 2003). The decision was surprising, especially in light of the fact that the Delaware legislature had taken steps to reduce judicial oversight of corporate transactions. In response to *Van Gorkom*, the Delaware legislature passed DEL. CODE ANN. tit. 8, 102(b)(7) (2001), which authorizes corporations to eliminate directors' personal liability for breaches of the duty of care. However, commentators have noted that this provision has done little to diminish the court's role. See, e.g., Charles M. Elson & Robert B. Thompson, *The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U. L. REV. 579, 584-585 (2002). Professors Elson and Thompson noted that:

> [e]xculpation clauses such as section 102(b)(7) relieve only the possibility of personal liability for money damages. Failure to meet the duty of care as set out by the court in *Van Gorkom* can still lead to injunctive action that could stop the transactions from being accomplished, an outcome that directors would want to avoid.

Id.

[249]Waller Lansden Dortch & Davis, LLP, DESPITE OUTCOME, DISNEY DECISION STANDS AS A WARNING TO ALL DIRECTORS (Aug. 25, 2005), http://www.wallerlaw.com/articles/Tax-Exempt%20Organizations?id=48893; LeBoeuf, Lamb, Greene & MacRae, LLP, RAMIFICATIONS OF THE IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION (June 16, 2003), http://www.deweyleboeuf.com/files/News/2305de78-d1d7-4765-aef7b00d26067735/Presentation/NewsAttachment/5d9d5b83cffa-4a1e-b809-c52918eb0320/article_592.pdf. In the wake of *Disney*, the law firm of LeBoeuf, Lamb, Greene, and MacRae, L.L.P. advised its clients that:

> [i]f the ideas expressed in this case stand, all compensation committees will have to be far more diligent about setting compensation for senior executives, or risk personal liability for a perceived failure. Certain procedural safeguards (retaining an outside consultant, control of negotiations, a record of deliberations) could apparently have protected the Disney committee.

Id. It is clear that even though the court ultimately found in favor of the directors, it is arguable that its dicta regarding the appropriate procedural safeguards for analyzing executive compensation actually carried more weight than its ultimate finding of no liability.

[250]Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996).

[251]Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) (emphasis omitted).

for the main characters, and readers react accordingly by adjusting their own behavior.[252] Through this process, the opinions express both the law and behavioral norms, which allows the court to overcome resistance among firms to changing the industry response to unconscious discrimination. If firms are hesitant to implement programs that are more far reaching than current antidiscrimination policies, the courts' judicial opinions provide guidance to corporate management in a way that can lend itself to creating new norms regarding the eradication of unconscious discrimination through its own form of storytelling.

The court's largely standards-based approach serves an important role by giving it greater flexibility in testing the boundaries of the law without the rigid adherence to stare decisis found in most courts.[253] The Delaware courts also have a high degree of legislative lawmaking power but similar to federal judges, are largely insulated from political pressure.[254]

It is conceivable, therefore, that the Delaware courts could decide that ignoring obligations that arise pursuant to Title VII can constitute a breach of the duty that corporate officers and directors have to monitor the activities of the firm to ensure profitability and legal compliance.[255] One of the few commentators to address this issue concluded that "inappropriate corporate responses to allegations of racial discrimination . . . breach the fiduciary duty of care that corporate managers owe to the corporation and its shareholders."[256] The answer why is obvious.

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[252]*In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 760 (finding that the directors did not act with the requisite bad faith to establish liability, but still referring to their actions as "at most ordinarily negligent"). In absolving Disney's CEO, Michael Eisner, of liability for "waste" by forcing the board of directors to hire a company president who earned $140 million after working only fourteen months, the court noted that "[d]espite all of the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom, I nonetheless conclude, after carefully considering and weighing all the evidence, that Eisner's actions were taken in good faith." *Id.* at 763. It is clear that the court used this opportunity to caution corporate boards against blind deference to the company's CEO.

[253]Fisch, *supra* note 236, at 1079. Professor Fisch concluded that "Delaware courts aggressively adopt and modify corporate law doctrine, exhibiting a degree of activism that more closely resembles the legislative process." *Id.* at 1080.

[254]Romano, *supra* note 237, at 226. *See also* DEL. CONST. art. IV, § 3 (mandating that no more than a simple majority from either political party sit on each court within the state).

[255]Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 971 (Del. Ch. 2003) (noting that the "duty to monitor may arise when the board has reason to suspect wrongdoing").

