The Bias Presumption

DAVE HALL* & BRAD AREHEART**

The American workplace is a fractured sphere of public life, in which white men often wield power at the expense of women and people of color. However, that power imbalance is no longer fully imbued with the active animus that characterized the first few centuries of American life; now, much of the damage done by discrimination is done structurally and implicitly. Consequently, the operation of bias and disadvantage is often invisible to employers and employees alike. The problem of discrimination in American life is thus larger and deeper than a few bad actors, and it will be impossible to solve without buy-in from the institutions that perpetuate it. This Article argues that the workplace is one such institution, that it can be a positive agent of change, and that the law is an appropriate venue for creating that change.

Antiracist interventions are predicated on, first, recognizing structural impediments to racial equality and, second, taking deliberately pointed action. One of the law's primary levers in the pursuit of racial equality is Title VII of the Civil Rights Act of 1964, which seeks to address workplace discrimination. In practice, however, Title VII has been largely unsuccessful in securing equality within the workplace. There are two significant problems. The first is the current burden of proof framework, which in practice requires employees to scrape together the kind of "smoking gun" proof that is often difficult (and sometimes impossible) to find. The second is a host of psychological and social factors that enable discriminatory practices while at the same time making it difficult for courts to recognize discrimination.

This Article argues that Title VII's failures are in part a problem of scope. Specifically, the law is centered on individuals and discrete moments in time and operates from a presumption of nondiscrimination.

Further, employment discrimination cases are inherently hard to prove because they reach back in time and seek to dissect nonphysical and nonconcrete states of mind. Yet there is a vast body of literature that shows most people have discriminatory tendencies that run afoul of the law. We argue that Congress should amend Title VII to shift all burdens of proof and persuasion away from employees in suspect classes who have

* Adjunct Professor of Law, University of Tennessee College of Law.

** Professor of Law, University of Tennessee College of Law. For helpful conversations and astute insights regarding various iterations of this Article, we would like to thank Mark Brodin, Katie Eyer, Sandra Sperino, and Val Vojdik. We are also grateful for help from our talented research assistants, Bethany Wilson and Billy Quinlan. Finally, we thank the Editors at *The Georgetown Law Journal*, who have been conscientiously detailed and yet also a pleasure to work with.

experienced adverse outcomes and onto employers. This change would ensure that a plaintiff's prima facie claim of discrimination automatically creates a rebuttable presumption of discrimination, which the employer then has the burden of demonstrating did not occur. By turning the typical analysis of employment discrimination on its head, Congress would be recognizing that discrimination is often structural and implicit, allowing us to achieve a greater recognition of systemic bias. Just as importantly, such a change would signal an acknowledgment to the public, and to employers in particular, that discrimination is far more common than the operation of the law might suggest. It would express a presumption of bias, which would incentivize employers to be more proactive about combating discrimination—even when it comes disguised as social slights, indignities, or apathy.

TABLE OF CONTENTS

INTRODUCTION 751

I. DISCRIMINATION IN THE WORKPLACE 755

A. ANIMUS 756

B. APATHY 757

C. IMPLICIT BIAS 758

D. STRUCTURAL BIAS 760

II. CONTEMPORARY TITLE VII JURISPRUDENCE 763

A. DISPARATE TREATMENT CLAIMS 764

1. Why Direct Evidence Doesn't Work 765

2. The *McDonnell Douglas* Seesaw 766

B. DISPARATE IMPACT CLAIMS 768

C. WHY COURTS DON'T SEE DISCRIMINATION 770

III. PREVIOUSLY SUGGESTED REVISIONS TO TITLE VII 773

A. A BROAD REFORM THAT ISN'T BROAD ENOUGH 773

B. A NARROW REFORM THAT IS TOO NARROW 775

IV. PRIOR INNOVATIONS IN THE LAW 776

V. THE BIAS PRESUMPTION 777

A. THE PROPOSED STATUTORY LANGUAGE 778
B. THE PRACTICAL EFFECTS 779
C. SOME LIKELY OBJECTIONS 780
1. A Flood at the Courthouse? 780
2. A Mere Proposal for Just Cause? 781
3. The End of At-Will Employment? 784
4. A De Facto Quota System? 784
CONCLUSION 785

INTRODUCTION

Franklin Thomas was drawn with a noose around his neck.[1] That particular graffiti was not the only indication that Black people were not welcome in the shipbuilding company.[2] White coworkers displayed Confederate flags on their clothes, on protective work gear, on their cars.[3] The men's room was filled with hateful drawings and racist phrases such as "all blacks need to go back to their motherland in Africa" and "[Blacks] are hired from the neck down not to think."[4] The first time that Black plaintiff Thomas reported the graffiti to his white supervisor, it was painted over.[5] When the graffiti reappeared and Thomas raised it a second time, the supervisor told him that "there was nothing he could do to stop it."[6] After he reported it to a second white supervisor, he was told again that "there was nothing they could do about it."[7]

After reading those claims, the United States District Court for the Southern District of Alabama granted summary judgment *against* Thomas, holding that no reasonable jury could have found the described conduct sufficiently frequent and severe to constitute unlawful discriminatory harassment.[8] That is, despite the court's having found that it was "not unreasonable to infer from Thomas' allegations that the conduct was racially demeaning, humiliating and degrading,"[9] the conduct was still not *severe enough* for current law to prohibit. The facts Thomas alleged present a particularly egregious case that involves malice and racist intent, yet the district court's interpretation of Title VII[10] did not adequately capture such treatment in its narrow conception of discriminatory harassment. One

1. Thomas v. Austal, U.S.A., L.L.C., No. 08-00155, 2011 WL 2078525, at *5 (S.D. Ala. May 26, 2011).
2. *Id.* at *1, *4–6.
3. *Id.* at *5.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *6.
9. *Id.* at *7.
10. 42 U.S.C. § 2000e-2.

might naturally wonder how well the law deals with discrimination that *doesn't* involve such overt hostility.

The trial court's holding in *Ash v. Tyson Foods, Inc.*[11] gives some indication. There, the District Court for the Northern District of Alabama heard evidence that two Black superintendents at a poultry plant sought promotion to two open positions as shift managers, but the plant manager instead filled the positions with two white men.[12] The plaintiffs "had introduced evidence that their qualifications were superior to those of the . . . successful applicants."[13] The plaintiffs further gave evidence that the plant manager who decided the promotions had referred to each of the plaintiffs as "boy" on more than one occasion.[14] The employer claimed it preferred the white candidates for race-neutral reasons—namely, certain written and unwritten job requirements.[15] Although there was no allegation of the kind of cruel and overtly racist behavior on display in *Thomas*, the jury in *Ash* nevertheless found unlawful discrimination and awarded the plaintiffs compensatory and punitive damages.[16] However, upon the defendant's renewed motion for judgment as a matter of law, the court granted the motion and, in the alternative, ordered a new trial.[17] The Eleventh Circuit took up the case and similarly would not allow the original verdict to stand.[18] Thus, in a case where twelve ordinary Alabamians saw discrimination—even without the heavy-handed, brutal imagery and epithets on display in the *Thomas* case in the southern part of their state—the court in the Northern District nevertheless reached the same conclusion as its southern counterpart: there was no unlawful discrimination.

The *Thomas* and *Ash* cases are not unique. The Equal Employment Opportunity Commission (EEOC), in the most recent year for which there is data, resolved over 90,000 workplace discrimination charges.[19] Out of all those cases, only thirteen percent of complainants received any sort of relief,[20] the vast majority of which came via settlement.[21] Settlements could be seen as positive by

11. 546 U.S. 454 (2006) (per curiam).

12. *Id.* at 455.

13. *Id.* at 456.

14. *Id.*

15. Ash v. Tyson Foods, Inc., 664 F.3d 883, 893, 897 (11th Cir. 2011).

16. *Ash*, 546 U.S. at 455.

17. *Id.*

18. *Id.* at 455–56. It did so in part by holding that "the use of 'boy' alone is not evidence of discrimination." *Id.* at 456 (quoting Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005)). It also found that qualification-related evidence of pretext must "virtually . . . jump off the page and slap you in the face." *Id.* at 456–57 (quoting *Ash*, 129 F. App'x at 533).

19. Press Release, U.S. EEOC, EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data (Apr. 10, 2019), https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm [https://perma.cc/2HJ6-5X4J].

20. Maryam Jameel, *More and More Workplace Discrimination Cases Are Closed Before They're Even Investigated*, CTR. FOR PUB. INTEGRITY (June 14, 2019), https://publicintegrity.org/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/ [https://perma.cc/AC9D-NVGN].

21. Out of the more than 90,000 resolved cases, less than 200 resulted in merits lawsuits. Press Release, U.S. EEOC, *supra* note 19. Only 1.03% of all federal civil cases went to trial in 2016, part of a declining trend in trials that extends back to at least 1970. *See* Graham K. Bryant & Kristopher R.

keeping plaintiffs from waiting years for a jury verdict or having to testify about traumatic events. However, settlements in employment discrimination cases tend to be modest; the best evidence indicates the median settlement is around $30,000.[22] A tiny fraction of employment discrimination cases will ever make it to trial, and only in about one-third of those will the plaintiff prevail.[23] For the approximately two percent of plaintiffs who prevail at trial, there are damage caps, "and nearly half of those wins are later reversed on appeal."[24] Ultimately, most workplace discrimination claims never get off the ground and are instead disposed of before a jury can even reach the merits.[25] One might assume that this lack of plaintiff success indicates a lack of good cases. However, upon closer examination, it seems that plaintiffs are fighting a losing battle from the start. Even plaintiffs with clear-cut evidence of discrimination must defeat seemingly (and often literally) insurmountable hurdles including overly technical applications of the *McDonnell Douglas* framework,[26] "bulletproof" employers,[27] and court bias,[28] all of which come together to hobble plaintiffs' chances of success. In short, many plaintiffs find themselves a David facing a defendant–employer Goliath. What's worse is these Goliaths have the justice system as their shield, while most plaintiffs don't even have a single pebble in their bag.

If America desires equal opportunity as much as we (sometimes) say we do,[29] it's time to put teeth in our regulatory systems. The fallout from numerous police shootings of Black men and women and nationwide protests has shown that there is an increasing appetite for audacious change when it is directed in the pursuit of

McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 REGENT U. L. REV. 287, 295, 340–41 (2018).

22. ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 63–64 (2017).

23. *Id.* at 61 fig.3.4, 63 (citing a study charting employment civil rights litigation outcomes).

24. Bradley A. Areheart, *Organizational Justice and Antidiscrimination*, 104 MINN. L. REV. 1921, 1930 & n.46, 1951 (2020).

25. Judges decide cases in employers' favor and before any jury hears the facts at a staggering rate. *See, e.g.*, SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 23 (2017) (citing studies showing that employers win summary judgment motions between seventy and eighty-three percent of the time).

26. Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 969–70 (2019) ("Through . . . case-by-case application of the technical *McDonnell Douglas* paradigm, the lower courts have effectuated a quiet revolution in anti-discrimination law, rendering it very difficult for victims of discrimination to seek relief." (footnote omitted)).

27. *See* Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 963 (1999) ("Symbolic, legal conformity [by employers] also ensures that, in the aggregate, there will be less evidence of discriminatory decision making and practices.").

28. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 113 (2009).

29. According to a poll conducted by the Pew Research Center, seventy-five percent of Americans think that it is "important for companies and organizations to promote racial and ethnic diversity in their workplace." Juliana Menasce Horowitz, *Americans See Advantages and Challenges in Country's Growing Racial and Ethnic Diversity*, PEW RSCH. CTR. (May 8, 2019), https://www.pewsocialtrends.org/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/ [https://perma.cc/LU7R-453M].

racial justice.[30] "Anti-racism has been broadly defined . . . as 'ideologies and practices that affirm and seek to enable the equality of races and ethnic groups.'"[31] Scholars have lauded the importance of equality of opportunity for antiracist praxes.[32] Given the importance of work for human development as well as for opportunities, that is, access to both tangible and intangible goods,[33] this is an opportune time in history for a radical intervention into workplace inequality.

Over half a century of Title VII has shown that the current statutory regime overwhelmingly favors employers. There are two primary reasons. The first is Title VII's stringent burden of proof framework, which in practice requires employees to scrape together the kind of "smoking gun" proof that is often difficult (and sometimes impossible) to find.[34] The second is the collection of psychological and social factors that enable discriminatory practices while at the same time making it difficult for courts to *see* discrimination.[35]

Employment discrimination is much like a patterned tapestry. When viewed through a sufficiently wide lens, it is obvious that a decoratively woven textile bears a pattern. However, if you zoom in closer and closer, until you're looking only at a single strand of fabric within the tapestry, the pattern is lost entirely. It is possible to get so close to the tapestry that you can't see anything at all. The law of employment discrimination has similarly forced decisionmakers and fact finders so close to the tapestry of workplace behavior that, instead of seeing patterns of discrimination, courts are left scrutinizing individual strands.[36]

---

30. *See* Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), https://www.pewresearch.org/social-trends/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/ [https://perma.cc/4YQK-YKTV] ("Overall, majorities of Americans see working directly with black people to solve problems in their local communities (82%), bringing people of different racial backgrounds together to talk about race (74%), and working to get more black people elected to office (68%) as effective tactics for groups and organizations that work to help black people achieve equality.").

31. Gabrielle Berman & Yin Paradies, *Racism, Disadvantage and Multiculturalism: Towards Effective Anti-Racist Praxis*, 33 ETHNIC & RACIAL STUD. 214, 218 (2010) (quoting Alastair Bonnett, *The Americanisation of Anti-Racism? Global Power and Hegemony in Ethnic Equity*, 32 J. ETHNIC & MIGRATION STUD. 1083, 1099 n.2 (2006)); *see also* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 20 (2019) ("An antiracist idea is any idea that suggests the racial groups are equals in all their apparent differences . . . .").

32. *See* Berman & Paradies, *supra* note 31, at 219 ("Direct anti-racism encompasses efforts to promote equal treatment that results in equal opportunity and hence addresses direct racism (i.e. unequal treatment that results in unequal opportunity).").

33. Professor Joseph Fishkin keenly observes that opportunities matter not just because they are instrumental in attaining a certain outcome, such as well-paying employment, but also because they facilitate agency by providing access to intangible goods. Opportunities give us the materials to build out fulfilling lives. JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 9–10 (2014).

34. Katie Eyer has helpfully described and characterized these difficulties—such as "rigid formulations of the prima facie case, demands for 'nearly identical' comparators, doctrines like the stray remarks doctrine, [and the] honest good faith belief rule"—as constituting "the technical *McDonnell Douglas* paradigm." Eyer, *supra* note 26, at 970.

35. *See* Areheart, *supra* note 24, at 1934–38 (exploring "disbelief of discrimination" and "belief in merit[]" as two broad reasons people fail to see discrimination).

36. Areheart has further noted that some of the current doctrinal impediments "are procedural, such as heightened pleading standards" (*Twiqbal*), "more stringent class action requirements," or the ready

Over the years, some scholars have suggested tinkering with Title VII's burdens of proof.[37] We argue—against a modern backdrop of institutional racism and with a sensibility for radical change—for a structural reorientation in how courts weigh all claims of employment discrimination. Specifically, Congress should amend Title VII by inserting language into the statute that shifts all the burdens of proof and persuasion away from employees in suspect classes who've experienced adverse outcomes and onto the employers who fire them, refuse to promote them, and allow them to be harassed.[38] We often impose higher burdens of proof on the party with more resources to make their case. Consider criminal law. In criminal trials, the prosecution has almost all the power when compared against the (usually poor) defendant, and the defendant is presumed innocent until the state proves otherwise. However, no such presumption is enjoyed by an employment discrimination plaintiff—even though such a plaintiff is often more like a criminal defendant given their relative lack of resources and power.[39] Using some of the same logic regarding apportionment of the burden in criminal cases, it ought to be the employer—the party with more money, more access to power, and more control over the opposing party—who bears the burden of proof.

There would naturally be objections to restructuring Title VII's longstanding burdens of proof. Some might worry that this change would result in a flood of litigation. Others might see our proposal as a thinly veiled requirement for "just cause" or as installing a de facto quota system. Still others might see our proposal as portending the end of employment at will. We address each potential objection in turn.

I. DISCRIMINATION IN THE WORKPLACE

Before turning to the current state of the law and the nature of the proposed change, it may be useful to turn a fresh eye toward the various ways in which discrimination shows up in the workplace.

---

enforcement of "mandatory arbitration agreements." *Id.* at 1929. "Other rules are substantive, such as those requiring a plaintiff to prove she is a member of the protected class or those allowing the judge to disregard evidence of bias" (for example, the same-actor inference or stray remarks doctrine). *Id.* at 1929–30 (footnote omitted). While any one of these bias-minimizing rules or inferences might be justified within the confines of a particular case, taken together they often make it prohibitively difficult for plaintiffs to prevail. Specifically, judges use these doctrines to "slice and dice" specific pieces of evidence from the case. *See generally* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (illustrating this phenomenon through examination of cases). This evidentiary sidelining of biased statements or pretext-implying decisions can transform a plaintiff's colorable case into a legal nonstarter.

37. *See, e.g.*, Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 752–53, 761 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2301, 2313–17 (1995); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 160–61, 191–94 (2005); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229–30 (1993).

38. *See infra* Part V for a more detailed account of what such a law might look like.

39. Of course, sometimes an executive is the Title VII plaintiff, or the employer defendant is a smallish business (but they would, by statutory definition, still have at least fifteen employees). *See* 42 U.S.C. § 2000e(b). Even so, employment discrimination claims typically involve plaintiffs with relatively fewer resources suing larger and/or more sophisticated employers.

A. ANIMUS

Some employers are motivated by animus to mistreat the people around them.[40] Employers have addressed workers by racist and sexist slurs.[41] They've told racist "jokes" about employees and nonemployees alike.[42] They've even leveled death threats, delivered anonymously by phone.[43] These examples may shock the conscience, but they likely don't surprise the intellect. After all, they express something most of us already know: *of course* animus exists.[44] And these blatant acts of discrimination are the kinds that courts are most inclined to recognize and to sanction. But courts are not willing to find unlawful discrimination simply because animus is present;[45] further, evidence of explicit animus is rare and likely animates only a small portion of all workplace discrimination (because most discrimination seems to be due to unconscious, rather than intentional, bias).[46] Thus, any statutory regime aimed only at intentional discrimination is likely to miss a lot of discrimination.

---

40. *See, e.g.*, Boyer–Liberto v. Fontainebleau Corp., 786 F.3d 264, 270 (4th Cir. 2015) (describing a white manager calling a Black employee "porch monkey"); Kelly v. Senior Ctrs., Inc., 169 F. App'x 423, 425–29 (6th Cir. 2006) (describing staff at a senior center referring to Black foster grandparent volunteers as "n[*]ggers" and as "totally disgusting pigs"); Chapa v. Genpak, LLC, No. 12AP-466, 2014 WL 1347980, at *2 (Ohio Ct. App. Mar. 11, 2014) (describing a supervisor calling Hispanic employee "w[*]tback"); Chancellor v. Coca-Cola Enters., 675 F. Supp. 2d 771, 774 (S.D. Ohio 2009) (describing supervisor who told Black employee that "you remind me of the lady on the syrup bottle, you know, Aunt Jemima"); Sweezer v. Mich. Dep't of Corr., No. 99-1644, 2000 WL 1175644, at *1 (6th Cir. Aug. 11, 2000) (describing supervisor who called employee "N[*]gger" and "Bitch").

41. *See, e.g.*, Pollard v. E.I. DuPont De Nemours, Inc., 412 F.3d 657, 660 (6th Cir. 2005) (noting that staff "routinely referred to women as 'bitches,' 'c[*]nts,' 'heifers,' and 'split tails'"); Jackson v. Quanex Corp., 191 F.3d 647, 651 (6th Cir. 1999) (noting that supervisors and other white employees called Black employees "n[*]gger[s]," "boys," and "colored[s]," among other slurs and demeaning epithets).

42. *See, e.g.*, *Kelly*, 169 F. App'x at 425 (noting that staff were urged to "purchase plenty of bananas" for Black volunteers "because the little monkeys really enjoy their bananas").

