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Everyone's a Little Bit Racist? Reconciling Implicit Bias and Title VII

Christopher Cerullo

EVERYONE'S A LITTLE BIT RACIST? RECONCILING IMPLICIT BIAS AND TITLE VII

*Christopher Cerullo**

Since its enactment as part of the Civil Rights Act of 1964, Title VII's main purpose has been to end all forms of employment discrimination. Through a flexible judicial interpretation of Title VII that reached newly discovered forms of discrimination, and through occasional intervention by Congress to update the statute, Title VII has been largely successful in reducing and remedying instances of overt discrimination in the workplace. However, more recently, social scientists have analyzed and applied the results of Harvard's Implicit Association Test to recognize a new form of discrimination characterized by a subconscious decisionmaking process based on intuition and a lack of an overt intent to discriminate. This phenomenon is called "implicit bias."

To date, several courts have been receptive to incorporating an implicit bias-based theory of employment discrimination, seeing this as the next step in the battle to end all forms of discrimination. Yet many other courts have remained skeptical of the impact of implicit bias and have refused to find that discrimination existed without a showing of intent, specific actions by an employer, or specific employment practices. This Note examines the struggle courts face when analyzing potential instances of implicit bias, and suggests how implicit bias–based claims can be consistent with the existing Title VII intent-based framework and evaluated with minimal changes to that framework.

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* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2011, University of Delaware. I am especially grateful to Professor Tanya Hernandez for helping me select this topic, and to everyone else who helped guide me throughout this process. Additional thanks go out to my family and friends for their endless support and encouragement.

INTRODUCTION

> "[T]here are . . . things which a man is afraid to tell even to himself, and every decent man has a number of such things stored away in his mind."[1]

Title VII of the Civil Rights Act of 1964[2] was enacted with the broad purpose of ending all forms of discrimination within the workplace.[3] Over the course of almost sixty years, Title VII has effectively reduced and limited instances of overt and invidious employment discrimination through a flexible interpretation by the courts and a willingness to amend Title VII when new employment discrimination scenarios arise.[4] When overt discrimination was the leading form of discrimination for which employees sought a remedy, the U.S. Supreme Court adopted the *McDonnell Douglas Corp.* burden-shifting framework to give employees a full and fair chance to raise and vet any appropriate employment discrimination claims.[5] When seemingly neutral business practices had the unintended effect of

1. FYODOR DOSTOEVSKY, NOTES FROM UNDERGROUND 39 (Richard Pevear & Larissa Volokhosky trans., Vintage Books 1993) (1864).
2. Civil Rights Act of 1964 § 704, 42 U.S.C. §§ 2000e to 2000e-17 (2006).
3. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 488 (2005).
4. *See infra* Part I.A.
5. *See infra* Part I.A.1.

discriminating against protected classes of employees, the Supreme Court (and later, Congress) developed the disparate impact framework to allow employees to challenge these practices without having to prove intent.[6] Eventually, it became apparent that employers could escape liability when a discriminatory intent accompanied a legitimate business purpose, so both the Supreme Court and Congress sought to update Title VII's application by including a mixed-motive framework to allow employees to challenge these mixed intentions as at least partially discriminatory practices.[7] As such, both the judiciary and Congress should be commended for the advancement of women and minorities in the workplace.

Despite this, recent social science studies, led by various analyses of the Implicit Associations Test (IAT),[8] have found that a somewhat newly discovered form of discrimination called "implicit bias"[9] still pervades the workplace environment, often remaining completely unnoticed.[10] Implicit biases in the workplace may take the form of a "gut feeling" in situations where two candidates are equally qualified for a position. Depending on each candidate's race, religion, gender, or other identifying characteristics, their qualifications may be weighted differently.[11] When this phenomenon occurs, the decisionmaker is entirely unaware and rarely questions the legitimacy of this choice. Through data collected from the IAT, researchers have discovered that these implicit biases are pervasive throughout our society and may play a large role in modern Title VII employment discrimination.[12] Until implicit bias becomes more commonly recognized, little can be done to combat this new frontier in discrimination.

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6. *See infra* Part I.A.2.

7. *See infra* Part I.A.3.

8. For an online version of the test, see PROJECT IMPLICIT, http://implicit.harvard.edu/implicit/research (last visited Sept. 20, 2013). The IAT is a sorting task that measures time differences in pairings of images (an African American male and a Caucasian male) and words (positive and negative). *See, e.g.*, Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006). IAT takers must press one button for representation of "African American" and "negative" and another button for representation of "Caucasian" and "positive" and vice versa. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006). Generally, IAT takers react faster when the Caucasian, rather than the African American, image is paired with the positive word. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 948–50 (2006).

9. This Note uses the terms "implicit bias" and "unconscious bias" interchangeably to reduce confusion, since the courts evaluating this type of discrimination have done the same.

10. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 487 (2010); *see also infra* Part I.B.

11. *See infra* Part I.B. For example, if a male decisionmaker that holds an implicit bias against women is evaluating two equally qualified candidates, one male and one female, for a job that requires the employee to travel across the country often, that decisionmaker will select the male based on the gut feeling that he is more qualified. However, the truth behind that gut feeling may be that the decisionmaker improperly assumes a woman would prefer to stay home tending to her husband and children, rather than travel extensively, regardless of the woman's desire to work. This hypothetical is based on the facts of *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973 (W.D. Wis. 2003).

12. *See infra* Part I.B.

However, state and federal courts have struggled to find the most effective way to evaluate whether an employer has unconsciously discriminated against an employee or job candidate, or whether the choice was merely based on some other legitimate factor.[13] Many of these courts fall into one of two camps. In the first, judges are skeptical of implicit bias evidence and hesitate to find an employer liable for unintentional and unknown actions.[14] These courts tend to reject implicit bias–based claims of employment discrimination, and instead favor any of the myriad alternatives for the outcome of an employment decision, such as business needs or subjective discretion.[15] In the other camp, judges are more accepting of the implicit bias evidence and recognize the need to provide a remedy to employees or job candidates alleging these types of claims.[16] These courts are more amenable to the various employment discrimination claims, seeking either to evaluate them under the existing Title VII framework or a slightly modified Title VII framework.[17] Nevertheless, without greater acceptance by either the courts or Congress, employees raising claims of implicit bias–based discrimination remain largely without a remedy.

Part I of this Note explains the background against which Title VII of the Civil Rights Act of 1964 was enacted and the three major legal frameworks—disparate treatment, disparate impact, and mixed-motive discrimination—that courts developed and now use to evaluate potential violations of Title VII. It also provides a description of implicit bias and its effects on workplace decisionmaking, and then explores the pros and cons of recognizing implicit bias as a type of discrimination contemplated by Title VII's existing framework. Part II analyzes how courts address allegations of implicit bias–based discrimination. Finally, Part III argues that courts must definitively incorporate implicit bias into the Title VII analysis and describes how this new analysis is both consistent with and supported by the current purpose, language, and framework that courts already use to evaluate employment discrimination claims under Title VII.

I. TITLE VII'S NEWEST CHALLENGE: IMPLICIT BIAS

Since its enactment, the judiciary has taken an active role in interpreting Title VII to address various issues in employment discrimination cases as they arise. Although the Supreme Court may not accept a new and original claim of employment discrimination immediately, the Court remains a strong driving force behind the interpretation of Title VII. In turn, Congress has amended the Civil Rights Act of 1964 to recognize the Court's decisions.

13. *See infra* Part II.
14. *See infra* Part II.A.
15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. *See infra* Part II.B.

This Part first describes the history of Title VII's enactment, as well as the developments that led to the Supreme Court's various modifications to, and interpretations of, the statute, including the disparate treatment, disparate impact, and mixed-motive discrimination frameworks. It then explores the cognitive science discovery of implicit bias through the use of the IAT and the possible consequences of implicit bias in the workplace. Finally, this Part concludes by noting several arguments for and against recognizing implicit bias as a part of Title VII.

A. A Brief History of Title VII of the Civil Rights Act of 1964

The first federal governmental action against employment discrimination was an executive order signed by President Franklin Delano Roosevelt in 1941.[18] No further action was taken for nearly a decade. Then, in the 1950s, state legislatures interpreted the Supreme Court's decision desegregating public schools in *Brown v. Board of Education*[19] to mandate equal employment opportunity as well.[20]

After a lengthy debate amongst the federal legislative and executive branches, the Civil Rights Act of 1964 was enacted.[21] Title VII of the Civil Rights Act of 1964 prohibits employers from making employment-related decisions, either directly or implicitly, on the basis of race, religion, or sex, among other protected classifications.[22] Ultimately, Title VII's overriding goal was to provide equal employment opportunities for all United States citizens by creating a broad set of protections against all forms of discrimination, both overt and subtle.[23] Despite its goal of reducing employment discrimination, the word "discrimination" remains statutorily

18. PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL 13 (1985).

19. 347 U.S. 483 (1954) (holding that *Plessy v. Ferguson*, 163 U.S. 537 (1896), had unconstitutionally permitted racially separate but equal facilities to continue existing).

20. GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 4 (2d ed. 2007). By the 1950s, many states had begun enacting fair employment practice laws, which would become a model for Title VII. *Id.* These early state laws, however, were ineffectively enforced. *Id.*

21. For a brief history of the development of the Civil Rights Act of 1964 from 1957 to 1964, see THE CIVIL RIGHTS ACT: BACKGROUND, STATUTES & PRIMER 12 (Irene Y. Capozzi ed., 2006).

22. *See* Civil Rights Act of 1964 § 704, 42 U.S.C. §§ 2000e to 2000e-17 (2006). Section 2000e-2(a) currently reads, in relevant part,

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; or . . . in any way which would . . . otherwise adversely affect [that individual's] status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

23. *See* Damon Ritenhouse, *A Primer on Title VII: Part One*, ABA GPSOLO (Jan. 2013), http://www.americanbar.org/publications/gpsolo_ereport/2013/january_2013/primer_title_vii_part_one.html ("[T]he central focus of Title VII became to dismantle tangible barriers that operate to disadvantage minority employees.").

undefined to this day.[24] This is partially because, by the 1940s, a general list of prohibited employment practices already existed.[25] Additionally, the meaning of "discrimination" was later interpreted through early activist Supreme Court decisions.[26] But once the Civil Rights Act of 1964 was enacted, Congress generally refrained from addressing employment discrimination, except for major amendments to Title VII in 1972 and 1991 as a result of the aforementioned Supreme Court rulings.[27]

As in the past, today's Congress is unlikely to change the structural framework of Title VII without high levels of public support[28] or strong judicial leadership to inspire updated legislation.[29] As a consequence of congressional gridlock,[30] the judiciary has become the de facto developer of Title VII.[31] Through both its previous incarnations and in its current form, the language of Title VII has spawned many legal theories under which employees and job candidates can bring discrimination claims. Moreover, courts still possess the ability to reinterpret Title VII when changed employment practices demand it.

1. Disparate Treatment

The disparate treatment claim is the epitome of modern Title VII employment discrimination claims. Disparate treatment occurs when an employer takes a specific action to treat an employee differently from others because of the employer's discriminatory motive.[32] The current

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24. *See, e.g.*, RUTHERGLEN, *supra* note 20, at 11; Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 80 (2010). Title VII was largely premised on the notion that courts or judges would recognize discriminatory practices when they arose. *See* RUTHERGLEN, *supra* note 20, at 18–19.