[256]Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 397 (2002). Professor Wade uses the discrimination lawsuit against Texaco to convincingly argue that management has a responsibility, pursuant to the duty of care, to ensure that the firm addresses complaints of racial discrimination. The article does not, however, adequately grapple with the lack of incentive that firms have "to create a system of investigation and monitoring that goes beyond window dressing," given that the most employment discrimination cases fail and

Despite the uphill battle faced by employees who bring these claims, the cost of litigation and the possible reputational harm that comes from defending these cases ultimately affect the profitability of the firm, which can prompt shareholder action (even if the financial harm is perceived rather than actual) and possibly court involvement. As such, this can trigger liability under the duty to monitor.

The duty to monitor, which governs the responsibility that managers have to ensure compliance with Title VII, flows from the duties of care and loyalty.[257] *Caremark* requires directors to act with reasonable diligence, but

> liability for failure to monitor [can ensue where the director has acted with] . . . bad faith—because their indolence was so persistent that it could not be ascribed to anything other than a knowing decision not to even try to make sure the corporation's officers had developed and were implementing a prudent approach to ensuring law compliance.[258]

Arguably, ensuring compliance with Title VII falls within the realm of corporate officer and director liability under the duty to monitor.[259]

Director liability for failing to adhere to statutory mandates would not be unusual. In the criminal context, prosecutors sanction corporate management for failing to watch over the affairs of the corporation closely.[260] Scholars argue that "[w]here 'image and reputation are at the

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the mega-lawsuits faced by Wal-Mart and Texaco are the exception rather than the rule. *Id.* at 410. Nor does the article imagine an additional role for the Delaware courts outside of enforcing the duty of care, a role in which the court could enshrine diversity norms within the case law. This is why I propose a system in which a new norm is created through the actions of multiple actors, including corporate management, retail giants, and the Delaware court system.

[257]*Beam*, 833 A.2d at 971.

[258]Desimone v. Barrows, 924 A.2d 908, 935 (Del. Ch. 2007) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch. 1996)).

[259]*See* Wade, *supra* note 256, at 405. Applying the *Caremark* standard to the facts of the Texaco discrimination case and noting that:

> [t]he typical reaction of corporate managers to racial discrimination allegations embodies the conduct that Chancellor Allen describes as a duty of care violation. The reaction of Texaco's managers to discrimination allegations is illustrative. Complaints by African American Texaco employees put senior officers on notice, thereby triggering a duty to monitor and investigate alleged racial discrimination. This duty was breached when Texaco's senior officers ignored the obvious indicia of pervasive racial discrimination. It was breached also by board members who failed to install a system for reporting, investigating and monitoring race discrimination allegations.

Id.

[260]*See* Joshua Andrix, *Negotiated Shame: Inquiry into the Efficacy of Settlement in*

very heart of modern corporate life,' criminal penalties should target these central values."[261] This idea is conceptualized in the civil setting as well by imposing vicarious liability on management for the discriminatory acts of subordinates; these standards convey the idea that management has a duty to minimize the corporation's exposure to Title VII liability.

In *Meritor Savings Bank v. Vinson*,[262] the Supreme Court held that employers are liable for a hostile work environment under Title VII when the discriminatory conduct is "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'"[263] "The *Meritor* Court distinguished between 'quid pro quo' harassment cases, in which a supervisor threatens to take job-related action against the victim, and environmental cases . . . in which the environment alone gives rise to the claim."[264] Environmental harassment differs from quid pro quo harassment in that there is no guarantee of an agency relationship because the supervisor can engage in unofficial discriminatory acts.[265] In contrast, quid pro quo cases, by definition, involve "the supervisor's discriminatory use of delegated power."[266] With the recognition of environmental harassment as a cause of action, the *Meritor* Court directed lower courts to use the principles of agency law to derive appropriate standards for holding employers liable.[267] This resulted in such wide disparities that the Supreme Court granted certiorari to revisit the issue in *Burlington Industries, Inc. v. Ellerth*[268] and *Faragher v. City of Boca Raton*.[269]

Ellerth and *Faragher* resolve the circuit split regarding employer liability for the discriminatory acts of subordinates, and hold that, regardless of whether the case involves quid pro quo or environmental harassment, an employer may be vicariously liable for sexual harassment committed by a supervisor "if [the employer] knew or should have

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Imposing Publicity Sanctions on Corporations, 28 CARDOZO L. REV. 1857, 1867-68 (2007) (listing reasons why publicity sanctions "further many of the goals of criminal law and federal sentencing").

[261] *Id.* at 1865 (footnote omitted).

[262] 477 U.S. 57 (1986).

[263] *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[264] *See* Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 813 (2002).