43. *See, e.g.*, Hafford v. Seidner, 183 F.3d 506, 509 (6th Cir. 1999) (noting that corrections officer–plaintiff "received a telephone call on the prison's internal telephone system stating, 'you're dead'").

44. For just one example, in a recent Pew poll sixty-eight percent of Black Americans report that their race has made it harder for them to get ahead in this country, and nearly sixty percent of all respondents think the current state of American race relations is bad. Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019 [https://perma.cc/T8DH-USMQ]. *See generally* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505 (2018) (profiling through Title VII cases the ways in which explicit bias is alive and well).

45. The legal standard for harassment, for example, doesn't inquire into motives. It asks whether the harassment was severe and pervasive. *See, e.g.*, Thomas v. Austal, U.S.A., L.L.C., No. 08-00155, 2011 WL 2078525, at *6 (S.D. Ala. May 26, 2011) (finding no "frequent and severe" harassment of a Black employee despite numerous instances of racial slurs, lynching imagery, and Confederate iconography).

46. *See* DAVID ROCK & HEIDI GRANT HALVORSON, NEUROLEADERSHIP INST., BREAKING WORKPLACE BIAS AT THE SOURCE 9 (2015), https://neuroleadership.com/wp-content/uploads/2015/03/Breaking-Workplace-Bias-at-its-Source_Rock_17Mar15.pdf [https://perma.cc/8QGV-MSYH]; *see also* Jesse Washington, *Black Americans Overwhelmingly Say Unconscious Bias Is a Major Barrier in Their Lives*, ANDSCAPE, https://andscape.com/features/black-americans-overwhelmingly-say-unconscious-bias-is-a-major-barrier-in-their-lives/ [https://perma.cc/D9TJ-H3R4] (last visited Feb. 21, 2024) (noting that, according to polling, "Black people say unconscious racial bias has been a major barrier in their lives, posing as much or more of a problem than structural racism and individual discrimination").

B. APATHY

In the realm of workplace discrimination, apathy might properly be considered animus's immoral twin. Apathy is the inverse of empathy; it's the failure to invest care in the welfare of people around you.[47] In the workplace, apathy may lead supervisors to look away when employees demean or belittle their coworkers. And when employers display sufficient disregard for the belittling of employees, courts can find unlawful discrimination.[48] This notion comes up in hostile work environment cases, where failure to act on notice of severe and pervasive harassment that falls along protected class lines may give way to legal liability.[49]

Some scholarship suggests that apathy is a more common factor in discrimination than animus. For example, a sociological study of American race relations post-Hurricane Katrina found that "[i]n the current historical moment, racial apathy may be more important to the reproduction of racial inequality than are traditional forms of Jim Crow prejudice."[50] Nevertheless, apathy from an employer still requires animus from a coworker in order to amount to a cognizable claim of harassment; after all, an employer's indifference only leads to liability if there is some hostility the employer ignores.[51] Thus, employer apathy—much like employer animus—is unlikely to capture a lot of workplace discrimination.

---

47. *Cf.* Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 89 (1999) ("Good public health requires both personal and social change, as well as investment of social resources in creating the conditions in which people can be healthy. Policymakers and the public must care enough about public health as a societal goal to support programs and, on the individual level, to overcome the resistance to change in their own lives. While Americans are, as a group, quite as ready as public health officials to worry about threats to health, public health officials and the public rarely worry about the same ones in the same way.").

48. *See, e.g.*, Lapka v. Chertoff, 517 F.3d 974, 984 (7th Cir. 2008) (noting that employer "can be held liable for . . . harassment if it 'unreasonably fail[ed] to take appropriate corrective action'" (alteration in original) (quoting Guess v. Bethlehem Steel Corp., 913 F.2d 463, 465 (7th Cir. 1990))); Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 606 (7th Cir. 2006) (noting that employer may be "liable under Title VII's negligence standard if it 'failed to discover and prevent' sexual harassment of an employee giving rise to a hostile work environment" (quoting Zimmerman v. Cook Cnty. Sheriff's Dep't, 96 F.3d 1017, 1018 (7th Cir. 1996))).

49. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), the Supreme Court established a two-part affirmative defense by which employers may insulate themselves from liability for harassment that does not result in a tangible employment action. Under the first part of the defense, an employer must prove it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior." *Burlington Indus.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. An employer will typically meet this requirement "by having in place an effective internal investigation process that" is set up to address complaints of harassment. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 952 (2007). To satisfy the second part of the defense, an employer must show that the "employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus.*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

50. Tyrone A. Forman & Amanda E. Lewis, *Racial Apathy and Hurricane Katrina: The Social Anatomy of Prejudice in the Post-Civil Rights Era*, 3 DU BOIS REV. 175, 177 (2006).

51. *See, e.g.*, Freeman v. City of Riverdale, 330 F. App'x 863, 865 (11th Cir. 2009) (per curiam) ("[T]o be actionable, . . . behavior must result in . . . an environment that a reasonable person would find *hostile* or *abusive*." (emphases added) (quoting Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002))).

C. IMPLICIT BIAS

There is a type of bias that lies unseen at the root of most people's decision-making and is more common than overt animus: implicit bias.[52] The results of implicit bias testing consistently disclose that it is pervasive, a feature not moderated by the race or ethnicity of the person taking such a test.[53] Specific testing has highlighted the obvious potential for real-world effects. One study found that police officers shown "photographs of individuals and asked . . . which faces 'look[ed] criminal'" are more likely to identify stereotypically Black faces.[54] Another study had "subjects respond[] to a fictional vignette [of] a man who gets into a fight at a bar."[55] "When the vignette used a stereotypically black name . . . , subjects perceived the man as more aggressive . . . than when the vignette used a stereotypically white name . . . ."[56]

In part because of its invisibility—it's not, after all, an *explicit* bias—implicit bias has outsized effects on our interactions with one another. Implicit bias cannot predict individual outcomes, but its presence naturally has real-world significance in the aggregate.[57] Consider racial disparities in school discipline and drug enforcement,[58] or that Black newborns in Florida are more likely to die when

---

52. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995) (arguing that many biased employment decisions are cognitive, rather than motivational, in origin); MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 34–52 (2013) (detailing findings of the Implicit Association Test). In addition to the potential for implicit bias, there also exists the potential for conscious, but extremely covert, bias. As such, covert bias is functionally invisible to the law in much the same way as implicit bias. Given constraints, this Article does not devote separate space to covert bias. For a thorough discussion of the relationship between implicit and (explicit but) covert bias, see generally Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009).

53. For example, Black men "are more often associated . . . with being 'threatening,' and this tends to hold true regardless of the race . . . of the person taking the test." U.S. COMM'N ON C.R., POLICE USE OF FORCE: AN EXAMINATION OF MODERN POLICING PRACTICES 103 (2018), https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf [https://perma.cc/C8PB-ZR75].

54. Samuel R. Bagenstos, *Implicit Bias's Failure*, 39 BERKELEY J. EMP. & LAB. L. 37, 46 (2018) (alteration in original) (quoting Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 878 (2004)).

55. *Id.* (citing Colin Holbrook, Daniel M.T. Fessler & Carlos David Navarrete, *Looming Large in Others' Eyes: Racial Stereotypes Illuminate Dual Adaptations for Representing Threat Versus Prestige as Physical Size*, 37 EVOLUTION & HUM. BEHAV. 67, 71 (2016)).

56. *Id.*

57. "For example, metro areas with greater average implicit bias have larger racial disparities in police shootings," and "counties with greater average implicit bias have larger racial disparities in infant health problems." Keith Payne, Laura Niemi & John M. Doris, *How to Think About 'Implicit Bias*,' SCI. AM. (Mar. 27, 2018), https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/ [https://perma.cc/68SA-FVHD].

58. *See, e.g.*, Saba Mengesha, Alyson Diaz & Korinne Dunn, *Racial Disparities in School Discipline*, REGUL. REV. (July 29, 2023), https://www.theregreview.org/2023/07/29/saturday-seminar-racial-disparities-in-school-discipline/ [https://perma.cc/4U24-GBWH] (reporting that Black students are more frequently referred for disciplinary action than white students); PATRICK A. LANGAN, BUREAU OF JUST. STAT., U.S. DOJ, THE RACIAL DISPARITY IN U.S. DRUG ARRESTS 2 (1995), https://bjs.ojp.gov/content/pub/pdf/rdusda.pdf [https://perma.cc/5BKT-RUN7] (noting that Black Americans account for "40% of drug violation arrests but only 13% of admitted drug users").

cared for by white doctors than by Black doctors.[59] If people are moving through the world with discriminatory views, but they don't even know it, that dynamic is bound to have real-world effects.

Implicit bias is as common in the workplace as in every other realm of society. As one example, studies have found that implicit bias leads Black applicants to get significantly fewer callbacks than white counterparts with similar resumes.[60] And a recent update on resume audits found that Black job applicants are no more likely to be hired today than they were twenty-five years ago.[61] If the effects of implicit biases are measurable and significant, why have we not done more to counteract them? Partly because these biases are invisible, and we often cannot recognize these covert motives in the first place. Also, the harms are often only discernible in the aggregate—a quality that makes it challenging for legal systems to address and is distinct from the typical harms courts are used to addressing. But there is a deeper challenge: a lack of political will. There has been political and social resistance since the research on implicit bias first emerged.[62] When audiences hear that nearly everyone has implicit biases, many hear accusations of racial bias.[63] Others may write off learning to recognize such biases since they are universally held. If everyone has these biases, who is actually responsible for them?

So, what is to be done? In cases in which it's difficult for us to do the just thing, the law has traditionally served as a guardrail.[64] After all, one of the main justifications for a punitive component to law is deterrence;[65] the law may not be capable of changing our minds about things, but it can change our behaviors, and over

---

59. Aimee Cunningham, *What We Can Learn from How a Doctor's Race Can Affect Black Newborns' Survival*, SCIENCENEWS (Aug. 25, 2020, 9:47 AM), https://www.sciencenews.org/article/black-newborn-baby-survival-doctor-race-mortality-rate-disparity [https://perma.cc/Q3KL-GCHY].

60. *See, e.g.*, Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 226 (2012); 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, 992 (2004).

61. Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbøen, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 PNAS 10870, 10871 (2017); Lincoln Quillian, Devah Pager, Arnfinn H. Midtbøen & Ole Hexel, *Hiring Discrimination Against Black Americans Hasn't Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years [https://perma.cc/734U-73YK].