25. BURSTEIN, *supra* note 18, at 25. Senator Hubert Humphrey, broadly defending the bill, stated, "[Title VII] does not limit the employer's freedom to hire, fire, promote or demote for any reasons . . . so long as his action is not based on race." 110 CONG. REC. 5423 (1964).

26. *See infra* Part I.A.1–3; *see also* RUTHERGLEN, *supra* note 20, at 11.

27. *See, e.g.*, BURSTEIN, *supra* note 18, at 35 (stating that Title VII was amended in 1972 to provide the Equal Employment Opportunity Commission (EEOC) with enforcement powers); RUTHERGLEN, *supra* note 20, at 10 (noting that the Civil Rights Act of 1991 was amended to incorporate Supreme Court decisions regarding types of intentional discrimination). Two theories offered for the lack of congressional action on Title VII are (1) that Congress believes that Title VII has effectively eliminated employment discrimination, and (2) that Congress is merely giving the law a chance to work before taking further action. BURSTEIN, *supra* note 18, at 35–36. However, given that Title VII was last amended over twenty years ago, some scholars question how well the statute has held up over time in actuality. *See, e.g.*, Ritenhouse, *supra* note 23.

28. *See* BURSTEIN, *supra* note 18, at 62, 67.

29. *See* RUTHERGLEN, *supra* note 20, at 13.

30. *See, e.g.*, David Lawder, *Democrats Hold Senate, Moderates Fade in Both Parties*, REUTERS (Nov. 7, 2012, 2:10 AM), http://www.reuters.com/article/2012/11/07/us-usa-campaign-senateidUSBRE8A60HE20121107?feedType=RSS&feedName=topNews&rpc=69.

31. *See* Ritenhouse, *supra* note 23.

32. *See* 1 CHARLES R. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS § 1:29 (2012); 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION:

framework for evaluating a disparate treatment case was laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[33] which created a three-step burden-shifting framework that was later refined in *Texas Department of Community Affairs v. Burdine*.[34]

McDonnell Douglas Corp. involved Mr. Green, an African American mechanic and laboratory technician, who participated in organized protests against his employer's allegedly racially motivated hiring practices after being laid off.[35] After unsuccessfully reapplying at McDonnell Douglas, Green filed a complaint with the Equal Employment Opportunity Commission (EEOC), claiming that racial discrimination was the true motive behind McDonnell Douglas's refusal to rehire him.[36] McDonnell Douglas responded that Green was not rehired because of his involvement in the protests.[37]

Because the district court did not give Green an opportunity to respond to his employer's reason for refusing to rehire him, the Eighth Circuit reversed, stating that employees should receive the opportunity to demonstrate that employers' reasoning is simply a pretext.[38] In affirming the Eighth Circuit, the Supreme Court set forth the modern burden-shifting framework, seeking to balance both the societal and individual interests of employers and employees alike.[39]

The first step in the Court's burden-shifting framework requires the employee to establish a prima facie case of Title VII employment discrimination[40] by a preponderance of the evidence.[41] This burden is "not onerous."[42] By raising a prima facie case, the employees create an inference that their employers discriminated against them.[43] Once the employee establishes the prima facie case, the burden then shifts to the

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LAW AND LITIGATION § 2:2 (2009). The Supreme Court has referred to this standard as "the most easily understood type of discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

33. 411 U.S. 792 (1973).

34. 450 U.S. 248 (1981).

35. *McDonnell Douglas Corp.*, 411 U.S. at 794.

36. *Id.* at 796.

37. *Id.* at 797.

38. *Id.* at 797–98.

39. *Id.* at 801–02 ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

40. *Id.* at 802. Employees can make a prima facie case by alleging that they: (1) belong to a class of persons protected by Title VII; (2) applied to and were qualified for an open job; (3) were qualified for the job and rejected; and (4) can state that the job remained open after their rejection and that the employer sought other employees with similar qualifications. *Id.*

41. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253–54 (1981).

42. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (quoting *Burdine*, 450 U.S. at 253). *But see* Ritenhouse, *supra* note 23 (noting how difficult it is for employees to state a cause of action under the disparate treatment framework).

43. *Burdine*, 450 U.S. at 253–54 ("The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the [employee's] rejection.").

employer, who must articulate a legitimate, nondiscriminatory reason for its decision not to hire the employee.[44] To meet this burden, the employer must merely present evidence that creates an issue of material fact regarding the reason for its employment decision.[45] The ultimate goal of this step is to match the employee's prima facie case of discrimination by creating a sufficiently clear and reasonably specific factual issue that the employee can fairly challenge as pretextual.[46] Finally, the burden returns to the employee to demonstrate that the nondiscriminatory reason given by the employer is simply a pretext for discrimination.[47] Throughout this burden-shifting scheme, the ultimate question should always be whether the employee was intentionally discriminated against.[48] Although the burden "shifts" between employee and employer, the ultimate burden of proving intentional discrimination at trial always remains with the employee.[49]

Presently, the courts are more willing than in past years to grant summary judgment disposing of a disparate treatment discrimination claim in favor of the employer.[50]

2. Disparate Impact

The first departure from the traditional Title VII employment discrimination claim came in the form of the disparate impact theory. While disparate treatment cases typically involve discriminatory actions and intent, disparate impact cases involve seemingly neutral actions that have a disproportionate impact on members of a protected class of persons—no discriminatory motive is required.[51] The disparate impact burden-shifting

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44. *McDonnell Douglas Corp.*, 411 U.S. at 802. The Court noted that a wide range of legitimate reasons, both objective and subjective, exist. *See id.* at 802–03.

45. *Burdine*, 450 U.S. at 254–55. Specifically, the employer only has to explain why the decision was made or present evidence of a nondiscriminatory reason for the decision. *Id.* at 256 (quoting Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24, 25 n.2 (1978)).

46. *Burdine*, 450 U.S. at 255–56, 258.

47. *See McDonnell Douglas Corp.*, 411 U.S. at 804 ("While Title VII does not, without more, compel rehiring of [an employee], neither does it permit [the employer] to use [an employee's] conduct as a pretext for the sort of discrimination prohibited by [Title VII]."); *see also Burdine*, 450 U.S. at 256 ("[The employee] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."). Relevant evidence at this stage may include the employer's general treatment of minorities or whether the employer treated similarly situated employees differently. *See, e.g.*, *McDonnell Douglas Corp.*, 411 U.S. at 804–05.

48. *See, e.g.*, ROSSEIN, *supra* note 32, § 2:9; Lee, *supra* note 3, at 482 ("[T]he plaintiff must demonstrate that the employer was motivated by racial or other animus at the precise moment the adverse employment action was taken . . . .").

49. *See Burdine*, 450 U.S. at 253 ("The . . . division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question [of intentional discrimination]."); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) ("[T]hese shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence . . . .").

50. *See* Lee, *supra* note 3, at 482.

51. *See* ROSSEIN, *supra* note 32, § 2:30.

framework was first established in *Griggs v. Duke Power Co.*,[52] and was formally adopted into Title VII in 1991.[53]

In *Griggs*, Duke Power had a longstanding policy of refusing African American employees access to employment outside of the company's labor department until 1955; employees within the labor department received the lowest wages of all employees.[54] In 1955, Duke Power departed from its policy of outright exclusion by requiring all employees to have a high school diploma as a prerequisite for employment outside the labor department.[55] Finally, in 1965, responding to the newly enacted Title VII, Duke Power provided an alternative to the diploma requirement in the form of a professionally designed high school equivalency exam.[56] The African American employees brought a class action lawsuit against their employer, alleging that Duke Power's policy violated Title VII.[57] Although Duke Power had not engaged in any overt acts of intentional discrimination,[58] the Supreme Court created a new framework to provide Duke Power's African American employees with a remedy.

Congress intended Title VII to reach the discriminatory effects of employment practices, not just the motivations behind them.[59] Under *Griggs*'s disparate impact framework, employees must first demonstrate that a seemingly neutral business practice exists that has the effect of discriminating against a protected group.[60] Neutral business practices include a broad range of objective activities, such as intelligence tests.[61] In line with the holding in *Griggs*, employees may now challenge subjective practices and mixed objective-subjective practices as well.[62] The employer can rebut the employee's showing of discriminatory impact by demonstrating that the practice exists as a matter of business necessity or relevance to job performance.[63] Finally, the employee can reject the

52. 401 U.S. 424 (1971).

53. *See* 42 U.S.C. § 2000e-2(k) (2006) (stating that a disparate impact claim is established when "a complaining party demonstrates that [an employer] uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic] and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); ROSSEIN *supra* note 32, § 2:30.

54. *Griggs*, 401 U.S. at 426–27.

55. *Id.* at 427.

56. *Id.* at 427–28.

57. *Id.* at 426.

58. *See id.* at 428. The Fourth Circuit had held that, without evidence of intent, Duke Power could not have violated Title VII. *See* Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

59. *Griggs*, 401 U.S. at 432.

60. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988) (discussing the employee's need to identify an employment practice and prove it had a discriminatory impact); *Griggs*, 401 U.S. at 431 ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

61. *See* ROSSEIN *supra* note 32, § 2:30.

62. *See, e.g.*, *Watson*, 487 U.S. at 989–90. However, in cases of mixed objective-subjective practices, the court will evaluate them as if they were purely subjective practices. *Id.* at 994.

63. *See Watson*, 487 U.S. at 997–98; *Griggs*, 401 U.S. at 431.

employer's rebuttal by demonstrating that a less discriminatory alternative practice exists, but the employer still refuses to utilize it.[64] The relevant inquiry almost always takes place on a job-specific level.[65]

Years later, the Supreme Court considered the role of statistics and the appropriate standards by which courts may evaluate statistical data in disparate impact cases.[66] The Court recognized that, despite the utilities of statistical proof, some danger still existed when proving a disparate impact claim.[67] As such, the Court recognized that a higher standard of proof would be required when evaluating statistical data to protect against any abuses, especially given statistical uncertainties.[68] The Court also expressed some reluctance in the form of skepticism of the veracity of the statistical data presented by employees.[69]

Additionally, in response to the need for a higher standard of proof, Title VII now provides that the courts may evaluate a claim based on whether an employee can point to a specific business practice—unless that practice cannot be separated into individual components.[70]

Given the higher standard of proof, fewer cases of this type are currently being filed in state and federal courts.[71]

3. Mixed-Motive Discrimination

Like disparate impact cases, mixed-motive cases were not recognized as part of Title VII until after the 1991 Amendments to the Civil Rights Act of 1964.[72] This recognition resulted, in part, from the Supreme Court's own development of a mixed-motive framework and its subsequent

64. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). The court must additionally consider the costs and other burdens of that alternative practice when evaluating the strength of the employee's claim. *See Watson*, 487 U.S. at 998.

65. *See* Pippen v. Iowa, No. LACL10738, slip op. at 8 (Iowa Dist. Ct. Apr. 17, 2012), *appeal filed*, No. 12-0913 (Iowa Ct. App. May 16, 2012).

66. *See Watson*, 487 U.S. at 994–97.

67. *Id.* at 992. The Court recognized that statistical proof could potentially have an unintended chilling effect on legitimate business practices. *See id.* at 993.

68. *See id.* at 992 ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their workforces." (citations omitted)). However, the Court also refused to delineate a specific "mathematical formula" for determining when statistical proof satisfied the employee's burden. *Id.* at 994–95 ("[S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation.").

69. *See id.* at 996–97 (stating that courts are not forced to accept employees' statistical evidence and that employers are free to present their own countervailing evidence).

70. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2006) ("[T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.").

71. *See* Lee, *supra* note 3, at 482.

72. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).

interpretation of these amendments. The evolution of Title VII employment discrimination claims dealing with mixed motives started with the Court's decision in *Price Waterhouse v. Hopkins*[73] and continued through *Desert Palace, Inc. v. Costa*.[74] In a mixed-motive case, as the name would suggest, the employee alleges that the employer's decision was based on both legitimate, nondiscriminatory reasons, as well as illegitimate, discriminatory reasons, but that the illegitimate reasons actually drove the decision.[75] In mixed-motive cases, the ultimate inquiry is whether a protected classification was a factor in an employer's decision when it was made.[76] The mixed-motive framework seeks to preserve the delicate balance between an employer's right to choose how to run its business, and an employee's right to work free from the discrimination.[77]

In *Hopkins*, a female senior manager at Price Waterhouse brought a Title VII employment discrimination claim against her employers after being denied the opportunity to become a partner.[78] The firm's decisionmakers found her too aggressive and unfriendly, and subsequently told her to soften her image by behaving more femininely in order to be reconsidered for partnership.[79] Because Price Waterhouse's decision included a legitimate motive in addition to sex stereotyping, the Court sought to create a framework by which employees could demonstrate the existence of discriminatory behavior.

The employee must first prove that an illegitimate motive led to an employment decision that negatively affected the employee.[80] Additionally, the employee must then show that the employer would not have made an identical decision even if that illegitimate motive did not exist.[81]

To prove a mixed-motive discrimination claim, the employee may present either direct or circumstantial evidence.[82] Appropriate evidence includes statements by the employer (specifically, the individual who made the decision) that demonstrate the discriminatory animus and that directly

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73. 490 U.S. 228 (1989).
74. 539 U.S. at 90.
75. *See* RICHEY, *supra* note 32, § 1:42.
76. *Hopkins*, 490 U.S. at 241.
77. *See id.* at 239.
78. *See id.* at 231–32.
79. *Id.* at 235. For a full account of the facts of this case, see *infra* notes 209–23 and accompanying text.
80. *See* 42 U.S.C. § 2000e–2(m) (2006); *see also Hopkins*, 490 U.S. at 241–42 (recognizing that Congress rejected the use of the phrase "solely because of" in Title VII and determining that the court must look at all factors, legitimate and illegitimate, in assessing liability for employment discrimination); Costa v. Desert Palace, Inc., 299 F.3d 838, 847–48 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003) (interpreting the language of § 2000e-2(m)).
81. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *Hopkins*, 490 U.S. at 242 ("[A]n employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person.").
82. *Costa*, 539 U.S. at 100 ("'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957))).

relate to the contested decision.[83] However, "stray remarks" made by an employer are insufficient to demonstrate discriminatory animus, as are any statements susceptible to multiple interpretations any number of which are either discriminatory or nondiscriminatory.[84]

Generally, employees face a relatively high burden in proving a case of mixed-motive discrimination, limiting the utility of this framework to employees.[85]

B. What Is Implicit Bias?

Implicit biases are defined as the subconscious attitudes, feelings, and stereotypes that an individual may possess towards a given social group.[86] Such biases are assimilated through interactions with others and an individual's culture, and are picked up throughout an individual's lifetime.[87] Yet, most individuals are entirely unaware that they possess any implicit biases.[88] Notably, tests have found that implicit biases are not uncorrectable. Individuals respond to (and try to eradicate) their implicit biases when they are made aware of them, or when they interact with a nonstereotypical member of the social group against which they hold an implicit bias.[89]

This section of the Note explores the main tool that cognitive scientists use to measure the existence, extent, and impact of implicit biases. This section further explains the changes that the workplace has seen over the past fifty years. Finally, this section describes the ways in which employers make decisions, as well as the opportunities that implicit biases have to infect the decisionmaking process.

1. The Implicit Association Test

In 1998, three social scientists founded Project Implicit to study the existence of implicit social thought.[90] Project Implicit's key tool to collect data on implicit attitudes is the IAT.[91] Project Implicit and the IAT rely entirely on participants who frequent the website and take an IAT, so the

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83. RICHEY, *supra* note 32, § 1:42.

84. *Id.*

85. *Id.*

86. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 149 (2010); Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision To Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175, 1186 (2008).

87. Bennett, *supra* note 86, at 149.

88. *See, e.g.*, *id.* at 149; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012); Paterson et al., *supra* note 86, at 1188.

89. *See* Bennett, *supra* note 86, at 153; Kang & Lane, *supra* note 10, at 511.

90. *See* PROJECT IMPLICIT, http://projectimplicit.net/about.html (last visited Sept. 20, 2013).

91. For a description of the IAT, see *supra* note 8. Since 1998, Project Implicit's website has collected more than three million IATs. Kang & Banaji, *supra* note 8, at 1072.

sample of individuals who take the IAT may not be as representative of the general population as if a randomly selected sample were used.[92] However, from these studies, social scientists have found that implicit biases are extremely common, separate from explicit biases, and that the IAT predicts behavior in the real world.[93]

Generally, most takers of the IAT show favoritism for one social group over another, rather than having no biases at all.[94] Further, takers prefer socially privileged characteristics—typically the preferred subject is the heterosexual, affluent, Catholic, Caucasian male.[95] The IAT demonstrates that implicit biases predict how an individual will act towards members of both favored and disfavored groups better than explicit biases.[96] Additionally, because implicit biases are unknown to the individual that possesses them, they tend to come across in other ways that demonstrate "social warmth."[97]

2. The Evolution of Employment Practices: Decisionmaking and Implicit Bias

There are several factors that influence an employer's decisionmaking process. These include the structure of the workplace, the time spent contemplating the decision, the characteristics considered in the decision, and the employer's contact with employees of dissimilar backgrounds.

Since the enactment of the Civil Rights Act of 1964, the workplace has shifted to a more "fluid process of social interaction, perception, evaluation, and disbursement of opportunity."[98] Similarly, employees are working in jobs that rely on the employees' ability to adapt to a variety of tasks, rather than focus on just one well-defined task.[99] Employees are also increasingly required to work in teams.[100] In other words, the workplace has shifted away from the rigid and linear systems of the past, which has enhanced the impact of implicit biases on the employment decisionmaking process. Whereas, in the past, many employment decisions were motivated by

92. *See* Greenwald & Krieger, *supra* note 8, at 955. However, Greenwald and Krieger also note that the same findings would appear with a more representative sample, as well. *Id.* at 956.

93. Kang et al., *supra* note 88, at 1130–31.

94. *See* Kang & Lane, *supra* note 10, at 474; *see also* Greenwald & Krieger, *supra* note 8, at 955 ("[O]nly 18% of respondents [could] be judged implicitly neutral.").

95. *See* Jolls & Sunstein, *supra* note 8, at 971; Kang & Lane, *supra* note 10, at 474.

96. *See* Greenwald & Krieger, *supra* note 8, at 954–55 (noting that individuals generally suppress any explicit biases that they are aware of, so as to not appear racist or sexist).

97. Kang & Banaji, *supra* note 8, at 1073 ("[I]mplicit biases correlate[] with real-world behaviors like being friendly toward a target . . . and evaluating job candidates . . . ."). Examples of "social warmth" include: (1) friendliness, (2) eye contact, and (3) spatial closeness. *See* Greenwald & Krieger, *supra* note 8, at 954–55.

98. Tristin K. Green, *Discrimination in Workplace Dynamics: Towards a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99–108 (2003).

99. *See id.* at 101–02.

100. *See id.*

explicit biases, these decisions are now more commonly tainted by implicit biases.[101]

The decisionmaking process can be divided into two "systems" to highlight how implicit biases pervade everyday thought.[102] In "System I," individuals make quick decisions that are largely based on intuition.[103] These decisions tend to be more prone to errors in judgment.[104] If individuals remain unaware of their biases, they will not try to correct System I decisions.[105] On the other hand, decisions made in "System II" tend to be more thought-out and based on deliberation, resulting in more accurate decisions.[106] Thus, when individuals have to explain their decisionmaking processes, they tend to be less biased.[107] The modern, fluid structure of the workplace lends itself to an increasing number of System I decisions. [108]

Employers also commonly rely on subjective characteristics to evaluate their employees. In fact, employers often find subjective characteristics to be indispensable to the decisionmaking process and necessary to smooth the functioning of the workplace.[109] However, implicit biases often invade these subjective decisions in a phenomenon referred to as "malleability of merit."[110] Through this sliding-scale process, employers will alter how much weight they attribute to any given qualification based on a gut feeling as to which candidate they believe can do the better job.[111] This is especially true where either of two candidates is equally qualified.[112]

The "social contact hypothesis" acts as a counterweight to this trend toward increased implicit bias–based decisions. This hypothesis argues that close interactions with members of an "outgroup" against whom an individual may harbor an implicit bias may help to create a more positive

101. Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1435 (2008).

102. Jolls & Sunstein, *supra* note 8, at 975–76.

103. *Id.* For example, if an evaluator expects an African American individual to be violent, the evaluator will see evidence of violent behavior when presented with ambiguous behavior. *See, e.g.*, Kang & Banaji, *supra* note 8, at 1085.

104. Jolls & Sunstein, *supra* note 8, at 974.

105. *Id.* at 976.

106. *Id.* at 975.

107. *E.g.*, Kang et al., *supra* note 88, at 1178; Lee, *supra* note 3, at 486.

108. *See* Jolls & Sunstein, *supra* note 8, at 974–75 (discussing the use of "attribute substitution" to answer hard questions by asking easier ones).

109. *See* Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 470 (2003) ("[D]iscretionary acts are useful and necessary to any employer.").

110. *See* Kang et al., *supra* note 88, at 1156–58; *see also* Green, *supra* note 98, at 98–99 ("The decisionmaker . . . may be entirely unaware of the influence of his stereotypes on his ultimate decision."); Kang & Banaji, *supra* note 8, at 1086 ("[I]mplicit bias as measured by the IAT has been correlated with biased evaluations of job candidates.").

111. *See* Kang et al., *supra* note 88, at 1156–57. For an example of malleability of merit, see *supra* note 11.

112. *See id.*; Nicholas D. Kristof, Op-Ed., *Racism Without Racists*, N.Y. TIMES, Oct. 5, 2008, at WK.10.

feeling towards that group as a whole.[113] Taking this a step further, a workplace environment where individuals of various ingroups must rely on individuals from outgroups could help to reduce implicit biases by creating a stronger, more accurate understanding of each other, as opposed to a real or perceived disconnect between supervisors and their employees.[114]

3. Studies on the Effects of Race and Gender on Hiring Decisions

Several studies have been conducted to discover and analyze the impact of unconscious attitudes and stereotypes on hiring decisions. The subjects of these studies range from the effects of implicit biases on reviewing resumes to the impacts of anonymous hiring upon increased minority representation in the workplace.

One such study examined how a particular name listed on a resume can affect an applicant's chances of receiving an interview.[115] By varying the quality of resumes used, as well as the names on each resume,[116] the study found that—regardless of the quality of the application—an applicant with a "white" name will receive about one interview for every ten applications, while an applicant with a "black" name will receive one interview for every fifteen applications.[117]

Interestingly, social scientists have also found that, despite the need for a subjective decision, implicit biases can be controlled through anonymous hiring. Specifically, the blind audition system has worked wonders for equal employment opportunities within the major symphony orchestras in the United States, helping more females to get hired.[118] Claudia Goldin and Cecelia Rouse's study found that, by using blind auditions, the chances a woman had to advance to the final round of auditions or to secure a position within the orchestra increased by 25 percent.[119]

113. *See* Greenwald & Krieger, *supra* note 8, at 964; Kang & Banaji, *supra* note 8, at 1101–05.