[265] *See Vinson*, 477 U.S. at 69-72 (discussing the role of an agency relationship in hostile work environment suits); Grover, *supra* note 264, at 813.

[266] Grover, *supra* note 264, at 813.

[267] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-53 (1998) (noting that "in the wake of *Meritor* . . . [the terms quid pro quo and environmental harassment] acquired their own significance. The standard of employer responsibility turned on which type of harassment occurred").

[268] 524 U.S. 742 (1998).

[269] 524 U.S. 775 (1998).

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the mega-lawsuits faced by Wal-Mart and Texaco are the exception rather than the rule. *Id.* at 410. Nor does the article imagine an additional role for the Delaware courts outside of enforcing the duty of care, a role in which the court could enshrine diversity norms within the case law. This is why I propose a system in which a new norm is created through the actions of multiple actors, including corporate management, retail giants, and the Delaware court system.

[257] *Beam*, 833 A.2d at 971.

[258] Desimone v. Barrows, 924 A.2d 908, 935 (Del. Ch. 2007) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch. 1996)).

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Id.

[260] *See* Joshua Andrix, *Negotiated Shame: Inquiry into the Efficacy of Settlement in*

Just as the duty to monitor requires that corporate officers and directors make a good faith attempt to guarantee that an adequate corporate reporting system exists to ensure compliance with the law; the employer must also ensure that he has acted reasonably to correct and prevent discrimination.[276] Thus, a breach of the duty to monitor should, under certain circumstances, render management liable under both Title VII and Delaware law for failing to ensure that there are mechanisms in place to ensure the prompt resolution of discrimination claims.[277]

This suggestion has merit. The dual threat of suit and increased liability under federal and state law, as well as the publicity incidental thereto, could do much to ensure that firms are taking the steps necessary to address discrimination firm-wide, as opposed to sitting back and waiting to be sued, or relying solely on the firm's antidiscrimination policy as being sufficient to address this problem.[278] Furthermore, enforcement through the vehicle of the Delaware courts may be a more appropriate sanction than replacing an entire board in a messy proxy fight for failing in one area. This litigation would have the benefit of sending a message to the entire corporate community, which is fairly insular, on a particular issue but without the corresponding collateral damage, (i.e., the board does not have to be replaced). While it is not clear what directors fear more—being sued or being replaced—this proposal presents an alternative means of increasing the effectiveness of Title VII without actually using (and being limited by) the statute. Because of this prospect, this type of shareholder derivative suit may have value.[279]

Id. (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)). *See also* Sturm, *supra* note 7, at 482 (noting that in *Ellerth* and *Faragher*, "the Court adopted an approach to employer liability that, if properly implemented, clearly encourages the development of workplace processes that identify the meaning of and possible solutions to the problem of sexual harassment.").

[276] *See, e.g.*, *Caremark*, 698 A.2d at 970.

[277] Note, however, that this duty to ensure Title VII compliance is not infinite and boundless. In fulfilling the duty to monitor, directors may rely in good faith on the reports of other officers, as long as they do not do so blindly.

[278] *See* Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 910 (1999). Professor Kamar aptly noted that:

> [a]lso true, but difficult to quantify, is that fiduciary claims inconvenience directors and officers and harm their reputations. This disciplining effect is bolstered by the vilifying tone that court decisions often employ when condemning a defendant's conduct. In a world of rapid information flow and attentive media coverage, these sanctions can be effective. The same is true with respect to court decisions that precede or approve settlements. These decisions also impact defendants' reputations and thus have a deterrent effect.

Id. (footnotes omitted).

[279] Kraakman et al., *supra* note 223, at 1736 (arguing that "a derivative suit increases corporate value . . . if the prospect of suit deters misconduct"). This, of course, presupposes that the cost of the suit does not exceed the gains to corporate value created by the suit.

So far, this proposal appears to increase the likelihood of litigation by offering, as a solution, another cause of action under Delaware law. If the Delaware courts suggest that the duty to monitor includes ensuring compliance with Title VII, however, then more companies will implement these suggestions in order to foreclose the possibility of future litigation.[280] More safeguards equal less litigation. The court could go even further by stating that this burden can be met by implementing diversity initiatives or, in the alternative, stating that the presence of some type of affirmative action program is relevant to liability or damages. Therefore, boards could conceivably modify their behavior at the court's suggestion because it is less costly and more predictable than litigation. Under this scenario, the Delaware courts provide a catalyst for corporate change by wielding the immense power that they hold in corporate law and like *Van Gorkom* and *Disney*, the court's decision would be followed by instant changes in how corporations address discrimination. Because of the new norm, the number of lawsuits will decrease over time. The problem, however, remains one of incentives—only this time, what incentive does the court have to become involved in this dispute at all, especially since employment discrimination is not generally an area that is addressed under the auspices of corporate law doctrine?