62. *See* Bagenstos, *supra* note 54, at 42 ("The increasing use of implicit bias language by political progressives has not, in the main, blunted opposition to aggressive antidiscrimination enforcement. Instead, the same battle lines that were once drawn around accusations of individual racism, and later drawn around accusations of systemic racism, are now drawn around attributions of implicit bias.").

63. *Id.* at 51. This may be reflected in part by the deep resistance to mandatory diversity and implicit bias training. *See* Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?: The Challenge for Industry and Academia*, ANTHROPOLOGY NOW, Sept. 2018, at 48, 50–52 ("Employers mandate training in the belief that people hostile to the message will not attend voluntarily, but if we are right, forcing them to come will do more harm than good.").

64. *See generally* MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET (2004) (arguing that legislators often invoke moral principles in crafting laws to help resolve disputes).

65. *See, e.g.*, Jack P. Gibbs, *Crime, Punishment, and Deterrence*, 48 SW. SOC. SCI. Q. 515, 515 (1968) ("[T]he classical theory of justice favors a uniform legal treatment . . . and, with a view to maximizing deterrence, it stresses punishment.").

time, behaving differently can impact how we see things.[66] Even so, the Supreme Court has refrained from explicitly acknowledging "implicit bias."[67] We argue that if burdens of proof and persuasion are shifted onto employers, the law itself will better acknowledge implicit biases by forcing employers to carefully examine their decisions—instead of forcing what are often poorly treated employees to prove the invisible cause at the core of their mistreatment.[68]

D. STRUCTURAL BIAS

Discrimination may be explicit, it may be implicit, and it may also be structural. That is, there are certain biases built into American society: in our institutional structures, in our social frameworks, in most—if not all—of the organizing pillars of our everyday lives. We might see these reflected in persisting imbalances in professional achievement that fall neatly along protected class lines.[69] This is despite over eighty years of governmental efforts to stamp out discrimination in the workplace.[70] But how exactly is structural bias constructed?

---

66. *See* Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–72 (1998); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 43 (2002); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996) (exploring "the function of law in 'making statements' as opposed to controlling behavior directly"); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504–06 (2000).

67. Bagenstos, *supra* note 54, at 38.

68. "[I]t is exceedingly difficult to prove—especially, after the fact—what an employer believed about a person." Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 212 (2008). Employers often don't say what they think about a particular candidate, especially when their emphasis is on the person they prefer (which may be for conscious or unconscious reasons). To the extent the edict of employment discrimination law is to prove discrimination in the "theoretical mind" of the employer, that is an inherently challenging task. *Id.*

69. *See, e.g.*, Katherine T. U. Emerson & Mary C. Murphy, *Identity Threat at Work: How Social Identity Threat and Situational Cues Contribute to Racial and Ethnic Disparities in the Workplace*, 20 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 508, 512–13 (2014) (identifying racial disparities in high-status positions in Fortune 100 companies, among others); Karen I. Fredriksen-Goldsen, Michael R. Woodford, Katherine P. Luke & Lorraine Gutiérrez, *Support of Sexual Orientation and Gender Identity Content in Social Work Education: Results from National Surveys of U.S. and Anglophone Canadian Faculty*, 47 J. SOC. WORK EDUC. 19, 25–27 (2011) (identifying sexual orientation- and gender-based discrimination among social work faculty); Aasim I. Padela, Huda Adam, Maha Ahmad, Zahra Hosseinian & Farr Curlin, *Religious Identity and Workplace Discrimination: A National Survey of American Muslim Physicians*, 7 AJOB EMPIRICAL BIOETHICS 149, 149 (2016) (identifying religious identity discrimination among medical practitioners); Damon J. Phillips, *Organizational Genealogies and the Persistence of Gender Inequality: The Case of Silicon Valley Law Firms*, 50 ADMIN. SCI. Q. 440, 440 (2005) (identifying gender disparities in Silicon Valley law firms); Ming-Te Wang & Jessica L. Degol, *Gender Gap in Science, Technology, Engineering, and Mathematics (STEM): Current Knowledge, Implications for Practice, Policy, and Future Directions*, 29 EDUC. PSYCH. REV. 119, 127–30 (2017) (identifying gender disparities in science, engineering, technology, and mathematics education and workplaces).

70. The governmental effort to address employment discrimination can be dated as far back as the executive order President Franklin Delano Roosevelt signed in 1941 to prevent defense contractors from discriminating based on "race, creed, color, or national origin." Exec. Order No. 8802, 6 Fed. Reg. 3109, 3109 (June 25, 1941).

Susan Sturm has coined the term "second generation" bias, noting that it is "structural, relational, and situational."[71] The idea is that people are excluded over time through structures and the accretive patterns of social interactions.[72] She writes that "behavior[s] [which] appear[] gender neutral, when considered in isolation, may actually produce gender bias when connected to broader exclusionary patterns."[73] She notes that such exclusion is hard to tie "to intentional, discrete actions" and "may . . . be visible only in the aggregate."[74]

Kerri Stone has similarly written about how implicit bias may incrementally lead to soft forms of social exclusion that are not redressable by law. She notes,

> [F]or example, when a woman fails to receive invitations to things like after-work drinks with coworkers or the chance to use the boss's season tickets, she may quickly realize that these so-called extracurricular activities can be quite central to her being known, trusted, and liked when it comes to everything from work assignments to receiving the benefit of the doubt when things go south in the office.[75]

Discrimination laws simply are not geared toward addressing this kind of culturally complex and often-intersectional bias.[76] Another way of thinking about this exclusion is through its origins. For example, if workplaces were initially designed for men without childcare obligations, then it makes sense that they would structure professional opportunities around work obligations that do not account for childcare responsibilities. Despite now allowing women into those

---

71. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

72. *Id*. at 468–71.

73. *Id*. at 469.

74. *Id*. at 460.

75. KERRI LYNN STONE, PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW'S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY 137 (2022).

76. Stone cites to a recent federal court decision in which the female plaintiff sought to cast her lack of mentoring as sex discrimination for which she was entitled to redress. *Id*. at 135 (citing Gautier v. Brennan, No. 17-2275, 2019 WL 2754673, at *10 (D.P.R. June 28, 2019)). The court ultimately found that nothing materially adverse enough had happened (such as a change to her salary or job responsibilities) for the law to get involved. *Id*. at 135–36.

Intersectionality further complicates the ability of the law to provide full redress. Intersectionality, as a theory, posits that our identity lies at the intersection of multiple axes (for example, race, sex, class, religion, and age). *See* Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. C.R.L.J. 199, 206 (2006). In one of its paradigmatic formulations, Black women are said to face unique stereotypes that Black men or white women will never face. *See id*. at 223. Even so, Title VII emphasizes singular identity and the need to fit into one of those boxes. One may check "race" or "sex"—but not both—and this hamstrings their ability to press their claims. *Id*. at 208–09; *see also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 ("Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.").

workplaces, if employers fail to adjust workplace structures to accommodate the needs of people with such responsibilities, they maintain the legacy of exclusion. However, employment discrimination laws are paradigmatically targeted on "bad actors" who have behaved intentionally toward individuals at a specific point in time (as opposed to targeting structural biases).[77]

Tristin Green has emphasized the active role of organizations in creating cultures that foster discriminatory norms. She writes that the policies, practices, and procedures that an organization puts into place actively create workplace cultures.[78] In contrast to a view of organizations as neutral environments in which bad actors sometimes operate, Green argues that firms are the opposite of innocent bystanders: they actively seek cultural fit, structure compensation and benefits, and manage their workforce using select tools to recruit and retain workers. Any of these systems can foster a discriminatory corporate culture.[79]

Understanding the ubiquity of structural bias doesn't make our task any easier. Addressing it directly would require a huge lift from the law. Charles R. Lawrence III, focusing on the racial dimension of structural bias, writes that effective antidiscrimination law "must recognize that racism is both irrational and normal."[80] Structural racism is the normalized racial sorting that results in people of color having less, earning less, and competing on an unfair field throughout virtually every major field of American cultural and economic enterprise. Structural racism is present in educational attainment,[81] in workplace outcomes,[82] in wealth distribution,[83] and in rates of home ownership.[84] As Lawrence

77. *See* TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 5 (2017).

78. *Id.* at 3.

79. *Id.* at 3, 116–36.

80. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330–31 (1987) (articulating this position particularly about equal protection jurisprudence).

81. *See, e.g.*, Rita Kohli, Marcos Pizarro & Arturo Nevárez, *The "New Racism" of K–12 Schools: Centering Critical Research on Racism*, 41 REV. RSCH. EDUC. 182, 182 (2017) ("While organizing efforts by movements such as Black Lives Matter and responses to the hate-filled policies and rhetoric of President Donald Trump are heightening public discourse of racism, much less attention is paid to *mechanisms of racial oppression* in the field of education." (emphasis added)).

82. Black men earn fewer than seventy-four cents for every dollar white men earn. *See* ARIANE HEGEWISCH & HEIDI HARTMANN, INST. FOR WOMEN'S POL'Y RSCH., THE GENDER WAGE GAP: 2018 (2019), https://iwpr.org/wp-content/uploads/2020/08/C478_Gender-Wage-Gap-in-2018.pdf [https://perma.cc/VZR8-UX62]. But perhaps more importantly, "[a]s robust as the racial pay gap analysis may be, it doesn't always capture the *mechanisms of discrimination* in the workforce." Jackson Gruver, *Racial Wage Gap for Men*, PAYSCALE (May 7, 2019) (emphasis added), https://www.payscale.com/data/racial-wage-gap-for-men [https://perma.cc/HL8P-DLP2].

83. "According to the Senate's Joint Economic Committee, the median wealth held by white families" is ten times the median wealth held by Black families. Arianna Johnson, *Why the Racial Wealth Gap Hasn't Shrunk Since MLK's Death: A Look at the Numbers*, FORBES (Jan. 14, 2023, 11:19 AM), https://www.forbes.com/sites/ariannajohnson/2023/01/14/why-the-racial-wealth-gap-hasnt-shrunk-since-mlks-death-a-look-at-the-numbers/?sh=229d58b83aa2.