114. *See* Green, *supra* note 98, at 147.

115. 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).

116. The study utilized distinctive Caucasian names (like Brad and Allison) and distinctive African American names (like Latoya and Jermaine), randomly adding addresses in both affluent and "bad" neighborhoods. *See id.* at 995–96, 1003, 1012.

117. *Id.* at 998. A related study also looked to the effects of implicit bias when gender is the differentiating factor. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit To Justify Discrimination*, 16 PSYCHOL. SCI. 474 (2005). The candidates, one male and one female were alternatively attributed the characteristics of "streetwise" and "booksmart." *Id.* at 475. Participants consistently favored the male candidate, regardless of how he was characterized, and then accordingly described the criteria they found most relevant. *Id.*

118. *See generally* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

119. *Id.* at 736.

C. Pros and Cons: The Current Debate Over Implicit Bias

Given the recent cases[120] and the abundance of scholarly articles dealing with implicit bias, individuals concerned with implicit bias's role in future Title VII jurisprudence have created a heated debate on the topic. This section presents the arguments against and in favor of the recognition of implicit bias in employment discrimination claims.

1. Disfavoring Implicit Bias: Discretion and Deference

The most frequent criticisms of implicit bias question the scientific validity of the IAT's findings.[121] While touted by supporters as hard evidence of the pervasiveness of implicit biases in today's society,[122] not all scholars are convinced that the IAT actually proves anything. They claim that the "scientific" label attributed to the IAT studies may be nothing more than an honorific title attributed by scholars aiming to use the IAT to help reform antidiscrimination law, not an actual scientific validation of implicit bias's pervasiveness.[123]

One of the main features of this criticism arises from the difficulties of distinguishing causation from correlation.[124] First, there are numerous theories that can explain the correlation between the IAT scores and real world behavior without resort to the popular theory that virtually everyone is inflicted with a biased attitude towards certain groups.[125] Failure to eliminate these plausible alternatives may render any conclusions based on

120. *See infra* Part II.

121. *See generally* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) [hereinafter Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*]; Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737 (2009). *But see* Harriet M. Antczak, *Problems at* Daubert*: Expert Testimony in Title VII Sex Discrimination and Sexual Harassment Litigation*, 19 BUFF. J. GENDER L. & SOC. POL'Y 33, 36–38 (2011) (arguing that the premature exclusion of expert testimony in employment discrimination claims may do more harm than good).

122. *See supra* Part I.B.1–3.

123. Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1029 (arguing that the IAT is claimed as scientifically sound by the "sheer volume of laboratory studies that implicit prejudice advocates cite, by the moral certitude with which [social scientists] apply psychological generalizations to the real world, and by the impressive credentials [social scientists] bring to the courtroom.").

124. *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1049 (2006) ("In short, whether attitudes predict behavior depends on the attitude, the context, and the person."); *see also* Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1094; *infra* notes 189, 192 and accompanying text.

125. *See* Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1064. Such alternative theories include: (1) the psychological phenomena that the brain will simplify a task by focusing on only one category, rather than both; (2) an individual's fear of being labeled a bigot; (3) the creation of a "self-fulfilling prophecy"; (4) sympathy for, rather than bias against, certain protected groups; and (5) cultural expectations, rather than individual preferences. *Id.* at 1074–85; *see also* Maurice Wexler et al., *Implicit Bias and Employment Law: A Voyage into the Unknown*, DAILY LAB. REP., Mar. 1, 2013, at 1 ("[I]nfinite factors may influence an individual's response on the IAT.").

the IAT incomplete.[126] Additionally, evaluators of the IAT have yet to delineate a specific range of IAT scores that can accurately predict when an implicit bias will lead to an actual discriminatory act.[127] At this point, far too many unknown variables may exist to definitively say that the IAT reflects actual outward behavior for which an individual can be held accountable.[128]

Another facet of the criticism involves the IAT data itself. Evaluations of the IAT data demonstrate a low correlation to actual prejudicial behavior.[129] Therefore, many of those who demonstrate an implicit bias based on the IAT may never manifest any discriminatory behaviors.[130] Essentially, the proclaimed predictive power of the IAT is turned on its head. The persuasiveness of this predictive power is weakened even more in the employment context because of the training that decisionmakers, but not the average IAT taker, receive to effectively make employment-related decisions.[131] Moreover, compilations of the data do not consider any outlier test results: a small portion of IAT takers could be extremely biased, while average test takers may possess negligible biases.[132] Finally, some may doubt that an unconscious bias could be evidenced by a mere millisecond difference in reaction times, especially when the IAT does not control for outside variables that may also affect these times.[133]

Opponents express concern over the potential implications of adopting a test—like the IAT—that fails to meet the evidentiary standards of either the scientific or legal community.[134] Critics believe that the implicit bias studies are not yet properly vetted in such a way as to give them credence as

126. *See* Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1096–97.

127. *See id.* at 1032; *see also* Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 163 (2004); Wexler et al., *supra* note 125, at 5 ("While it looks objective, [the IAT] lacks any objective connection to legally actionable behavior.").

128. *See* Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1068–69.

129. *See id.* at 1100.

130. *See id.*; *cf. supra* note 93 and accompanying text.

131. *See, e.g.*, Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1108–10; *Outreach, Education & Technical Assistance*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/outreach/index.cfm (last visited Sept. 20, 2013) (providing an example of the training available to employers).

132. Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1103.

133. *See id.* at 1033, 1047; Wexler et al., *supra* note 125, at 4 ("One person's responses on the IAT may also differ from day to day, and nothing in the test accounts for this variability.").

134. *See* Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1028. For example, these critics find it both impractical and unorthodox to force federal judicial appointees to take the IAT before confirmation. *See id.* Other concerns arise from the potential that the IAT findings will lead to: (1) "debiasing" as a remedy for unconscious discrimination, (2) invasions of schools to recondition children's implicit biases, and (3) other related measures. *See id.* at 1027–28.

probative evidence in an antidiscrimination suit.[135] Until the implicit bias theory reaches an acceptable level of scientific validity, the risk of "false positives" of implicit bias is too great to support reliance in the legal landscape.[136]

Finally, the judiciary is concerned with several difficulties and uncertainties that arise when confronted with possible instances of implicit bias. These cases often look suspicious, as if some discrimination has occurred, but the characteristic "smoking gun"—explicit discriminatory statements—present in much of the early Title VII litigation are largely absent.[137] Similarly, the framework created by the early Title VII cases focused on intentional or conscious discrimination,[138] and this framework may be unable to accommodate instances of unintentional discrimination without undergoing serious changes that the courts are currently unwilling to make.[139]

Furthermore, the judiciary is reluctant to punish instances of implicit bias–related discrimination for several other reasons. First, the courts view unconscious discrimination as less morally reprehensible than intentional discrimination, and they are therefore somewhat hesitant to punish it under the same framework that Title VII creates.[140] Second, courts see an employer's organizational structure and business-related choices as matters exclusively within an employer's expertise and do not want to intervene.[141] Finally, many courts feel resignation because of the ease with which

135. *See id.* at 1056 ("[I]f the goal is application to the law, implicit prejudice research does not yet pass minimum standards of reliable science."); *see also* Justin D. Levinson, Huajian Cai, & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 187–88 (2010) ("Legal analysts have implicitly assumed that existing social cognition measures, many of which are carefully developed and rigorously tested (but not developed with the law in mind), are the only options for theory development in the legal context."); Wexler et al., *supra* note 125, at 3 ("[I]t is premature to incorporate the theory of implicit bias into employment discrimination law.").

136. Mitchell & Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, *supra* note 121, at 1032–33.

137. *See* Green, *supra* note 98, at 105; Lee, *supra* note 3, at 482.

138. *See supra* Part I.A. While the disparate impact framework may arise due to an unintentional effect of a business practice, the employer is likely at least somewhat aware of any impact on protected groups. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) (noting that some unintentionally discriminatory employment practices may arise to the functional equivalent of intentional discrimination).

139. *See, e.g.*, Lee, *supra* note 3, at 483; *see also* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1332–33 (1998) ("[N]either our cultural understandings nor our jurisprudential models of discrimination illuminate or provide ways to reckon with [subtle, incremental forms of discrimination]."); Wexler et al., *supra* note 125, at 2 ("Importing the theory of implicit bias into the jurisprudence of employment law would require an equally nuanced and complex approach.").

140. *See* Poirier, *supra* note 109, at 461; Ritenhouse, *supra* note 23 (pointing out the judiciary's refusal to recognize several forms of employment discrimination).

141. *See* Green, *supra* note 98, at 118; Green & Kalev, *supra* note 101, at 1460; *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 999 (1988) ("[C]ourts are generally less competent than employers to restructure business practices and [therefore should not attempt to do so]." (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978))).

employers can pass the buck and say that any discriminatory impact created by implicit biases was entirely beyond their control, effectively creating an affirmative defense to allegations of discrimination[142]—they do not want to spend time creating a remedy and wasting judicial resources when nearly zero likelihood of employee success exists.

2. Supporting Implicit Bias: The Evolution of the Law

One of Title VII's main goals was to combat all forms of discrimination against members of protected groups.[143] As such, supporters argue that recognizing implicit bias as a form of Title VII employment discrimination would be fully compatible with the intent of the sponsors and major proponents of the Civil Rights Act of 1964.[144] A new interpretation that recognizes unconscious discrimination would support Title VII even better than a refusal to acknowledge the impact of implicit biases on decisionmaking processes, because it would reflect the current state of discrimination in the workplace.[145]

Additionally, if Title VII is to be viewed as a living statute that changes with social and behavioral developments, supporters assert that the invidious intent model of antidiscrimination laws represents an outdated view that runs contrary to the scientific studies.[146] Further, as supporters point out, the EEOC has incorporated "unconscious stereotypes" into its definition of intentional discrimination.[147] Noting that the judiciary's interpretation of Title VII generally lags behind modern social trends,[148] supporters argue that the courts should consider these new scientific

142. Green & Kalev, *supra* note 101, at 1459–60; Ritenhouse, *supra* note 23 ("Deliberate racism has been replaced by cognitive bias that influences the decision making and interactions involving [minority] workers.").

143. *See supra* notes 3, 23 and accompanying text. Compare this goal to the general observation that employees bringing claims against their employers for employment discrimination have an exceedingly slim chance of success. *See, e.g.*, Ritenhouse, *supra* note 23; Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1153 (2008) (noting the hurdles that employees bringing Title VII employment discrimination cases face at all stages of litigation).

144. *See* Lee, *supra* note 3, at 488; Shin, *supra* note 24, at 84.

145. Ritenhouse, *supra* note 23.

146. *See* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 753 (2001); Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 418 (2000); *see also* Paterson et al., *supra* note 86, at 1181 ("[T]oday's Court continues to operate in this 'imaginary world' despite mounting evidence that the Intent Doctrine is not only outdated, but almost entirely ineffective in addressing racial discrimination or inequality."); Ritenhouse, *supra* note 23 ("[C]ourts have lagged behind in addressing the prevalence of subtle racial discrimination that plagues today's minority employees."). Viewing the intent requirement as the exception, rather than the rule, may bring American antidiscrimination jurisprudence into line with that of other countries. *See* Paterson et al., *supra* note 86, at 1196–97 (identifying Canadian law, South African law, and several international treaties that do not require intent).