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[280] As Professor Sunstein noted:

> A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action when one person takes the life of another. The point bears on the cultural role of law, adjudication, and even Supreme Court decisions. The empirical effects of those decisions are highly disputed. If the Supreme Court holds that segregation is unlawful, that certain restrictions on hate speech violate the First Amendment, or that students cannot be asked to pray in school, the real-world consequences may be much smaller than is conventionally thought. But the close attention American society pays to the Court's pronouncements is connected with the expressive or symbolic character of those pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This assumption is a matter of importance quite apart from its consequences as conventionally understood.

Sunstein, *supra* note 250, at 2027-28 (footnotes omitted).

C. *Solving the Collective Action Problem: And the Answer is . . . Wal-Mart*

While diversity initiatives and other mechanisms to minimize unconscious discrimination, which are discussed in the next section, may have net positive results, the collective action problem prevents both firms and the Delaware courts from giving serious consideration to implementing programs that could be costly, despite the potential for damning publicity similar to that faced by other corporations involved in Title VII litigation. This is not to say that the idea to highlight the Title VII duties that exist within the duty to monitor is a bad one; in fact, placing the duty on the board, rather than the courts, to address unconscious discrimination is preferable. It may only take one lawsuit to change the behavior of the boards of the majority of Delaware firms, but what incentives do the Delaware courts have to take up the banner of employment discrimination? How do we get our one lawsuit? A quick search of LEXIS reveals that only a handful of Title VII cases have ever been litigated in the Delaware courts, so this may not exactly be a concern of primary importance to the Delaware judiciary. Additionally, the court also has to maintain the balance—if the judiciary becomes active in enforcing Title VII all of a sudden, this may encourage firms to incorporate elsewhere. Once again, the problem of incentives haunts us—what incentive does the court have to act?

One incentive may arise from the same publicity that prompts boards to adopt diversity initiatives in response to litigation. This publicity could also prompt the court to become involved in the melee because publicity generally highlights deficiencies in corporate management and can bring scrutiny to Delaware's mechanisms for regulating firms incorporated within the state. Such scrutiny could increase the threat that Congress will federalize corporate law, thereby substantially cutting Delaware's revenues.[281] As one commentator pointed out, "the *Disney* court's decision came during a period in which executive compensation . . . practices remained in the public spotlight."[282] Thus, there is some support for the idea that increased media scrutiny could incentivize the court to weigh in on this issue. Given the rarity of these class action suits, however, it is questionable that the bad publicity would be enough to increase the federal threat to Delaware's market share and induce its judiciary to respond.

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[281]Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 604-07 (2003) (arguing that the omnipresent threat of federal intervention influences the development of Delaware corporate law).

[282]Timothy P. Glynn, *Delaware's* VantagePoint*: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 108 (2008).

The reoccurring problem of incentives raises the fundamental problem facing not only Title VII enforcement, but also much-needed changes to firm culture generally. Here, much can be gleaned from the law firm-client relationship, where corporations hire a particular law firm in part because of the diversity of its workforce. Clients of law firms have considerable influence over ensuring that the firms that represent them have a diverse workforce.[283] While diversity in law firms is still quite low because the pool of qualified minority candidates is small, this feature has been responsible for considerable recruitment of minorities among law firms nationwide.[284] Wal-Mart already has a program in place to ensure that minority- and women-owned law firms receive a larger share of its legal work.[285] Similarly, Wal-Mart can force its distributors, wholesalers, and manufacturers from whom it purchases its products to have minority hiring targets or other diversity initiatives. Like law firms and their clients, buyer-supplier relationships are, to some extent, personal; thus, concern about the characteristics of those involved in the negotiations and business dealings would not be unusual.

By framing the problem in this manner, it is clear that there is a domino effect—large corporations that are sued in large-scale class litigation regarding its employment practices then adopt diversity initiatives in response to shareholder pressure and, in turn, pressure other corporations with which they deal to value diversity in a similar manner. What we have is the creation of a new norm with very little court intervention outside of the initial Title VII lawsuit. This is consistent with the litigation/nonlitigation strategy outlined by Professor Hart to address subtle bias, where litigation forces companies to take measures that would otherwise be costly but holding employers responsible for some preemptive workplace reform.[286] The Delaware courts could further the creation and permanency of this new norm within the Delaware corporate arena by memorializing it in the case law through a shareholder derivative suit. From this view, Delaware courts still have a prominent role that can be furthered through the duty to monitor, but incentives are less of a concern than if one tries to urge the court to

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[283]Carisa Chappell, *Corporate Efforts to Enhance the Business Case for Diversity*, DIVERSITY & THE BAR, Mar./Apr. 2008, *available at* http://www.mcca.com/index.cfm?fuse action=page.viewpage&pageid=1696.