84. In the third quarter of 2019, 73.4% of white Americans owned their homes, while just 42.7% of Black Americans did. Press Release, U.S. Census Bureau, U.S. Dep't of Com., Quarterly Residential

notes, it's so big it's almost unseeable.[85] As individuals, it is hard to step far enough back (figuratively speaking) from the tapestry to see the complete picture. The pervasiveness of American structural racism makes it nearly impossible to overcome individual biases: when we test stereotypes against our lived experience, we are testing them against an experience already steeped in those same stereotypes.[86]

It is of course true that these modalities of exclusion (animus, apathy, implicit bias, and structural bias) cannot be neatly delineated. Even though they are conceptually different, it is difficult to tell whether animus or implicit bias or something else is at play in a specific situation. Moreover, these modalities of exclusion are not mutually exclusive and may work in tandem to produce inequalities. For example, one could ask whether the results in resume studies are more about conscious or unconscious prejudice. The same question could be asked about disparities across groups in compensation.

Our proposal to shift burdens of proof bypasses the need to pinpoint an exact cause and would assist with recognizing discrimination in its various forms (explicit, implicit, and structural). Sharpening the inquiry to rest solely on an individual's job performance would simultaneously minimize many of the implicit and structural factors, which often have the effect of discrimination and are hard to remedy through the law.

II. CONTEMPORARY TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 was enacted in an attempt to address the racism that the civil rights protests of the early 1960s brought to the forefront of the national consciousness. In its original form, it proscribed workplace discrimination against persons based on race, color, religion, sex, or national origin.[87] However, it existed only as a sort of national reprimand, with no enforcing agency and thus no real ability to effectuate actual, meaningful change. While the EEOC was already active, it had no enforcement power and was therefore seen by civil rights groups as a "toothless tiger"[88] with no capability to defend the fledgling law.[89]

In 1972, Congress passed the first major amendment to Title VII, broadening its scope to cover all levels of government, deepening coverage to include all

Vacancies and Homeownership, Third Quarter 2019 (Oct. 29, 2019, 10:00 AM), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/UX33-U7BF].

85. *See* Lawrence III, *supra* note 80, at 330–31.

86. *See id*. at 338–39. These race-based structural inequalities stem from "distant and recent public and private decisions" and have been richly explored "by authors such as Daria Roithmayr, Richard Rothstein, and Ta-Nehisi Coates." Bagenstos, *supra* note 54, at 48 (emphasis omitted) (footnotes omitted).

87. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2).

88. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 323 (2001).

89. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 672–75 (2005).

employers with at least fifteen employees, and giving the EEOC the power to sue nongovernmental entities.[90]

In 1991, in response to a slew of Supreme Court rulings in the previous decade that had made it more difficult for Title VII plaintiffs to prevail, Congress passed a raft of substantive changes to the statute.[91] Congress called these changes collectively the Civil Rights Act of 1991.[92] These amendments included measures to allow parties to obtain jury trials and seek compensatory and punitive damage awards (in "intentional discrimination" cases);[93] codified a "disparate impact" theory of discrimination;[94] and allowed plaintiffs to establish liability if they can show discrimination was at least a "motivating factor" in an employment decision.[95]

Despite efforts to make Title VII more remedial, the statute has failed to provide much recourse. For disparate treatment claims, direct evidence is often unavailable and indirect evidence will rarely be strong enough to satisfy the various legal sufficiency-related standards for establishing "pretext." For disparate impact claims, the proof deck is stacked heavily in favor of employer defendants and against individual employees who seek to show discrimination in effect. The statistics bear out that disparate impact, as a cause of action, has been a feeble innovation. Finally, there are a host of psychological and social factors which make it difficult for individuals (judges or jurors) to see discrimination.

A. DISPARATE TREATMENT CLAIMS

When an employee or prospective employee believes she has suffered a bad workplace outcome—being fired, not being promoted, or not being hired in the first place—she can file suit against her employer alleging "disparate treatment" under Title VII.[96] Disparate treatment claims are often called "intentional discrimination" claims. They rely on proving that the employer mistreated her employee or prospective employee with discriminatory purpose.[97] Courts have

90. Green, *supra* note 88, at 324–25.

91. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2–3, 105 Stat. 1071, 1071.

92. *Id.* § 1, 105 Stat. at 1071.

93. *Id.* sec. 102, § 1977A(a)(1), (c), 105 Stat. at 1072–73.

94. *Id.* sec. 105, § 703(k)(1), 105 Stat. at 1074.

95. *Id.* sec. 107, § 703(m), 105 Stat. at 1075. In disparate treatment cases, a plaintiff can now prevail by showing either that the protected trait was the "but for" (or sole) cause of the adverse employment action (a "single motive" claim, which allows one to recover economic damages), or that the trait merely "motivated" the action (a mixed motive claim, which does not allow one to recover economic damages). *See id.* sec. 107, §§ 703(m), 706(g)(B), 105 Stat. at 1075 (indicating a plaintiff may prevail by showing a trait was a "motivating factor for any employment practice," but also creating an affirmative defense barring economic damages where the employer can show it would have made the same decision "in the absence of the impermissible motivating factor").

96. *See, e.g.*, McCraven v. City of Chicago, 109 F. Supp. 2d 935, 941 (N.D. Ill. 2000) ("To establish disparate treatment, Plaintiff must demonstrate that Defendants treated him differently because of his [protected characteristic].").

97. Disparate treatment has historically been "widely assumed to be coextensive with so-called 'intentional discrimination.'" Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1631 (2021). However, recent scholarship has suggested that limiting the theory of disparate treatment to intentional discrimination is "fundamentally incomplete." *Id.* As the Supreme Court

delineated two ways for plaintiffs to prove these claims:[98] direct evidence of discriminatory purpose, or indirect evidence using the *McDonnell Douglas* burden-shifting analysis.[99] The latter was an attempt by the Court to address the difficulty plaintiffs have with the former.[100] *McDonnell Douglas* has since become "the most important case in employment discrimination law" and the most common way such plaintiffs try and prove their claims.[101] In the following Sections, we will examine the problems presented by each method.

1. Why Direct Evidence Doesn't Work

Plaintiffs seeking to prove disparate treatment via direct evidence must produce a smoking gun. Direct evidence is the type of evidence that would resolve an issue without requiring any inferences beyond the evidence itself.[102] As the court in *McCraven* put it, direct evidence is a statement along the lines of "I refused to hire you because of your race."[103] But such evidence is seldom available.[104] Furthermore, in those rare instances in which direct evidence of a discriminatory purpose exists, it is likely that the plaintiff can only obtain it via discovery.[105]

---

continues to treat disparate treatment as coextensive with purposeful discrimination, *see, e.g.*, *id.* at 1636, this Article does the same.

98. *See, e.g.*, Hasham v. Cal. State Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000) ("The two accepted ways of establishing that an employer [unlawfully discriminated] are: first, by direct evidence . . . or second, indirect evidence . . . [using] the burden shifting approach.").

99. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). While all circuits generally adhere to this framework, the Seventh and Eleventh Circuits have sometimes taken a more creative approach to reviewing Title VII cases. Eyer, *supra* note 26, at 1009–10 ("Some circuits' case law—most notably the Seventh and the Eleventh—provide models for what a *McDonnell Douglas* paradigm shorn of its technical rules might look like. For example, the Seventh Circuit has reminded us that the relevant question in a Title VII case 'is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action.' Similarly, the Eleventh Circuit (and previously the Seventh) has suggested that a plaintiff ought to prevail if they can demonstrate a 'convincing mosaic of circumstantial evidence'—irrespective of the technical twists and turns of the *McDonnell Douglas* paradigm." (footnote omitted) (first quoting Ortiz v. Werner Enters., 834 F.3d 760, 765 (7th Cir. 2016); and then quoting Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011))).

100. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (alteration in original) (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))).

101. Eyer, *supra* note 26, at 975 (alterations omitted) (quoting SANDRA F. SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018)); *see also id.* (observing that "*McDonnell Douglas* is the thirteenth most cited Supreme Court case *of all time*—cited 58,073 times").

102. *See Direct Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

103. McCraven v. City of Chicago, 109 F. Supp. 2d 935, 941 (N.D. Ill. 2000).

104. *See, e.g.*, Zachary J. Strongin, Note, *Fleeing the Rat's Nest: Title VII Jurisprudence After* Ortiz v. Werner Enterprises, Inc., 83 BROOK. L. REV. 725, 733 (2018) (observing that "while direct evidence can make a case easy, the smoking gun will often not exist in real world situations of workplace discrimination"); U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes").

105. *See, e.g.*, JOSEPH A. SEINER, THE SUPREME COURT'S NEW WORKPLACE: PROCEDURAL RULINGS AND SUBSTANTIVE WORKER RIGHTS IN THE UNITED STATES 30 (2017) (noting that in hiring

But due in part to heightened pleading standards, the plaintiff cannot survive a motion to dismiss and thus get to discovery unless she has sufficient evidence to state a "plausible" claim.[106] Factual development is particularly difficult in employment discrimination cases where the touchstone is intent—something that is nearly impossible to establish without access, through discovery, to the employer's personnel and policies.[107] Consider failure-to-hire cases, where applicants frequently fail to hear back from the employer or are rejected with little accompanying information. It might be impossibly difficult for such a plaintiff to allege "plausible" hiring discrimination.[108]

There are other problems with discovering direct evidence. Adopting a wider frame of reference shows that direct evidence of discriminatory intent is likely to be thin on the ground because overt animus is a rarely disclosed motive for discrimination. Thus, plaintiffs rarely prove cases of disparate treatment via direct evidence, save in the most egregious cases when their bosses have been hateful or foolish enough to provide noncircumstantial evidence of their intentions.

2. The *McDonnell Douglas* Seesaw

In most disparate treatment claims, plaintiffs rely instead on indirect or circumstantial evidence. In those cases, courts adjudicate that evidence using a burden-shifting framework first established in *McDonnell Douglas*.[109] The analysis begins with evidence from the plaintiff making out a prima facie case of discrimination, then shifts the burden to the employer who must produce evidence that shows they did not act discriminatorily, then returns the burden to the plaintiff who must rebut the employer's evidence.[110]

A typical articulation of the *McDonnell Douglas* framework is as follows:

> (1) The plaintiff bears the initial burden of proof, specifically to present to the court a prima facie case of discrimination. She must do this by showing:
>
> (A) that she belongs to a protected class;
> (B) that she "applied and was qualified for" the position she sought;
> (C) that she was nevertheless rejected for the position; and
> (D) that "the position remained open and the employer continued to seek" candidates.[111]

---

discrimination cases, for example, applicants frequently never hear back from employers, and it may thus be nearly impossible for a plaintiff to allege "plausible" discrimination in such cases without evidence obtained in the discovery process).