147. *See Questions and Answers About Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/policy/docs/qanda_race_color.html (last updated May 16, 2006).

148. *See, e.g.*, Paterson et al., *supra* note 86, at 1186; Ritenhouse, *supra* note 23.

findings in their Title VII jurisprudence, rather than allow these findings to be entirely disregarded or viewed too skeptically.[149] Alternatively, supporters urge Congress to amend Title VII to reflect these modern trends.

Finally, over the nearly fifty years since the enactment of the Civil Rights Act of 1964, employers have discovered the types of liability they face for discriminatory employment decisions. Now that these employers have the skill and ability to avoid "documenting, outwardly expressing, or retaining" evidence of any infringement of Title VII,[150] supporters suggest that recognizing implicit bias would send a message that the government is serious about ending discrimination and is willing to hold these clever employers liable for their conduct, intentional or not.[151]

II. IMPLICIT BIAS AND THE COURTS: IS IT REALLY EMPLOYMENT DISCRIMINATION?

Given Title VII's historical application to cases of overt or invidious employment discrimination,[152] the courts have not found a uniform way to recognize discrimination based on implicit bias. While some courts have recognized implicit bias under Title VII, an almost equal number of courts have not. This Part presents a number of cases exemplifying each approach.

A. Rejecting Implicit Bias Claims: The Ambiguities of Employment Decisions

Several courts have recognized the difficulties inherent in determining whether alleged employment discrimination resulted from unintentional stereotypes and attitudes or permissible discretion and legitimate business decisions. On several occasions, these courts have determined that nondiscriminatory reasons, rather than any implicit biases, led to an employment decision. These courts also typically reject the notion that implicit biases influence employment decisions at all. This section explores a sample of recent cases decided by the Supreme Court and two district courts where implicit biases could have played a part in employers' decisions, but where the courts have not felt the need to address such biases.

149. *See* Shin, *supra* note 24, at 80 ("If one were to approach the statute afresh rather than through the lens of Supreme Court precedent, one might very well read it to permit the imposition of liability for unconscious bias."); Ritenhouse, *supra* note 23 ("The plain language of Title VII does not mandate proof of purposeful or intentional discrimination."). *See generally* Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009) (arguing that social framework testimony on stereotyping and bias should be allowed to expand Title VII's reach).

150. Lee, *supra* note 3, at 488*; see also* Ritenhouse, *supra* note 23 ("[D]ecision makers have become more and more sophisticated in hiding discriminatory intentions.").

151. *See* Lee, *supra* note 3, at 488.

152. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (noting the traditional requirement of intent for Title VII employment discrimination claims).

In *Wal-Mart Stores, Inc. v. Dukes*,[153] the Supreme Court heard an appeal in a class action lawsuit regarding a pattern and practice of discrimination against female Wal-Mart employees.[154] The putative class consisted of 1.5 million female employees[155] claiming that a pattern and practice of discrimination existed against women because pay and promotion decisions were left to local managers' broad, subjective discretion.[156]

Writing for the majority, Justice Scalia expressed some skepticism when explaining the circumstances surrounding the named plaintiffs.[157] The majority found that, without further, specific proof of nationwide discrimination, most store managers could not possibly have discriminated against all employees throughout the country because Wal-Mart's employment policies specifically forbade discrimination on the basis of gender (and imposed penalties for violations).[158] Highlighting an additional problem, Justice Scalia noted that, even if the class action were to go forward, all managers would simply claim that they applied "sex-neutral, performance-based criteria" to rebut any claim of discrimination.[159] Rather, the plaintiffs were required to identify a specific employment practice.[160] Ultimately, the Court refused to certify the class.[161]

One of the most recent rejections of an implicit bias legal theory occurred in *Pippen v. Iowa*, a class action lawsuit in which African American state employees brought claims of disparate impact against the thirty-seven departments of the state executive branch regarding the administration of Iowa's merit-based employment hiring and promotion system.[162] The crux of the employees' claim was that the merit-based system was designed to

153. 131 S. Ct. 2541 (2011).

154. *Id.* at 2547–48.

155. *Id.* at 2547.

156. *Id.* at 2548 ("[Wal-Mart's] strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers.").

157. *See id.* at 2547–48. For example, Betty Dukes was promoted and then later demoted after several disciplinary actions. *See id.* at 2547–48. Similarly, Christine Kwapnoski held a number of positions, which included a supervisor position, but complained that the managers only screamed at the female employees and made several sexist comments. *See id.* Finally, Edith Arana claimed that she was ignored by her store manager when inquiring about management training, but failed to apply directly for the position after being told, and was later fired for violating Wal-Mart's timekeeping policy. *See id.* Moreover, Justice Scalia found a social science analysis regarding the impact of stereotypes on employment discrimination to be too vague to provide sufficient evidence to establish this class. *See id.* at 2553.

158. *Id.* at 2554–55 ("Left to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."); *see also id.* at 2553. Wal-Mart also had another policy of allowing local management the discretion to deal with local employment matters. *See id.* at 2554.

159. *Id.* at 2555.

160. *See id.*

161. *See id.* at 2561.

162. Pippen v. Iowa, No. LACL107038, slip op. at 1 (Iowa Dist. Ct. Apr. 17, 2012), *appeal filed*, No. 12-0913 (Iowa Ct. App. May 16, 2012).

limit opportunities for African American employees,[163] and it had effectively succumbed to favoritism, excluding the African American employees in violation of Title VII and the Iowa state law equivalent.[164]

Iowa's executive branch is divided into thirty-seven departments of varying responsibilities and funding, each possessing independent hiring authority.[165] The merit-based system serves as a guidepost for each of these departments, requiring them to make all personnel decisions "solely on the basis of merit and fitness, to be ascertained by examinations or other appropriate screening methods."[166] The Department of Administrative Services (DAS) oversees the process for the entire executive branch and has the responsibility of developing guidelines for efficient employment decisionmaking, as well as overseeing the proper implementation of the guidelines in each department.[167] The DAS carries out its duties by monitoring compliance throughout the executive branch, taking action to enforce the guidelines when necessary,[168] and collecting data throughout the state regarding Iowa's state employee affirmative action practices.[169] All job applicants similarly submit their applications through the DAS's online system, or occasionally by hard copy.[170] Despite the DAS's role, each department still retains autonomy regarding all hiring and promotion decisions.[171]

The DAS's overall system can be divided into three steps that become increasingly more particularized the further along a candidate advances.[172] Once a given candidate advances past the DAS's referral round, the departments are given greater leeway to individualize the screening and interview process based on specific job-related needs.[173]

The class members' anecdotal evidence included a number of situations in which they were incorrectly classified during the screening process, such

163. *See id.* at 3. The class claim also highlights that the decisionmaking process was largely subjective and discretionary. *Id.* at 4.

164. *See id.* at 3.

165. *See id.* at 17.

166. *Id.*

167. *See id.* at 18.

168. *See id.* at 19.

169. *Id.* at 21. The DAS's data collection falls into three categories. First, it collects "job information," which includes the basics regarding the type of job, what minimum requirements applicants must meet, and pay. *See id.* Second, the DAS collects "applicant information," such as the age, race, and gender data provided by each applicant. *See id.* Finally, the DAS collects "application information," which includes which individuals are competing for a job, how far along in the hiring process each applicant made it, and, occasionally, why a given applicant was not selected. *See id.*

170. *Id.* at 22.

171. *Id.* at 20, 22.

172. *See id.* at 21–22. In the "Step One" referral process, the DAS screens all applicants to determine whether they meet the minimum requirements for the available job, advancing all qualified applicants to the relevant executive branch department's individual hiring department. *Id.* at 21–22. In "Step Two," the hiring department performs its own screening process and selects potential candidates for interviews. *Id.* at 21. Finally, "Step Three" consists of the actual interviews and selection of candidates for hire or promotion. *Id.*

173. *Id.* at 22–23 ("[P]ractices and procedures become more individualized to a given department and a particular job.").

that they were effectively (and improperly) removed from consideration for an open position despite their qualifications. Caucasian employees (and one Asian employee) were not alleged to have received the same treatment.[174] In addition to the submission of statistical data,[175] the class presented testimony regarding implicit bias from Dr. Anthony Greenwald and Dr. Cheryl Kaiser to further bolster their claim.[176] Dr. Greenwald mainly focused on the IAT[177] and his findings that all persons possess some level of implicit bias towards one race or another.[178] Dr. Kaiser, on the other hand, focused on the range of implicit and explicit biases that everyone possesses,[179] as well as how implicit biases could pervade subjective decisionmaking in ambiguous situations.[180] Though stating that the merit-based system was specifically designed to avoid discrimination, the DAS also recognized that biases could potentially invade the hiring process.[181]

Although the court considered the legislative history of Title VII and briefly addressed the changing nature of discrimination,[182] the court still noted both the uniqueness of the class's claims[183] and the lack of precedent for its legal theory.[184] While the court's main holding rejected the class's claims because of a failure to identify a specific employment practice,[185] the court also looked to whether the class could prove causation, even if the entire hiring process could be considered inseparable.[186] After finding errors and ambiguities in the statistical analyses,[187] the court turned its attention to the implicit bias testimony.[188] First, the court generally focused on how implicit bias does not necessarily translate into actual prejudicial

174. *See id.* at 24–27. In some instances, the DAS incorrectly reported an applicant as unqualified, and, when informed of the error, stated that the hiring department already had another candidate in mind. *See id.* at 24–25. Other instances saw candidates rejected based upon criteria that were not included in the provided job description or based upon factors that were not evaluated during the interview process. *See id.* at 25–27. Still other class members stated that they did not believe they were the most qualified for the job, or were rejected for reasons such as trying to work outside the hiring system. *See id.* at 26–27. On one occasion, the department ceased hiring for a certain position altogether after a white applicant declined the offer. *Id.* at 26.

175. *See id.* at 31–36.

176. *Id.* at 27–31.

177. *Id.* at 28.

178. *Id.*

179. *See id.* at 30.

180. *See id.* Dr. Kaiser also highlighted how racial cues pervade resumes even when the employer has not seen the applicant. *Id.* at 31.

181. *Id.* at 18.

182. *See id.* at 5.

183. *Id.* at 36.

184. *Id.* at 37.

185. *See id.* at 46 ("The 'entire hiring process' is not a particular employment practice.").

186. *Id.* at 47.

187. *See id.* at 47–51. For example, the court determined that the class's statistical data regarding disparities in hiring and promoting African Americans did not consider how African American job applicants typically applied to more jobs overall than Caucasian applicants. *Id.* at 50.