[284]Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 719 (1997) ("The racial composition of clients may affect both the demand for and the success of minority associates and partners.").

[285]Chappell, *supra* note 283.

[286]*See generally* Hart, *supra* note 11 (arguing that litigating as well as crafting solutions in nonlitigation arenas both play significant roles in potentially changing discriminatory practices).

unilaterally expand the duty to monitor in the absence of any significant, preemptive change in corporate culture.

Additionally, incentives are less of a problem from the corporation's perspective. Wal-Mart has an incentive to force its partners to adopt similar diversity initiatives because it creates positive publicity at a time in which such publicity is sorely needed, especially to keep Wal-Mart's shareholders at bay. Indeed, Wal-Mart, has "flexed" its muscles in the past in order to force its suppliers to bend to its will on various issues from pricing to packaging, and will likely make demands in the future that its suppliers will most likely have no choice but to accede to.[287] In other words, what is the likelihood that Wal-Mart's suppliers would threaten to take their wares elsewhere in the face of demands for diversity from the largest retailer in the world? The answer is, quite simply, none.

D. *Conceptualizing the Diversity Norm: A Few Suggestions*

Addressing unconscious discrimination should be viewed as a necessary component to achieving racial and gender equality in the workplace; yet characterizing it as a part of the larger thrust to enact policies that tackle discrimination generally is necessary to confront the credibility issues that these claims have, as outlined in Part III.[288] By placing the burden on the firm to enact these policies, it would be unnecessary to determine the extent and prevalence of unconscious discrimination in the workplace, which would be required if the plaintiff was attempting to prove his case in court.[289] The value comes in increasing diversity, ethnic/gender sensitivity, and cooperation among diverse groups as well as recategorizing minorities as a part of the in-group, all of which will decrease racism and sexism that are byproducts of a mostly homogenous workplace.[290] The best way to counter stereotypes about minorities and women is to limit subjective decision

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[287]Charles Fishman, *The Wal-Mart You Don't Know*, FASTCOMPANY.COM, Dec. 2003, http://www.fastcompany.com/magazine/77/walmart.html; Greg Schneider & Dina ElBoghdady, *Stores Follow Wal-Mart's Lead in Labor: Competitors Struggle to Match Savings From Non-Union Workforce*, WASH. POST, Nov. 6, 2003, at A1, *available at* http://newsmine.org/archive/cabal-elite/corporate/walmart/wal-mart-screws-labor-force.txt.

[288]As Professor Fiske has noted, "Given subtle biases that are unconscious and indirect, change is a challenge, resisting frontal assault. Similarly, given blatant biases rooted in perceived threat to group interests and core values, direct confrontation will likely fail again. Instead, more nuanced means do work." Fiske, *supra* note 25, at 127.

[289]*But cf.* Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117 (Henry L. Roediger III et al. eds., 2001) (asserting the validity of methods measuring implicit racial attitudes).

[290]*See* Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 280 (1993). *See also* Fiske, *supra* note 25, at 127-28 (advocating constructive intergroup contact as a means of addressing implicit bias).

making, or in the alternative, to hire more of these individuals for management and supervisory positions, which may reduce the incidence of unconscious bias against them.[291]

Hiring individuals from these groups is a good starting point and can address more than unconscious discrimination. However, firms can tailor any program designed to increase diversity to their specific needs and should aim for placing workers of all backgrounds in a competitive environment designed to achieve a specific goal.[292] Private firms have more freedom than schools and other government bodies to create affirmative action plans and do not have to worry about only correcting the effects of past discrimination or tailoring their programs to address specific, identifiable discrimination, a factor that could sound the death knell for any program designed to specifically reach unconscious discrimination.[293] Nevertheless, quotas and hiring targets should not overshadow the importance of taking additional steps to decrease unconscious discrimination. Another fairly costless alternative is for firms to tie minority hiring targets to executive bonuses, a move that Wal-Mart embraced.[294]

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[291]Jolls & Sunstein, *supra* note 44, at 1108-09.