106. These arose from the two cases commonly referred to with the portmanteau *Twiqbal*: *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 681 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), which together raise the standard for plaintiffs' pleadings in civil claims, holding they must be factually plausible to survive a motion to dismiss.

107. SEINER, *supra* note 105, at 30.

108. *Id.* Seiner contrasts this inside information problem with tort claims, for example, where typical plaintiffs "would have the same access to photos, police investigation reports, and insurance information as the defendant in the case." *Id.* at 31.

109. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

110. *See id.* at 802, 807.

111. *Id.* at 802.

(2) After a plaintiff meets the first part of her burden, the burden of production then shifts to the employer,[112] who must show that she acted for "some legitimate, nondiscriminatory reason."[113]

(3) Finally, the plaintiff must be given "a fair opportunity to show that [defendant]'s stated reason for [the] rejection was in fact pretext" or was otherwise discriminatory.[114]

That last step is the main problem with the *McDonnell Douglas* framework; in practice, it moves plaintiffs back to the direct evidence scheme that they sought to avoid in the first place. Given the ease in meeting step one and step two burdens, most cases tend to end up as plaintiff-bearing-the-burden pretext cases.[115] As the *McDonnell Douglas* Court put it, the purpose of the shift back to the plaintiff is to allow her the chance to put on "competent evidence that the *presumptively valid* reasons for [the] rejection were in fact a coverup."[116] But what sort of evidence could suffice to overcome the presumption of validity the Court places on the employer's averred "valid" reason? It is hard to say. For example, in the *Ash v. Tyson Foods, Inc.* case, the plaintiffs endeavored not only to persuade the jury, but also to lay a thick enough evidentiary foundation to survive a motion for judgment as a matter of law and appellate review.[117] The plaintiffs had persuasive evidence of pretext,[118] but the Eleventh Circuit disagreed with the jury verdict[119]—disagreement that looked a lot like employer deference. Reading the cases on appeal can be confounding. One is shuttled repeatedly from one analytical cubicle to another, and one can easily lose the big picture—the pattern of the tapestry. This compartmentalization of the inquiry has been further compounded

112. *Id.* Although there is a seesaw of burden shifting, the Supreme Court clarified in *Burdine* that the burden of *persuasion* stays always with the plaintiff. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

113. *McDonnell Douglas Corp.*, 411 U.S. at 802.

114. *Id.* at 804–05. However, a showing of pretext or failure to show pretext alone is not ultimately dispositive. *See* Eyer, *supra* note 26, at 1005 (noting that "*St. Mary's Honor* [*Center v. Hicks*, 509 U.S. 502, 518–19, 524 (1993)] . . . held that a defendant's liability does not turn on pretext, because the factual question of discrimination is the ultimate issue in a *McDonnell Douglas* case—and yet some lower courts today treat a plaintiff's failure to prove pretext as fatal to their claims." (emphases omitted)).

115. CHARLES A. SULLIVAN, STEPHANIE BORNSTEIN & MICHAEL J. ZIMMER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 34 (10th ed. 2022) ("*It's All Pretext*. . . . While cases might start as three-step *McDonnell Douglas* cases, given the ease with which the two parties can carry their step one and step two burdens, they tend to end up, like *Reeves*, as pretext cases.").

116. *McDonnell Douglas Corp.*, 411 U.S. at 805 (emphasis added).

117. 546 U.S. 454, 455–56 (2006) (per curiam) (noting that the Eleventh Circuit granted defendant's Rule 50(b) motion after determining that "the trial evidence [was] insufficient to show pretext . . . under the burden-shifting framework set forth in *McDonnell Douglas*" and that "the District Court did not abuse its discretion in ordering a new trial" as to the second plaintiff).

118. Consider the jury verdict: $250,000 in compensatory damages and $1.5 million in punitive damages for each plaintiff. Ash v. Tyson Foods, Inc., 664 F.3d 883, 887 (11th Cir. 2011).

119. *See Ash*, 546 U.S. at 455.

by an expansive variety of legal doctrines that favor employer defendants.[120] The ultimate result is that not very much discrimination gets found.[121]

Yet taking a broad view of discrimination in the American workplace reveals a clear picture: discrimination not only exists, but it's widespread. The median full-time female worker in the United States earns seventeen percent less than her male counterpart.[122] The median Black male full-time worker earns only 73.5 cents for every dollar his white-male counterpart earns.[123] At the median, only white and Asian men—no Black or Hispanic men, and no women at all—earn enough to have economic security as a single parent.[124] These disparities persist even after nearly half a century of the supposedly employee-friendly *McDonnell Douglas* analysis.[125] And no disparities can exist in the aggregate without at least raising questions about how much discrimination is influencing those outcomes.

And yet, once you zoom in on the specific facts of any given case or apply certain defendant-favoring legal frameworks, you simply cannot see that broader picture anymore. After all, if you zoom in so tightly that all you consider is the employer's stated "legitimate" reason for a facially discriminatory action and weigh that against whatever circumstantial evidence the plaintiff can cobble together, you may not find any discriminatory intent at all. Our proposal would prevent such a zoom and instead keep the tapestry in focus.

B. DISPARATE IMPACT CLAIMS

Title VII does not count only intentional discrimination as a cognizable claim of action. Plaintiffs can also prevail by showing that an adverse outcome was the result of a facially neutral policy or action that nevertheless had a disproportionate effect on a protected class.[126] Courts were the first to recognize this avenue of redress, but Congress felt the Supreme Court's analysis of disparate impact claims set the bar too high.[127] The Civil Rights Act of 1991 thus amended Title VII to explicitly set out disparate impact claims and make it easier to prove such claims.[128] The statute adopts a tripartite burden-shifting approach for disparate impact cases similar to the *McDonnell Douglas* dance:

120. *See supra* note 36 and accompanying text.

121. *See supra* notes 19–25 and accompanying text.

122. Sonam Sheth, Madison Hoff, Marguerite Ward & Taylor Tyson, *These 8 Charts Show the Glaring Gap Between Men's and Women's Salaries in the US*, BUS. INSIDER (Mar. 15, 2022, 11:01 AM), https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3 [https://perma.cc/DZG7-WDUK].

123. *See* HEGEWISCH & HARTMANN, *supra* note 82.

124. *Id.*

125. *See* Eyer, *supra* note 26, at 971 (observing that the paradigm was initially intended to be helpful to plaintiffs).

126. *See* 42 U.S.C. § 2000e-2(k)(1)(A).

127. *See* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 74–75 (2011).

128. *See id.* at 75 (explaining how the amendments made it somewhat easier for disparate impact plaintiffs to prevail).

(1) The plaintiff must first present a prima facie case of disparate impact by identifying the particular employment practice that causes the disparate impact;[129]
(2) The defendant then has the burden of producing evidence that the practice in question either
    (A) did not cause the disparate impact,[130] or
    (B) was "job related" and was "consistent with business necessity";[131] and
(3) The plaintiff must then show that the employer could have—but did not—use other practices that did not produce a discriminatory effect.[132]

This burden-shifting regime suffers from the same deficiencies as the *McDonnell Douglas* test. Even with the added benefit to the plaintiff of being able to treat a set of business practices as together creating a disparate impact, the burden of persuasion is, in effect, heavier on the plaintiff than the defendant.[133] The final step, in particular, requires the plaintiff to show what alternative practices the employer defendant was familiar with that would equally accomplish the business purposes in question, whether the alternative practice would successfully avoid the discriminatory effect, and whether a jury could conclude that the employer refused to adopt the alternative practice.[134] That is a lot of proving.

This state of affairs mirrors the burden allotment in criminal cases and helps illuminate its shortcomings in workplace discrimination cases. In criminal trials, the analog to the civil plaintiff is the government prosecutor, and the analog to the civil defendant is the criminal defendant.[135] In criminal trials, the prosecution

129. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). *But see id.* § 2000e-2(k)(1)(B)(i) ("[I]f 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.").

130. *Id.* § 2000e-2(k)(1)(B)(ii).

131. *Id.* § 2000e-2(k)(1)(A)(i).

132. *Id.* § 2000e-2(k).

133. Horowitz v. AT&T Inc., No. 17-cv-4827, 2018 WL 1942525, at *22 (D.N.J. Apr. 25, 2018) ("A plaintiff's initial burden is heavier under a disparate impact theory than it is under a disparate treatment theory. . . . To plead a disparate impact claim under the ADEA, 'it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.' Moreover, the plaintiff must show that the 'facially neutral employment practice had a significantly discriminatory impact.' Statistical evidence of this impact 'must be limited in scope in accordance with [Federal Rule of Civil Procedure] 26(b)(1) and tied to the allegations of plaintiff's complaint.'" (alteration in original) (citations omitted) (first quoting Smith v. City of Jackson, 544 U.S. 228, 241 (2005); then quoting Connecticut v. Teal, 457 U.S. 440, 446 (1982); and then quoting Kresefky v. Panasonic Commc'ns & Sys. Co., 169 F.R.D. 54, 66 (D.N.J. 1996)); *see* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 993–95 (2005) (noting that even though disparate impact liability is the most promising way of dealing with subtler forms of bias, such litigation is more costly (primarily because of expert testimony) and expressly allows a defendant to justify any disparities).

134. *See* Jones v. City of Boston, 845 F.3d 28, 34–38 (1st Cir. 2016).