188. *See id.* at 52.

behavior.[189] Next, the court determined that any IAT results were inadmissible because there was no evidence that any Iowa decisionmakers took the IAT[190] and because Dr. Greenwald did not evaluate any hiring files for the Iowa state employees.[191] The mere plausibility that implicit bias could have played a role in the decisions was insufficient to show causation,[192] especially when the class conceded that subjectivity and implicit bias could not be eliminated completely from the employment decisionmaking process.[193] Because of the extreme variability and uncertainty as to actual causation, the class's disparate impact claim was rejected.[194]

Third, in *Thomas v. Eastman Kodak Co.*,[195] Myrtle Thomas brought a disparate treatment claim of employment discrimination against her former employer, Eastman Kodak (Kodak).[196] Thomas was laid off after working in the same office for thirteen years. She was the only African American customer support representative.[197]

The District of Massachusetts found that Kodak used a "Performance Appraisal" system to evaluate and reward each employee for meritorious job performance.[198] Thomas's evaluations were largely positive and also showed that she received several awards and bonuses for her job performance.[199] Kodak eventually decided to create a new management position, to which Thomas applied.[200] However, Thomas's application was denied on the basis that she was unqualified, and a secretary named Claire Flannery was hired instead.[201] Flannery's promotion put her in a position to review Thomas, and was followed by several clashes between Thomas and Flannery.[202] When Thomas received her annual evaluation that year, she discovered that Flannery gave her a lower rating than all of the other customer service representatives.[203] Flannery claimed that Thomas could not receive a score higher than three because of the recent change in

189. *See id.* at 29.
190. *Id.*
191. *Id.* at 30.
192. *See id.* at 54 (calling the social science testimony an "opinion of conjecture, not proof of causation"). Dr. Greenwald was also unable to rule out other race-neutral causes for the employment decisions. *See id.* at 30.
193. *Id.* at 53. Ultimately, the court chose to defer to employers' expertise in the business world, rather than getting involved. *See id.*
194. *See id.* at 51 ("The causes could be anything as egregious as explicit bias or as benign as extremely specific job requirements.").
195. 18 F. Supp. 2d 129 (D. Mass. 1998), *rev'd*, 183 F.3d 38 (1st Cir. 1999).
196. *Id.* at 131.
197. *Id.*
198. *See id.* (describing that the appraisal system rated each employee numerically in several areas, but also considered written comments).
199. *Id.*
200. *Id.* at 132.
201. *Id.* At the time, Thomas was studying for a master's degree in business and was more senior than Flannery. *Id.*
202. *See id.* For example, Flannery gave Thomas the wrong time for a customer meeting and then refused to explain the incident to the customer. *Id.*
203. *Id.*

Thomas's wage grade at Eastman Kodak.[204] Regardless, Thomas still received pay raises for two of the three years she worked under Flannery, even though she was eventually laid off, as a result of her lower scores.[205]

Finding for Kodak, the court determined that Thomas provided insufficient evidence to prove that Flannery was motivated by racial animus when annually evaluating Thomas's performance.[206] As such, the court found that Flannery and Thomas merely had conflicting personalities.[207] Thus, without a showing of discriminatory animus, the court declined to say that Thomas was discriminated against based merely on a presumably unfriendly office environment and suspiciously unfair treatment by an immediate supervisor.[208]

B. Recognizing Implicit Bias in the Courts: More Than Mere Discretion

While the Supreme Court and some lower courts have been hesitant to recognize the existence of implicit bias in cases alleging employment discrimination, such reluctance is not universal. This section explores representative cases from various federal courts that have acknowledged not only the phenomenon of unconscious bias, but also the cognitive science research examining implicit biases and their effect on employment decisions.

In *Hopkins v. Price Waterhouse*,[209] the D.C. Circuit confronted one of the earliest cases dealing with mixed-motive discrimination.[210] At the time, a senior partner and a policy board, elected by all Price Waterhouse partners, controlled all of the company's business-related decisions.[211] Many partners were hired from within the company, through a formal review process.[212] Once nominated for partnership, a candidate's name was circulated to all partners, who then had the chance to comment on the candidate's job performance.[213] Partners who worked closely with the candidate were permitted to fill out a detailed "long-form" evaluation, while those who did not only filled out a "short-form" evaluation.[214] Each evaluation provided reasoning for why the candidate should or should not be promoted.[215] Once all evaluations were complete, a committee prepared a summary of all comments, added its own recommendations, and then provided these materials to the policy board.[216] Upon review of the

204. *Id.* Kodak had no such policy. *See id.*
205. *See id.* at 131–32.
206. *See id.* at 138.
207. *See id.*
208. *Id.*
209. 825 F.2d 458 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989).
210. *Id.* at 470.
211. *Id.* at 461.
212. *See id.*
213. *Id.* at 462.
214. *Id.*
215. *Id.*
216. *See id.*

materials, the policy board voted on the candidate, considering both individual merit and the business needs of the firm.[217]

Ann Hopkins, the sole female employee in the Office of Government Services, was passed over for partner despite her outstanding qualifications[218] and praise from the partners in her department.[219] Ultimately, the policy board's rejection commentary pointed to Hopkins's aggressive personality and her lack of interpersonal skills with clients and other staff members alike.[220] Her defenders within the policy board, however, stated that many male candidates and partners were much worse than Hopkins, and that she would be an excellent partner if the policy board could ignore her "macho" characteristics.[221]

Without outright denying Hopkins's bid for partner, the policy board determined that she needed to undergo a "quality control review." This review would assuage any concerns, and would permit her to demonstrate her skills to the partners by working more closely with them.[222] To give Hopkins a little extra help, one of the partners even told her that she should act and dress more like a woman to help reduce her macho image.[223]

On the one hand, the lower court found that the criticism of Hopkins's aggressive personality was genuine and unrelated to her gender.[224] However, the court also found that the Price Waterhouse corporate culture was rife with sexual stereotyping, which the firm took no action to discourage.[225] In the end, the district court determined that it would be unable to evaluate the exact effect that gender stereotyping played on Price Waterhouse partnership decisions.[226]

Relying on the testimony of an expert on stereotyping, Dr. Susan Fiske,[227] the D.C. Circuit found that the "disappointed stereotypical expectations of male partners played a 'major determining role' in the firm's decision not to make Hopkins a partner."[228] Finding an intent requirement less necessary, the court looked to the sophistication and

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217. *Id.*

218. *See id.* The district court noted that, not only was Hopkins a skilled businesswoman capable of generating business and closing high-profile contracts for the firm, but she also brought in the most business in the year she was considered for partner and billed more hours than any other partner candidate. *Id.*

219. *See id.* Citing her past performance, the partners provided a "flattering appraisal of her work," and enthusiastically pushed for Hopkins's promotion to partner. *Id.*

220. *See id.* at 463 (noting that the policy board found Hopkins "overly aggressive, unduly harsh, impatient with staff, and very demanding").

221. *Id.*

222. *Id.* However, this quality control review would prove futile for Hopkins once her supervising partners later became opposed to her candidacy for partnership. *See id.*

223. *Id.* ("[The partner] advised her to walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.").

224. *See id.* at 464.

225. *Id.*

226. *See id.* at 464–65

227. *Id.* at 465, 467. Dr. Fiske's testimony highlighted the combination of factors that supported Hopkins's claim of stereotyping, such as the lack of other female candidates, ambiguous criteria for partnership, and the lack of objective standards. *See id.*

228. *Id.*

educational background of the alleged discriminators and decided that stereotyping is much less excusable for individuals with the experience and education that Price Waterhouse partners possessed.[229] Finally, by emphasizing the unintentional form that stereotyping sometimes takes, the D.C. Circuit broke new ground by stating that unconscious or unintentional discrimination is equally as serious and harmful as overt, invidious discrimination. As such, the court had an equal duty to protect against this unconscious discrimination.[230]

Meanwhile, on appeal from the district court's decision, the First Circuit handled the facts of *Thomas v. Eastman Kodak Co.*[231] very differently from the district court. First, the court highlighted that Thomas was the only African American customer service representative working for Eastman Kodak's Wellesley office at the time.[232] Further, the court delved deeper into an analysis of Eastman Kodak's evaluation process.[233] For example, the First Circuit noted that the evaluations were placed on a company-wide curve that ranked the employees.[234] Moreover, the First Circuit placed greater weight on Thomas's past performance than the district court. The First Circuit also highlighted that: (1) Thomas's office was never dissatisfied with her work prior to Flannery's arrival, (2) Eastman Kodak evaluated Thomas to perform at a level above and beyond her colleagues, and (3) Thomas received praise from both her customers and her coworkers.[235]

The First Circuit stated that the requirements of disparate treatment could be satisfied even if an employer discriminates based on unconscious biases,[236] notably shifting away from the court's past requirements of invidious intent to discriminate. Denouncing the district court's conclusion that Flannery's behavior merely showed evidence of an unwelcoming office environment and a personality conflict with Thomas,[237] the First Circuit noted that Flannery's behavior was also possibly inappropriate and unprofessional.[238] Relying purely on the change in Thomas's evaluation scores pre- and post-Flannery, the First Circuit held that strong evidence of discrimination existed,[239] reversing the district court's dismissal of Thomas's claim.[240]

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229. *See id.* at 468.
230. *See id.* at 469 ("[T]he 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.").
231. 183 F.3d 38 (1st Cir. 1999).
232. *Id.* at 42.
233. *See id.* at 44.
234. *Id.*
235. *See id.* at 43.
236. *See id.* at 58.
237. *See id.* at 64; *see also supra* Part II.A.
238. *See Thomas*, 183 F.3d at 64.
239. *Id.* at 62.
240. *Id.* at 65.

Most recently, the Eastern District of Wisconsin considered the role of implicit bias in employment decisions in *Kimble v. Wisconsin Department of Workforce Development*.[241] In *Kimble*, an African American supervisor working in the Equal Rights Division (ERD) for twenty-nine years, brought suit against his employer, the Wisconsin Department of Workforce Development, alleging race and gender discrimination after he was denied a raise.[242]

The Court found that, while the ERD had provisions for awarding merit-based raises and bonuses,[243] these provisions were extremely general, necessitating the addition of actual criteria.[244] However, the ERD never established any specific policies.[245] As a result, the ERD essentially had free reign to subjectively decide when to award raises and bonuses, without any objective checks against the decisionmaker's biases. The ERD's chief decisionmaker, J. Sheehan Donoghue, who had no first-hand experience with Kimble,[246] determined that Kimble's performance did not merit a raise,[247] claiming to have relied on the annual evaluations of Kimble's other supervisors.[248]

However, at trial, no supervisors stated that they were asked for any recommendations.[249] Moreover, had Donoghue consulted these recommendations as she claimed, she would have seen that Kimble's reviews were mostly positive.[250] But Donoghue was so detached from Kimble that she failed to realize that he felt neglected at work,[251] instead viewing him as an incompetent employee.[252]

Finding that Donoghue discriminated against Kimble, the court relied on the subjectivity of Donoghue's decisionmaking process and the lack of any meaningful review of her decisions.[253] Given these factors, the court found an opening through which any biases or stereotypes could infect the decisionmaking process.[254] Specifically, this court became the first to explicitly recognize and rely on implicit bias cognitive studies in reaching its holding.[255]

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241. 690 F. Supp. 2d 765 (E.D. Wis. 2010).
242. *Id.* at 767.
243. *Id.* at 768.
244. *See id.* at 772.
245. *Id.*
246. *See id.* In fact, the extent of Donoghue's direct contact with Kimble occurred on the occasions when she used his office to store her purse and papers while on site. *See id.* at 776.
247. *Id.* at 772.
248. *Id.* at 773.
249. *Id.*
250. *Id.*
251. *See id.* at 777 (noting that Kimble was unable to participate at any employment meetings without having another employee corroborate what he was saying).
252. *Id.* at 776–77.
253. *See id.* at 776.
254. *See id.* ("Individuals draw lines and create categories based in part on race, gender and ethnicity, and the stereotypes they create can bias how they process and interpret information and how they judge other people.").
255. *See Kimble*, 690 F. Supp. 2d at 776 (citing the major literature on implicit biases).