> What if . . . an institution hires certain people because of their debiasing capacity on their students, customers, or employees? [Studies have shown that] . . . the mere presence of an African American experimenter reduced race bias in White participants. Debiasing worked presumably because participants heard the African American instructor give directions, be in charge, and implicitly hold power.

Id. (footnote omitted). Professors Sunstein, Jolls, and others advocate direct debiasing to address this problem, in which individuals are hired that run directly counter to prevailing norms. *Id.* at 1109. *See also* Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001) (arguing that exposure to admirable members of stigmatized groups can reduce automatic bias); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 16 (2006) ("Affirmative action forces employers to identify and redress the subtle and unconscious discrimination, as well as the overt and deliberate discrimination, that occurs within their enterprises.").

[292]Consistent with *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), Title VII does not forbid private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial or gender preferences. *Id.* at 200-02.

[293]*But see* Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 834 (1995) (noting that voluntary affirmative action programs should be limited to correcting "identifiable" discrimination; for example, an employer who has never discriminated should not have to employ hiring targets because it will not solve the problem resulting from a lack of qualified applicants).

[294]Texaco employed this strategy, and in 1999, 44% of its new hires were minorities. *Id.* at 1277 n.114 (citation omitted). Texaco also unveiled a plan in which it provided financial aid and other assistance to blacks trying to open Texaco franchises. Allana Sullivan, *Texaco to Unveil Plan for Diversity in the Workplace*, WALL ST. J., Dec. 18, 1996, at B8. *But see* Selmi, *supra* note 210, at 1279-80 (explaining that Texaco has missed its diversity goals and has

There are other, more controversial means of addressing unconscious discrimination. Firms can adopt initiatives that promote diversity among its employees and celebrate differences, such as ethnicity and gender sensitivity training or training on its antidiscrimination policies, or both. The merits of such training and programs are greatly disputed in the literature, but there is evidence to suggest that these policies have value.[295] In his study of the Home Depot and Texaco litigation, Professor Selmi noted that in the wake of the lawsuits against each of these corporations, there were improvements in the number of minority employees and increased access to management positions.[296] It is also likely that there was some corresponding benefit on unconscious bias in the workplace as a result of this direct debiasing.[297]

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made little progress reforming its culture). Another industry attempting to internally address inequities is the professional sports community, which is a big supporter of affirmative action initiatives because of the dismal number of minority coaches within the profession. *See* Brian W. Collins, Note, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 888 n.99 (2007) (citing *Minority Fellowship Attracts 79 Coaches*, NFL.COM, Aug. 31, 2005, http://www.nfl.com/news/story/ 8790093) (discussing the NFL Minority Coaching Fellowship Program).

[295]*See generally* Samuel R. Bagenstos, *supra* note 291, at 29; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 162-65 (2001); Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 67 (2004). *See also* Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 85-86 (2006) (arguing that although the affirmative defense in hostile environment sexual harassment cases creates an incentive for employers to design and implement policies to deter and punish sexual harassment at the workplace level, courts should place greater weight on the informal power dynamics of the workplace as part of a more rigorous affirmative defense); Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 243 (2004) ("[A]llowing employers to define how and when they obtain notice of workplace harassment encourages the creation of a private system of rules over which there is no effective oversight, and provides incentives to employers to narrow the avenues available for employees to file complaints."); ALEXANDRA KALEV ET AL., TWO TO TANGO: AFFIRMATIVE ACTION, DIVERSITY PROGRAMS AND WOMEN AND AFRICAN-AMERICANS IN MANAGEMENT 1-4, http://www.si.umich.edu/ICOS/dobbin.pdf) (finding that the combination of diversity programs and affirmative action law is most effective in increasing managerial diversity but little is known about the effectiveness of particular initiatives).

[296]Selmi, *supra* note 210, at 1276-77, 1286; *but see id.* at 1277, 1286 (acknowledging while the workforce was temporarily more diverse, by 2000 Texaco's efforts stalled and new hires and promotions declined). Similarly, the Home Depot released a "social responsibility report" that appears to show gains in female employment since settlement of the discrimination suit, however, Professor Selmi notes that the report provides no past statistics for comparison, does not explain how the figures provided translate to jobs, nor how these figures relate to the percentage of female applicants. *Id.* at 1286-87.