135. *See Criminal Cases*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases [https://perma.cc/T58J-FJMY] (last visited Feb. 21, 2024).

has almost all the power when compared against the (usually poor) individual defendant, and the defendant is presumed innocent until the state proves otherwise.[136] As such, it may be sensible to demand a high burden of proof and to structure the system so that the defense has no affirmative burden.[137]

However, this is the place where the analogy begins to warp: in contrast to most criminal trials, in the typical employment discrimination case it is the *defendant*—the larger employer—who has access to the levers of power *and* the resources and information necessary to pull them. And that is true whether the business is smallish (at the minimum fifteen-employee threshold) or far larger (such as an Amazon or Google). This power asymmetry means employers in employment discrimination cases simply do not need the same protection offered to criminal defendants via a presumption of innocence. It ought to be the employer—the party with all kinds of superior resources—who bears the burden of proof. The present burdens compound the challenges faced by plaintiffs—for example, under heightened pleading standards—when they have access to limited information.[138]

A realignment of the burden of persuasion along axes of power, rather than along the traditional plaintiff–defendant axis, would both be more just and help solve the problem of "zooming in" that causes courts and the legislature to miss the pattern of discrimination—a pattern that is seen clearly with the benefit of context.

C. WHY COURTS DON'T SEE DISCRIMINATION

Judges and juries fail to see discrimination in Title VII cases for many of the same reasons that employers discriminate, as well as for some other reasons that are particular to the legal system.

First, most people simply have a narrow mental paradigm of what constitutes discrimination.[139] As we confront ambiguous situations in life, we assess them by comparing new situations with existing mental templates of potential explanations.[140] So if someone is denied a promotion at work and the reason for the denial is not obvious, the person could conjecture that the reason was, say, discrimination, merit, nepotism, or a personality clash. In settling on any one of those reasons, the person would likely compare the facts of the current situation to her

136. *See* BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR 1–2 (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/R7WP-6XK3].

137. As scholars have noted, "Proving criminal intent involves an extremely high burden of proof." Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 496 (2009). However, balanced against this high burden is the fact that prosecutors ordinarily have close working relationships with law enforcement and that judges and juries have been shown to have "an inherent predisposition to believe the testimony of police officers rather than citizens (a phenomenon that is compounded when the victim has a criminal record independent of the incident in question)." *Id.*

138. *See supra* Section II.A.1; *infra* text accompanying note 192.

139. *See* Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1278 (2012).

140. *Id.* at 1312.

existing mental prototypes of discrimination, merit, nepotism, or personality conflicts.[141] "The process of making judgments thus becomes one of comparing salient features of an existing template and the situation currently demanding interpretation, and judging the extent of similarity."[142] In the discrimination context, most people's templates are quite narrow, requiring strong evidence of invidious intent and clear harm before they will attribute a result to discrimination.[143] Thus, outside of exceptional circumstances, people are unlikely to identify discrimination as the cause of a workplace outcome.

Second, it is easy to miss unconscious bias, and courts are just as likely to be conduits of implicit bias as any other structure or organization.[144] Implicit bias should not be confused with explicit or overt prejudice. Some judges and jurors surely act out of explicit apathy or animus, a reality that is beyond the scope of both Title VII and this Article.[145] But judges and jurors don't have to act on apathy or animus to reach poor decisions; all they have to do is fail to recognize their implicit biases.[146] While one might be tempted to despair, the research shows that "when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so."[147] What is needed, then, is a mechanism to help courts account for and counteract implicit bias. Our proposal could be one such mechanism.

That mechanism could also be brought to bear against the structural forces that shroud courts in our "common history" of normalized bias.[148] Just as individual judges are subject to implicit bias like their fellow citizens, so also are courtrooms built out of the same structural biases as other American institutions.[149] When

141. *Cf. id.* at 1312–13.

142. *Id.* at 1312.

143. *See id.* at 1300–01. There has also been writing that indicates white and non-white people may have different perceptions of what racism *is*. Lynne Duke, *Blacks and Whites Define Word 'Racism' Differently*, WASH. POST (June 8, 1992), https://www.washingtonpost.com/archive/politics/1992/06/08/blacks-and-whites-define-word-racism-differently/9e716579-5dd0-4f7d-82f8-0bf060db1f2d/.

144. *See Understanding Implicit Bias*, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY (2015) [https://web.archive.org/web/20200702060803/http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/] ("Implicit biases are *pervasive*. Everyone possesses them, even people with avowed commitments to impartiality *such as judges*." (second emphasis added)); *see also supra* notes 78–79 and accompanying text (noting the active role of organizations in creating cultures that foster discriminatory norms).

145. However, others have addressed the role of explicit bias. *See, e.g.*, Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009) ("Explicit bias exists and undoubtedly accounts for many of the racial disparities in the criminal justice system."); Michael Montella, *A Cause for Concern: Bias on the Supreme Court*, HARV. POL. REV. (Oct. 5, 2018) [https://web.archive.org/web/20181006015049/http://harvardpolitics.com/united-states/a-cause-for-concern-bias-on-the-supreme-court/] (describing impartiality concerns arising from Justice Brett Kavanaugh's "reckless slur of Democrats during" his confirmation hearings).

146. *See* Rachlinski et al., *supra* note 145, at 1221–22 ("[I]mplicit biases can affect judges' judgment.").

147. *Id.*

148. Lawrence III, *supra* note 80, at 330.

149. *See, e.g.*, Erik Girvan & Heather J. Marek, *Psychological and Structural Bias in Civil Jury Awards*, 8 J. AGGRESSION CONFLICT & PEACE RSCH. 247, 254 (2016) (finding that "structural and psychological biases related to plaintiffs' race, ethnicity, and sex may affect jury decision-making and

bias is so thoroughly baked in to a culture as to become invisible, the solution must require more than disavowing individual animus and more than identifying and countering individual implicit bias. The solution to structural bias must itself be structural.

That brings us to the third reason judges and jurors fail to see discrimination: they aren't built to see structures. The reason for that is ideological in nature. The American legal system is built on notions of individual justice; the legal system treats both criminal defendants and parties to civil matters as individuals, not in their roles as members of a broader swath of society.[150] And Title VII is just an extension of that pattern. The text of the statute is plainly focused on individuals. The text prohibiting disparate treatment, for example, makes it discriminatory "to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin."[151] The Supreme Court has affirmed this focus, writing that "[t]he principal focus of the statute is the protection of the *individual* employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the *individual* employee."[152] Whatever the merits of an individual-centric approach, it renders the standard modus operandi of our courts particularly ill-suited to solving—or even recognizing—systemic issues.[153] How can courts hope to address broader structural issues when using the same old ways of doing business? Courts are focused in so close they cannot see the pattern of discrimination.[154]

Fourth, courts fail to see discrimination because it is their privilege not to see it. Nearly sixty percent of state court judges are white men—approximately

---

contribute to differential jury awards"); ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 10 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/UFR9-PRFG] ("[T]he ways in which the criminal justice system operates to disadvantage people of color are *systemic* and ingrained, and more often subtle." (emphasis added)).

150. *See, e.g.*, Roscoe Pound, *Individualization of Justice*, 7 FORDHAM L. REV. 153, 158 (1938) ("[I]ndividualization is a required element in judicial justice.").

151. 42 U.S.C. § 2000e-2(a)(1) (emphases added).

152. Connecticut v. Teal, 457 U.S. 440, 453–54 (1982) (emphases added). Interestingly, disparate impact is the doctrine that seems to pay more attention to groups, and yet its seminal cases (like *Teal*) remind us that the focus is to remain on individuals. Consider the chief disparate impact case, *Griggs v. Duke Power Co.*, which emphasized measuring "the person for the job." 401 U.S. 424, 436 (1971). Indeed, scholars have noted that one possible understanding of disparate impact's guiding rationale is to maximize individual capabilities. *See* SULLIVAN ET AL., *supra* note 115, at 201.

153. *See, e.g.*, GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 5 (2005) (writing that in good criminal courts, "instead of seeing each case as an isolated incident, judges and attorneys in problem-solving courts *analyze the cases in front of them for patterns* and then fashion responses that seek to change the behavior of offenders, enhance the safety of victims, and improve the quality of life in our communities" (emphasis added)).

154. Of course, disparate impact may be seen as an outlier for this individualistic statute. Even so, disparate impact jurisprudence has been feeble, *see infra* Part IV, a point which may indicate that courts read the statute with an individualistic frame in mind.

double their share of the U.S. population.[155] Our courts, like our corporate boardrooms, are very white and very male. This naturally affects the way judges see the parties, with measurable effects on outcomes. Gene Nichol, for example, has studied the way privilege affects a court's decisions regarding whether a plaintiff has standing to sue. He explains that judges, who are often members of dominant social groups, are more likely to find a legally cognizable injury when the plaintiff's experiences mirror their own.[156] Within this same vein, a recent study found that, when compared against male judges, "[e]vidence suggests that female judges are better able to *perceive* less egregious forms of sex discrimination."[157]

Much as with implicit bias, white-male privilege exerts a toll on the ability of people to see or understand the effects of bias that they have never experienced.[158] Having been born into privilege doesn't make judges bad; it makes them *lucky*.[159] But that fortune ought to carry with it the responsibility, at the least, to identify that privilege and to move past it.

III. PREVIOUSLY SUGGESTED REVISIONS TO TITLE VII

This Article is not the first to identify the shortcomings of Title VII jurisprudence. In this Part, we analyze two of these prior scholarly contributions, which bear some general similarities to our own. The goal is to explain how exactly our proposal reaches further and better addresses Title VII's structural impediments.

A. A BROAD REFORM THAT ISN'T BROAD ENOUGH

In her 2011 article, *Rethinking Discrimination Law*, Sandra Sperino makes a broad argument for what she calls a "return to first principles."[160] She intends by this "return" to fold disparate treatment and disparate impact cases together into a

155. TRACEY E. GEORGE & ALBERT H. YOON, AM. CONST. SOC'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? 7 fig.6 (2016), https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf [https://perma.cc/RUS3-FBV5].

156. Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002) ("The malleable, value-laden injury determination has operated to give greater credence to interests of privilege than to outsider claims of disadvantage. As elite judges summarily determine which interests are worthy of legal cognizance, they unsurprisingly embrace concerns that strike closest to home, sustaining 'harms' that mirror the experiences and predilections of their own lives.").

157. Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LAB. ECON. 623, 627 (2018) (emphasis added).