III. THE NECESSITY OF JUDICIAL INTERVENTION

Currently, there is no easy way to incorporate implicit bias into employment discrimination law. Practically, Congress is so deadlocked in general that a bipartisan agreement to make a major structural change to Title VII seems unrealistic,[256] and Congress would likely wait for intense public support before even considering this type of reform.[257] However, now is a perfect time for a judicial intervention, or at least a willingness to explore possible solutions to this newly identified type of employment discrimination. Although courts have expressed an unwillingness to intervene in matters best left to employer discretion,[258] they have previously taken it upon themselves to modify the Title VII framework to address newly discovered forms of discrimination.[259]

First, this Part argues that the cases presented in Part II.A were improperly decided, because the courts failed to seriously consider the effects of implicit bias. Additionally, this Part asserts three reasons—purposivism, textualism, and consistency through the Title VII legal framework—that favor the judiciary using Title VII as an interventional means to eliminate unconscious bias in the employment setting. Next, this Part demonstrates that judicial intervention is necessary if the courts want to serve the main aim of Title VII—eliminating *all* forms of employment discrimination. Then, this Part advocates that a broader interpretation of the language of Title VII is applicable to cases alleging implicit bias–induced employment discrimination. Finally, this Part explains how the current burden-shifting framework under disparate impact, disparate treatment, and mixed-motive cases can be applied with equal force and minimal changes to cases alleging implicit bias as a form of employment discrimination.

A. The Pervasiveness of Implicit Bias: Why They Got It Wrong

While cases like *Dukes*, *Pippen*, and *Thomas* clearly recognize the practical difficulties of identifying implicit bias in potential instances of employment discrimination,[260] each makes the faulty assumption that the impact of implicit biases is so negligible or its existence so unlikely that it could be ignored entirely.

This major flaw in the *Dukes* Court's reasoning[261] was obvious, as Justice Scalia tried to ascertain the male managers' motivations and effectively rejected the possibility that the store managers had an improper motive, unconscious or otherwise.[262] By refusing to consider the proposition that the Wal-Mart managers could have discriminated against the female employees, the *Dukes* majority equally rejected the notion that

256. *See, e.g.*, *supra* note 30.
257. *See supra* notes 27–29 and accompanying text.
258. *See supra* notes 140–42 and accompanying text.
259. *See supra* Part I.A.
260. *See supra* Part II.A.
261. *See supra* notes 153–61 and accompanying text.
262. *See supra* note 158 and accompanying text.

implicit biases are pervasive throughout society[263] and have a real impact on decisionmaking.[264] On the other hand, Justice Ginsburg's opinion demonstrated the possibility of recognizing implicit bias, while still denying relief to a gigantic class of individuals.[265]

The *Pippen* court went to similar extreme ends to avoid giving credence to the implicit bias theory in a massive class action suit against the entire state executive branch.[266] The crux of the error that the Iowa state court made in this case stemmed from that court's refusal to find causation based upon the statistical evidence and cognitive studies on implicit bias.[267] By refusing to treat Dr. Greenwald's implicit bias analysis seriously, the Iowa state district court essentially found that—despite the plausibility[268] that implicit bias played a role in the executive branch's hiring practices—the lack of specific IAT data regarding the implicit attitudes of Iowa state employees was compelling enough to totally disregard the entire theory.[269] The court, in effect, supported the view that for an implicit bias theory to succeed, the employer whose practices are at issue should be required to take the IAT. This view presents the practical problem, however, of invading the privacy of the employers at issue. If the court willingly accepted other criticisms of the IAT, it surely would have recognized that forcing the IAT upon employers would impede business duties, and would fall back on the popular reasoning that everyone has implicit biases.[270]

Moreover, the Iowa state district court in *Thomas* made the equally faulty assumption that, even though Thomas was the only African American customer support representative at the Wellesley Kodak office, Thomas's treatment by Flannery was due only to their incompatible personalities and an unfriendly (but not discriminatory) workplace.[271] Here, the court essentially rejected the premise of the social contact theory, which states

263. For a discussion on the pervasiveness of implicit bias, see *supra* notes 93–97 and accompanying text.

264. *See supra* Part I.B.2.

265. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561, 2563–64 (2011) (Ginsburg, J., concurring in part and dissenting in part). Though not dispositive of bias, suspicions are raised by the fact that a large majority of Wal-Mart's managerial positions are occupied by men, who are left to make "arbitrary and subjective" managerial decisions. *Id.* at 2563. Without any specific criteria for setting wages, there are no checks upon the unconscious biases that may have infected these subjective decisions. *See id.* at 2564. To dispose the claim, Justice Ginsburg stated her belief that the class was certified under the wrong subsection of Federal Rule of Civil Procedure 23. *See id.* at 2561.

266. *See supra* notes 162, 194 and accompanying text.

267. *See supra* notes 187–93 and accompanying text.

268. Plausibility is greater than a mere possibility. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (highlighting the need to state additional facts to cross the line from mere possibility to plausibility).

269. *See supra* notes 190–92 and accompanying text. The District of Massachusetts also appeared to accept the views criticizing the validity of the IAT, despite the myriad legal scholarship in support of its findings. *See supra* Part I.C.2.

270. *See supra* Part I.B.1–3 (discussing the pervasiveness of implicit bias); *supra* note 125 (noting the self-fulfilling prophecy of unconscious discrimination).

271. *See supra* notes 207–08 and accompanying text.

that contact with diverse individuals reduces the impact of implicit bias.[272] Because Thomas was the only African American employee in that office, it would have been more prudent of the court to be skeptical of Flannery's motives, rather than deferential to them.[273]

By rejecting the social science findings and, thus, evidence of the existence of implicit bias, the courts in each of these three cases effectively undermined Title VII's primary goal of eliminating all forms of discrimination.[274] Without an expansion of Title VII to cover implicit bias, many employees remain powerless to seek a remedy for this type of employment discrimination. This is especially true when virtually no court is willing to experiment with variations on the accepted legal framework to develop a workable manner in which to recognize a remedy for discrimination caused by implicit bias.

B. Ending All Forms of Employment Discrimination Means Recognizing That Discrimination Is Not Only Based on Conscious Intent

Judicial recognition of implicit biases within the Title VII framework would greatly further the legislative goals of the Civil Rights Act of 1964.[275] This would not be the first time that the judiciary has taken an active role in expanding Title VII when new, potentially harmful and discriminatory employment practices are revealed.[276] Given the cognitive science research on implicit biases, such a development has been brought to the courts' attention on several occasions.[277]

Title VII's broad purpose is to end all forms of employment discrimination.[278] When the Supreme Court recognized that certain aptitude tests served no legitimate purpose and had the effect of depriving protected groups of employment opportunities, it adopted the disparate impact formulation.[279] Similarly, both the courts and Congress adopted the mixed-motive framework upon recognizing that an employer could escape

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272. *See supra* notes 113–14 and accompanying text.

273. Clearly the First Circuit decided to take this route, similar to how the D.C. Circuit expressed skepticism of the Price Waterhouse partners' decisions in *Hopkins v. Price Waterhouse*, 825 F.2d 458, 471–72 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989). *See supra* Part II.B.

274. *See supra* notes 143–44 and accompanying text.

275. *See supra* notes 143–44 and accompanying text.

276. *See supra* Part I.A.2–3. Further, the judiciary has, both in the past and presently, shown a willingness to treat antidiscrimination law flexibly. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) (calling for a flexible application of the burden-shifting test outlined in the decision); Pippen v. Iowa, No. LACL107038, slip op. at 3 (Iowa Dist. Ct. Apr. 17, 2012) ("The question here is not so much whether the law of equal rights will evolve—it will."), *appeal filed*, No. 12-0913 (Iowa Ct. App. May 16, 2012); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 950 (2005) (noting that the Supreme Court's decision in *Desert Palace, Inc. v. Costa* abandoned a structural analysis in favor of a more flexible approach to proving Title VII employment discrimination cases premised on a disparate impact theory).

277. *See supra* Part II.

278. *See supra* note 143 and accompanying text.

279. *See supra* Part I.A.2.

liability for an employment decision that was motivated by discriminatory animus, but tempered by a legitimate business purpose.[280] Once again, with the legal impact of implicit biases becoming more prevalent and contentious,[281] the courts must adopt a new framework to protect employees from a newly discovered form of discrimination.[282]

Subjective hiring and promotion decisionmaking have much the same effect as an aptitude test,[283] and is full of opportunities through which implicit biases can infect employers' choices.[284] With both subjective decisionmaking and aptitude tests, employees protected under Title VII suffer a disadvantage, because these practices allow employers to discriminate without actually intending to do so.[285] Regardless, the elimination of all types of employment discrimination necessarily includes protecting employees against the effects of unconscious discrimination. Thus, judicial recognition of, and protection against, implicit biases is wholly inherent in any purposive interpretation of Title VII.[286]

C. The Plain Language of Title VII Supports Broadening Its Reach

Title VII, in its current incarnation, does not read as an outright bar to recognizing implicit bias.[287] Rather, Title VII can—and should—be read more broadly by the courts to recognize that a case need not involve intentional discrimination to merit a remedy. Cases like *Kimble* and the First Circuit's handling of *Thomas* demonstrate that Title VII is capable of remedying the impact of implicit biases without radically rewriting the Civil Rights Act of 1964.[288]

First, looking to § 2000e-2(a), the only indicator of intent is the prohibition against discriminating "because of" race and other protected characteristics.[289] A strict reading of this phrase interprets "because of" to require overt discrimination against a member of a protected group.

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280. *See supra* Part I.A.3.

281. *See supra* Part II.

282. In addition to adapting the framework of traditional Title VII employment discrimination claims in cases of disparate treatment, disparate impact, and mixed-motive discrimination, the courts have also recognized new causes of action under Title VII, such as sexual harassment claims, despite Congress's failure to specifically provide for such relief. *See, e.g.*, Barbara L. Zalucki, *Discrimination Law—Defining the Hostile Work Environment Claim of Sexual Harassment Under Title VII*, 11 W. NEW ENG. L. REV. 143, 144–45 (1989).

283. *See supra* Part I.B.2.

284. *See supra* notes 110–12 and accompanying text.

285. *See supra* Part I.A.2, I.B.3. Although employers may be more aware of a discriminatory effect in disparate impact cases, this is not necessarily so. Regardless, protected classes of employees face an adverse impact because of an employment practice that is not facially discriminatory. *See supra* Part II.B. The inclusion of subjective employment practices in the disparate impact framework furthers this conclusion. *See supra* note 62 and accompanying text.

286. This is especially true if one believes that implicit bias is as pervasive as the social science studies suggest. *See supra* notes 93–97 and accompanying text.

287. *See* Ritenhouse, *supra* note 23; *supra* note 149 and accompanying text.

288. *See supra* Part II.A. However, neither the *Kimble* court nor the First Circuit in *Thomas* provided a textual analysis of Title VII. *See supra* Part II.B.

289. *See* 42 U.S.C. § 2000e-2(a) (2006). For the text of this section, see *supra* note 22.