[297]Jolls & Sunstein, *supra* note 44, at 980-85. *See also* Robinson, *supra* note 91, at 1170. Professor Robinson focuses on "the racial and gender composition of committees that handle interviewing, promotion, and EEO matters" arguing that a diverse committee could debias target audiences because:

While increasing the numbers of minorities is certainly important, firms have to go a step further by forcing these groups to interact in order to reduce conflict.[298] In other words, there must be the creation of a common in-group identity tied to a common goal.[299] One inexpensive option is for the firm to make a focused effort to place its employees in activities or on projects that require intergroup cooperation, which many behavior psychologists believe will ameliorate bias and ease tension between groups.[300] The decategorization perspective proposes that activities that focus on intergroup cooperation have the benefit of counteracting the categorization that contributes to bias in the first place because it "permits members' attention to focus on one another's personal qualities, [and] it contributes to the development of personalized rather than categorized interactions."[301] Shared goals will enable the groups to come together and reduce the focus on characteristics that would otherwise be divisive. Competition between diverse groups within the firm can also minimize race and gender bias and bring into focus the larger group identity and goals, which is good for business.[302]

Such initiatives can help dispel stereotypes about minorities and women, ultimately having a net positive benefit on the productivity of all employees.[303] Having established programs can also help employers

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> (1) The presence of outsiders on interviewing committees will help the interviewee when bias emerges during the interview; (2) the presence of outsiders in decisionmaking groups concerning hiring and promotion will help the employee/interviewee in that the outsiders may debias the group's deliberations; (3) the employer benefits from the increased presence of outsiders in that fewer applicants and employees will perceive discrimination and bring lawsuits; and (4) when the employer is trying to determine whether to settle those claims that are not deterred, including outsiders may balance the discussions so that the employer does not exaggerate its likelihood of success.

Id. at 1170.

[298]Dovidio et al., *supra* note 22, at 97-99.

[299]Gaertner et al., *supra* note 38, at 389 (arguing that "cooperative intergroup interaction and common fate, can reduce bias ... by transforming members' cognitive representations of the memberships from separate groups to one involving a common in-group identity.").

[300]*See* Fiske, *supra* note 25, at 127-28; Gaertner et al., *supra* note 38, at 388; Gaertner et al., *supra* note 32, at 101.

[301]Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 692 (1990) (citing Norman Miller & Marilyn B. Brewer, *Beyond the Contract Hypothesis: Theoretical Perspectives on Desegregation*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 281, 281-302 (Norman Miller & Marilyn B. Brewer eds., Academic Press 1984)); *see also* Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 123-24 (2004) (discussing social motives to avoid engaging in automatic implicit prejudice).

[302]Gaertner et al., *supra* note 32, at 103-04.

[303]*See* Kang & Banaji, *supra* note 67, at 1087 ("Individuals who belong to social groups marked by negative stereotypes about intellectual performance underperform when cues remind them of their group identity."). It follows that the firm can reinforce, through

avoid liability under Title VII, although many argue that employers should have to prove the effectiveness of these programs in actually promoting diversity.[304] According to Professor Melissa Hart, other options include "neutral and well-advertised posting of management positions and training opportunities; written standards of both expectation and evaluation; [and] monitoring and appraisal of workplace statistics."[305] This list is by no means exhaustive.[306] Such measures can be taken along with forcing supervisory personnel to explain their decisions, which can also have a debiasing effect.[307] Thus, there are common sense and inexpensive means of addressing unconscious discrimination.

Additionally, besides "direct debiasing" by hiring more minorities and women, firms can also force their decision makers to take the IAT routinely to test whether they are suffering from any impermissible bias, a test which "can be taken online, free of charge."[308] Even if the test is flawed, as many contend, this will determine at the very least whether the

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programs, the idea that there is nothing wrong with any particular group identity nor does it correlate to an employee's ability to do the job. The correlative effects of positive reinforcement is something that can be empirically tested in order to determine if it is having the desired effect. *See also* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) (examining monitored self-regulation of the enforcement of individual rights); Jolls & Sunstein, *supra* note 44, at 981 (explaining the presence of population diversity tends to reduce the overall level of implicit bias); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1997), *available at* http://www.eeoc.gov/abouteeoc/task_reports/practice.html (identifying the best equal employment opportunity practices of several private companies).

[304]Hart, *supra* note 11, at 1644-46.

> Of course, no check-list of policies will or should automatically insulate an employer from liability for discrimination. Courts must consider how policies in fact operate in the particular context of a given workplace. But the practices described here may offer a starting point for considering what kinds of basic steps employers should be taking to reduce the likelihood of stereotyping in workplace decisions.

Id. at 1639.

[305]*Id.* at 1639.