However, a broader reading of the phrase "because of" encompasses other situations where the discrimination occurs as a result of any type of bias.[290] In fact, discriminating "because of" a protected characteristic must include implicit bias–induced discrimination that causes the employer to treat an employee differently. Though the intent to discriminate is often unconscious when implicit bias is involved, implicit bias may still lead decisionmakers to act in a certain discriminatory way.[291] Further, though the courts are hesitant to punish behavior over which an employer may not have control, individuals that possess implicit biases are not helpless[292]—if anything, recognition of implicit bias liability will lead decisionmakers to take active steps to ensure that their decisions are legitimate.

Second, § 2000e-2(a) also encompasses any other decisions that "adversely affect" an employee's status.[293] Again, an adverse effect need not be caused by an obvious and invidious intent to discriminate.[294] Any type of bias that arises out of an unconscious attitude or stereotype that the employer possesses can cause an adverse effect.[295] A decision to promote a Caucasian employee over an African American employee merely based on a gut instinct rather than a bona fide difference in qualifications still causes an adverse effect that would not otherwise exist if both employees were Caucasian. The African American employee must then establish that implicit bias impacted the employer's decision, showing that this effect actually did occur because of the African American employee's race. Thus, a broad reading of "adversely affect" encompasses implicit biases, without the need to radically alter Title VII.[296]

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290. For example, in *Kimble v. Wisconsin Department of Workforce Development*, 690 F. Supp. 2d 765 (E.D. Wis. 2010), Kimble's treatment in the Department of Workforce Development occurred because of Donoghue's potential implicit biases against him, though he did not face any adverse impact because of a specific act that Donoghue performed. *See id.* at 776; *supra* notes 241–55 and accompanying text; *see also supra* Part I.A.3 (discussing the mixed-motive framework).

291. *See supra* Part I.B.

292. *See supra* notes 106, 113–14, and accompanying text (discussing how deliberation and the social contact hypothesis help to combat the influence of implicit biases).

293. *See* 42 U.S.C. § 2000e-2(a).

294. In *Hopkins v. Price Waterhouse*, Hopkin's status as a Price Waterhouse employee was adversely affected by the policy board's penchant for sexual stereotyping, despite the policy board's lack of knowledge that such stereotyping occurred. 825 F.2d 458, 464 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989). Further, the disparate impact framework recognizes that not all forms of discrimination will be wholly intentional. *See supra* Part I.A.2.

295. *See supra* Part I.B; s*ee also Kimble*, 690 F. Supp. 2d at 765 (explaining how Donoghue's behavior towards Kimble evinced the existence of implicit bias, and how this behavior discriminated against Kimble).

296. Other similar statutes, namely the Americans with Disabilities Act, lend further support to this argument. *See* 42 U.S.C. § 12112(b)(2) (using the phrase "has the effect of"). In this statute, Congress recognized that an employee could be discriminated against regardless of an employer's intent. While discriminating against disabled employees is a serious problem, discrimination based on an employee's status as a minority has a much more prominent and infamous history within this country. However, the argument could also be made that Congress knows how to write a statute to incorporate unintentional discrimination, and that Congress chose not to include this standard in Title VII. Regardless,

D. Shifting Burdens Maintain the Status Quo of Employment Discrimination Claims and Implicit Bias

Because the broad language of Title VII supports considerations of implicit bias, courts merely need to incorporate the implicit bias research into the traditional burden-shifting standard to adequately combat all of forms of employment discrimination. Title VII's legal framework addresses virtually every type of employment discrimination claim.[297] Because of the overall success of this framework, there is little need to change it when recognizing a claim premised on an implicit bias theory. Courts can maintain this framework to preserve Title VII's integrity while still recognizing claims alleging implicit bias discrimination.[298]

Kimble v. Wisconsin Department of Workforce Development is one example of how Title VII jurisprudence can evolve within the current framework.[299] *Kimble* successfully incorporated the social science of implicit bias into the disparate treatment framework without creating any new burden-shifting test.[300]

Instead of requiring employees to present a prima facie case of overt discrimination before shifting the burden to defendants, employees can be required to present evidence of implicit bias in action. This can be achieved by requiring plaintiffs to demonstrate a plausible inference that an implicit bias affected an employer's decision. Evidence supporting this inference may include the employee's treatment at the job and an employment decision inconsistent with the treatment of similarly situated employees. However, merely pointing to an unfavorable employment outcome and a few ambiguous situations that may evidence implicit bias would be insufficient. Thus, employees should be required to demonstrate that they were adversely affected by an overly subjective decisionmaking process that naturally allowed for unconscious employment discrimination.[301] A lack of meaningful oversight and the absence of sufficient guidelines or objective factors to balance out the subjective nature of the decisions would provide additional evidence.[302]

Though employers may not be aware of unconscious discrimination, they would still have the opportunity to rebut presumptions of discrimination by showing that a legitimate business practice or decision was the true reason behind any alleged discriminatory behavior. Employers can point to the

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the Civil Rights Act has not been touched since the 1991 amendments, and inaction is not necessarily a choice.

297. *See supra* Part I.A.2.

298. Since the enactment of Title VII, and subsequent interpretations of the statute and its amendments, the Supreme Court has created slight variations on the traditional burden-shifting scheme for employment discrimination claims. *See supra* Part I.A.2–3.

299. *See supra* notes 253–55 and accompanying text.

300. *See supra* notes 253–55 and accompanying text.

301. *See supra* Part II.A (discussing *Wal-Mart Stores, Inc. v. Dukes*; *Pippen v. Iowa*; and *Thomas v. Eastman Kodak Co.*).

302. *See supra* Part II.A (discussing *Dukes*, *Pippen*, *Thomas*, and the factors the respective courts considered in evaluating the discrimination claims).

lack of gut-feeling decisions by demonstrating a conscientious consideration of all candidates' merit-based credentials.[303]

When the burden shifts back to the employee to respond to the employer's explanation, the employee can use the full gamut of Title VII responses—statistical evidence,[304] differential treatment of similarly situated individuals,[305] and other similar evidentiary proof—to show that the employer's explanation is either not necessarily true or heretofore unknown to the employer's decisionmaking personnel. Going further, however, by directly using the IAT to test employers for implicit biases at this point is premature, and given all the controversy surrounding the IAT,[306] may never provide adequate proof that implicit biases exist. Similarly, interpretations of the IAT's data should be allowed, but only as highly persuasive evidence of implicit bias.[307]

The current requirement that employees must identify a specific business practice should be removed temporarily, until better indicators of implicit bias are discovered. In cases of implicit bias, this requirement often places far too high a burden on employees, and also runs counter to recent findings regarding implicit biases[308] and intent.[309] Often, unconscious biases manifest themselves uncontrollably in small, but significant ways throughout all aspects of the hiring and promotion process.[310] As such, a specific, liability-inducing employment practice will not exist.[311] Requiring

303. This is essentially the framework used in the recent cases where implicit bias is a potential factor, but for the courts' refusal to acknowledge implicit bias's existence. *See, e.g.*, *supra* Part II.A.

304. Statistics on their own may be insufficient, but they can greatly support a claim of implicit bias when combined with other facts indicating that something other than a legitimate business decision is at play. *Compare* ROSSEIN, *supra* note 32, §§ 15:1–17 (analyzing the costs and benefits of using statistics to prove a Title VII employment discrimination claim), *and supra* note 187 and accompanying text (discussing the validity of statistical proof), *with supra* Part I.C (discussing the use of statistics to prove a Title VII employment discrimination claim based on a theory of disparate impact).

305. This will be especially relevant in cases such as *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999), and *Hopkins v. Price Waterhouse*, 825 F.2d 458, 462 (D.C. Cir. 1987), *rev'd on other grounds*, 490 U.S. 228 (1989), when the plaintiff is the member of a protected group of employees that is underrepresented in a specific workplace. *See supra* notes 113–14 and accompanying text.

306. *See supra* Part I.C.

307. The many criticisms about the scientific accuracy of IAT metadata studies still hold great weight, and it would be inappropriate to treat these studies as more probative evidence than they actually are. *See supra* notes 121–28 and accompanying text.

308. *Compare, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011) (refusing to consider that the entire Wal-Mart hiring and promotion process could be tainted by implicit biases), *and* Pippen v. Iowa, No. LACL107038, slip op. at 52–54 (Iowa Dist. Ct. Apr. 17, 2012), *appeal filed*, No. 12-0913 (Iowa Ct. App. May 16, 2012) (refusing to consider that implicit biases could pervade the executive department's entire hiring and promotion system), *with supra* Part I.B (discussing the pervasiveness of implicit bias and the ambiguity surrounding subjective employment decisions).

309. *See supra* notes 146–47 and accompanying text.

310. *See supra* Part I.B.2–3.

311. This was the problem in *Pippen*, where the hiring and promotion process could be separated into three different steps, and no specific step was the obvious focal point of any potential discrimination. *See supra* note 173 and accompanying text. Similarly, in *Dukes*,

plaintiffs to point to specific practices would, therefore, be almost entirely inconsistent with social science's unconscious discrimination findings.

To assuage any concerns the courts may have in recognizing the existence of an implicit bias, and to protect the employers' business interests while preventing frivolous lawsuits, the courts should provide a less severe remedy than that which is available under the more traditional Title VII claims. The courts have sufficient experience in dealing with unintentional discrimination under the Americans with Disabilities Act[312] —finding an analogous remedy, even if only a temporary one, for implicit bias claims should not be too taxing or difficult.

A higher potential for liability will provide employers with some incentive to ensure that those responsible for making hiring and promotion decisions are consciously aware of, and capable of guarding against, the invasion of any implicit biases in the decisionmaking process. They may even develop new ways to counter the implicit bias studies in court, leading in turn to further innovation by those seeking to prove implicit biases exist. Alternatively, employers have plausible, cost-effective options available to protect themselves from a broader interpretation of Title VII.[313]

Effectively, judicial recognition could reduce unconscious discrimination in the same way that the current version of Title VII has reduced overt, invidious discrimination. Mere acceptance of the preliminary implicit bias studies could be the step needed to eliminate this new form of discrimination.

CONCLUSION

Although Title VII has greatly reduced instances of overt employment discrimination, implicit bias is still very much a pervasive reality. The ambiguities and uncertainties associated with implicit bias further complicate the ability to provide a remedy to employees who have been adversely affected by their employers' implicit bias–related decisions. Currently, because the courts are hesitant to fully embrace the implicit bias studies, Title VII's main goal of ending all forms of employment discrimination is not being faithfully served. Until the courts broadly recognize the existence of implicit bias, this problem will remain a serious reality to many female and minority employees who are denied advancement opportunities.

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pinpointing a specific employment practice was nearly impossible, even if one existed, because too many different Wal-Mart branches were included. *See supra* note 158 and accompanying text. Rather, the potential for implicit biases that the human resources personnel possessed would have been manifested throughout the entire process because of the uncontrollable nature of these unconscious biases.

312. *See supra* note 296.

313. Particular employer protections against increased Title VII liabilities are outside the scope of this Note. However, for one possible example of a solution, see generally David Hausman, *How Congress Could Reduce Job Discrimination by Promoting Anonymous Hiring*, 64 STAN. L. REV. 1343 (2012).

Although the courts may currently lack the ability to accurately recognize implicit biases, and legislatures may be unwilling to create a new type of liability for discrimination without intent, the courts' continued willingness to experiment with implicit bias within the Title VII framework will place them in a better position to provide adversely affected employees with a remedy. Hopefully, increased judicial recognition of the impact of implicit biases will lead to a truly merit-based workplace, in which female and minority employees have equal opportunities of advancement, free from decisionmaking personnel's unconscious attitudes.