[306]Another benefit of the Title VII litigation that has already occurred is that now firms can look at past consent decrees and implement some of the remedies proposed by plaintiffs in those cases in order to limit the firm's liability exposure. *Id.* at 1638. Scholars also advocate "the blurring of adversarial lines" where plaintiff-side employment discrimination lawyers:

> approach employers that are potential litigation targets before any complaint is filed and agree to represent those employers in efforts to achieve compliance with the law. In their compliance efforts, these lawyers typically focus on urging adoption and improvement of workplace structures that aim at preventing discrimination and mitigating its harmful effects.

Bagenstos, *supra* note 291, at 32 (citing Sturm, *supra* note 7, at 529).

[307]Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 229 (1985).

[308]Kang & Banaji, *supra* note 67, at 1091.

firm needs to have an additional level of review to account for and correct this potential bias.[309]

One obvious criticism of placing the burden on firms is that the costs, relative to the perceived gains, may be too high to justify these initiatives. Unconscious discrimination so often flies under the radar, however, resulting in disparate treatment over time as opposed to any identifiable wrongdoing by the decision maker at a specific instance. This places the firm in the best position to address this problem.[310] Moreover, firms can adopt initiatives that address their particular issues, and there are some options, discussed above, that can be implemented at low or no cost to the company.

Since the Wal-Mart case is atypical to say the least, forcing firms to act ex ante ultimately closes the gap left open by endless litigation in which the protagonist only succeeds in the most extreme cases. If the employer takes steps to address this problem at the onset, then presumably, all that will be left on the courts' dockets are unmeritorious cases, which will be dismissed, and the extreme cases which, as Part IV argues, courts can adequately resolve. Ultimately, once firms have more elaborate mechanisms in place that counter the effects of unconscious bias, most of these claims will be addressed outside of the adversarial process.

V. CONCLUSION

In a sense, we end where we began—in order to get firms to act ex ante, there must be litigation, but it is with a new sense of purpose and direction that we approach this problem. We can start with firms that have already modified their practices in response to Title VII litigation, most notably retail giant Wal-Mart, and use this as a vehicle to apply pressure on other firms to follow suit. Furthermore, we can envision more global change—the Delaware courts as a mechanism to further the creation of a new diversity norm, resulting in a less hostile forum for unconscious bias claims, a better remedy, and ultimately less litigation. Firm level remedies are the best way to address unconscious discrimination because the firm is in the best position to assess its needs, its workers, and what steps are required to ensure an integrated, equal-

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[309] *See* Anthony C. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998) (finding that the IAT is useful for assessing stereotypes about blacks).

[310] Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1226 (9th Cir. 2007). In fact, Wal-Mart, in contesting class certification, argued that the plaintiff's experts failed to identify any specific discriminatory incidents or stereotyping policies in which the company engaged. Both the district court and the court of appeals rejected Wal-Mart's argument, suggesting that a corporation could be liable where general, unconscious bias results in harm. *Id.*

opportunity workplace. The process by which this solution was reached highlights huge gaps within the literature. The focus on normative theory—how judges, or the law, or both should approach unconscious discrimination claims[311]—has largely overshadowed any positive approaches to unconscious discrimination—or, what judges are actually doing to resolve these claims. As a result, scholars have proposed solutions to the problem that are improbable and unlikely to take hold. This study fills that gap by addressing both sides of the issue. Recognizing that courts will only resolve unconscious discrimination claims in certain circumstances has the benefit of allowing us to tailor the debate in a manner that provides for alternatives to this "unconventional" problem. Courts will only justify what would otherwise be a problematic departure from the doctrine of employment at will if they can infer the requisite intent by isolating the bias in unconscious discrimination cases. They can only do so if the plaintiff has eliminated every nondiscriminatory reason from the record and behaved reasonably. In most cases, one of these factors will be missing, thereby illustrating that courts are only able to act in limited circumstances. It is clear, therefore, that the remedy is not to amend or expand Title VII, for this would only give the courts more discretion that they would be unwilling or unable to use.

Scholars should thus focus less on amending or expanding Title VII and more on remedies that operate outside of Title VII case law. Placing the burden on the firm as a part of its duty to monitor firm activities and ensure compliance with the law provides a means by which unconscious discrimination can be eradicated as a matter of corporate policy. This policy can include indirect and direct debiasing through affirmative action programs and diversity initiatives, which scholars have noted are an effective means of addressing subtle biases.[312] In the end, firm-based remedies are another alternative to Title VII in addressing unconscious discrimination, one that has the potential to have greater effects than Title VII's broken doctrine.

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[311] *See supra* Part II.

[312] Jolls & Sunstein, *supra* note 44, at 980-88.