158. *See, e.g.*, Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* 13 (Wellesley Ctrs. for Women, Working Paper No. 189, 1988), https://www.wcwonline.org/images/pdf/White_Privilege_and_Male_Privilege_Personal_Account-Peggy_McIntosh.pdf [https://perma.cc/9FNH-277S] ("In my class and place, I did not see myself as racist because I was taught to recognize racism only in individual acts of meanness by members of my group, never in invisible systems conferring racial dominance on my group from birth.").

159. Nancy DiTomaso poignantly describes white privilege as "an invisible knapsack that whites carry around, filled with institutional social resources to use whenever necessary, [which] also provide[s] a cognitive experience of goodwill and affective preference that allows whites to feel confident, secure, and capable as they make decisions and encounter choices throughout their lives." NANCY DITOMASO, THE AMERICAN NON-DILEMMA: RACIAL INEQUALITY WITHOUT RACISM 7 (2013) (citation omitted).

160. Sperino, *supra* note 127, at 115.

single, simpler analysis than the top-heavy edifices courts currently use to assess claims under Title VII.[161] In Sperino's revision, courts would reduce the analysis for both types of claims under Title VII to a single, three-part approach: "The elements of a discrimination claim under Title VII's statutory language would require proof of (1) hiring, termination, compensation decisions, or other actions that affect the terms or conditions of employment or that limit a plaintiff's employment opportunities that are (2) taken because of (3) a protected trait."[162]

The primary benefit of the Sperino revision is that it would shake the courts out of their calcified reliance on structural formulations—what she calls frameworks—that don't always fit the cases brought before them. By removing the analysis from strictly regimented frameworks and placing it instead in a freer wheeling "totality of the circumstances"-type scheme, the Sperino revision is expressly designed to allow courts to consider the very types of discrimination that are most in need of consideration: what Sperino terms "negligent, unconscious, [and] structural discrimination"[163] (which appear to be at least very close analogs to what we have termed "apathy," "implicit bias," and "structural bias").

However, as Sperino herself notes, framing the analysis in the way she does amounts to a recapitulation of the courts' current schema for assessing direct evidence cases in disparate treatment claims.[164] But that isn't the major deficiency of her proposal. The chief problem of the Sperino proposal is that while it may *allow* courts to do better, it doesn't *require* them to do so. That is, as Sperino concedes, her revision would not demand "that the courts will *actually* recognize [negligent, unconscious, and structural discrimination] claims, but rather that these claims *arguably fit* within the statutory language of Title VII."[165]

And there's the rub: if Congress doesn't force action through statutory regime change, the most likely outcome of a proposal like the Sperino revision is that courts will move all their analyses to narrow, technical readings of the word "because."[166] That is, by adopting her revision, we will have traded out the current frameworks for a single new one. Instead of being forced to reckon with the hidden biases which cause discrimination, courts will be free to continue to debate whether a negative employment action was taken *because of* the plaintiff's protected characteristic. And "because of" is just another word for the same old "motivating factor" test created by the 1991 amendment.[167] Despite the promise

161. *See id.* (referring to these edifices as "frameworks," and arguing that they have become totems that the courts serve and are unable to see past).

162. *Id.*

163. *Id.* at 117.

164. *Id.* at 115.

165. *Id.* at 117 (emphases added).

166. Consider how the Americans with Disabilities Act's (ADA) amendments shifted the analytical action from the protected class query ("is one disabled?") to questions of qualification and discrimination (i.e., causation). The result is still that "the employer win rate [on motions for summary judgment] in the post-amendment cases" is nearly fifty percent. Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2045, 2058 (2013).

167. *See* 42 U.S.C. § 2000e-2(m).

of a mixed-motives theory (discussed further, *infra*, in Part IV) to more easily allow plaintiffs to prove both unlawful motives and a causal nexus to the employment outcome, nothing easy has materialized.

Proving causation is difficult in any context,[168] but discrimination cases present their own unique challenges. In such cases, the event of discrimination is often imperceptible. It is one thing to unpack cause and effect for the most common torts, say a dented bumper or broken leg. It is quite another to try and discern exactly why any one person out of dozens of applicants was not hired or promoted. Employment discrimination cases are inherently hard to prove in large part because they reach back in time and seek to dissect "nonphysical and nonconcrete states of mind."[169]

Complicating matters further is that these judgments about why a person made the decision that they did are frequently made by judges who, as noted earlier, disproportionately hail from socially dominant groups. Such judges may naturally fail to recognize discrimination if it does not fit into their personal paradigm of bias.[170] Thus, in the end, we might have nothing more with the Sperino revision than the ability to make arguments on the same ground we paved thirty-two years ago with the Civil Rights Act of 1991. That ostensibly improved ability to show causation has thus far been ineffective at improving outcomes for plaintiffs.[171]

B. A NARROW REFORM THAT IS TOO NARROW

In contrast to the Sperino revision, Mark Brodin seeks a narrower solution in his 2018 article *Discriminatory Job Knowledge Tests, Police Promotions, and What Title VII Can Learn from Tort Law*.[172] There, he addresses his argument toward Title VII claims that involve disparate impact arising from facially neutral tests, particularly those used by police departments.[173]

Brodin's suggestion is to change this slice of employment law by importing into it the tort law concept of inferred intent.[174] In his revision, Brodin relies on

168. For example, on the one end of causation is the butterfly effect and on the other is sole causation, but either could be reasonably understood as causal in nature. *See* SPERINO & THOMAS, *supra* note 25, at 102.

169. Areheart, *supra* note 24, at 1950–51 (citing SPERINO & THOMAS, *supra* note 25, at 107).

170. *See supra* notes 139–43 and accompanying text (discussing how most people hold an extremely narrow paradigm of discrimination).

171. Among employment discrimination cases, over one-third are disposed of by motion, with virtually all of these resolved in favor of the employer. *See* BERREY ET AL., *supra* note 22, at 60–65, 61 fig.3.4. Most cases settle for small amounts and silence plaintiffs through nondisclosure agreements. *See id.* at 19. Only six percent of employment discrimination cases make it to trial, and only in one-third of those does the plaintiff prevail. *Id.* at 61 fig.3.4, 63. Moreover, the odds of a plaintiff's trial win being reversed on appeal is about forty percent. Clermont & Schwab, *supra* note 28, at 110, 131 (observing, in a study that spanned seventeen years, that employee trial wins were reversed more than forty percent of the time on appeal, where only about nine percent of employer wins were reversed). That means the odds of an employment discrimination plaintiff reaching a fully litigated outcome in which they have their day in court and win a verdict that is upheld over time is only about one percent. Only prisoner litigants fare worse. *See* Eyer, *supra* note 139, at 1276.

172. Mark S. Brodin, *Discriminatory Job Knowledge Tests, Police Promotions, and What Title VII Can Learn from Tort Law*, 59 B.C. L. REV. 2319, 2320, 2362 (2018).

173. *Id.* at 2320.

174. *Id.* at 2327.

the doctrine "in tort . . . that an actor *intends* the natural and foreseeable consequences of [her] actions."[175] Accordingly, the Brodin revision would have courts find that an employer's repeated use of selection practices that routinely result in discriminatory outcomes should be taken as evidence of discriminatory intent.[176]

In this way, Brodin's revision would remove analysis in such cases from the "hyper-technical"[177] realm of test validation offered by competing experts and place it instead within tort law standards that have long been familiar to courts.[178] Adopting his proposal would effectively create per se liability where it can be shown that the selection process used was (1) more discriminatory than another process available to the employer and (2) *known*—either actually or constructively—by the employer to have a discriminatory impact.[179]

The problem with the Brodin revision is chiefly one of scope. It's certainly an improvement over current analyses that allow bad (or simply apathetic) actors to persist in using discriminatory selection tools so long as they "have been able in court to isolate each device's impact and avoid confronting the cumulative effects of the pattern."[180] But it's simply too narrow in scope to move the needle in any appreciable way for many victims of discriminatory workplace outcomes. If enacted as suggested, the Brodin revision would result in courts finding discriminatory intent in the small number of cases involving employers who repeatedly used selection techniques that courts will recognize as discriminatory. But considering the multitude of reasons courts fail to see discrimination, Brodin's recommendation would likely affect only one small cross-section of employee outcomes (those involving facially neutral selection devices) and, thus, a small fraction of the overall picture.

IV. PRIOR INNOVATIONS IN THE LAW

Previous Title VII innovations have not ushered in a new age wherein plaintiff employees have a lower, more realistically attainable burden of proof. One such intended innovation was the aforementioned "motivating factor" or "mixed-motives liability" theory. Under this approach, a plaintiff can avoid proving but-for causation—and instead may show merely that the unlawful trait "motivated" the ultimate decision—in exchange for a more limited recovery.[181] However, this innovation has "largely proven to be the revolution that wasn't."[182]

While several theories have been proffered as to why mixed-motives liability failed to transform the landscape of employment discrimination law, one compelling theory is the limited remedy associated with a successful claim. If a plaintiff

175. *Id.* at 2363.
176. *Id.* at 2363–64.
177. *Id.* at 2320.
178. *See id.*
179. *See id.* at 2368–69.
180. *Id.* at 2369.
181. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 359 n.9, 366 (2020).
182. *Id.* at 366.

proceeds on a mixed-motives theory, the employer can assert an affirmative defense that it would have made the same decision notwithstanding consideration of the prohibited trait.[183] If this defense is successfully established, the plaintiff may not recover economic damages. Many plaintiffs' attorneys may not be willing to take such a risk because most are paid only if their client can recover economic damages. This limitation of remedy has minimized the frequency with which plaintiffs make use of this tool.

Similarly, the previously discussed theory of "disparate impact," whereby a plaintiff can establish liability without a showing of animus or intent on the part of the employer, has been a relatively feeble innovation. Although it was heralded to be a game-changer, its impact has been limited in scope. In fact, "[o]utside of the original context in which the theory arose, namely written employment tests, the disparate impact theory has produced no substantial social change and there is no reason to think that extending the theory to other contexts would have produced meaningful reform."[184]

The lack of substantial change might be explained by the fact that "the disparate impact theory begins where intentional discrimination ends, and seeking an expansive role for the disparate impact theory ultimately has left us with a truncated definition of intentional discrimination."[185] In contrast, the bias presumption collapses the theory of disparate impact into that of disparate treatment, allowing both theories to operate under the same framework and thereby eliminating the danger that cases will fall into the crack between two warring theories.

V. THE BIAS PRESUMPTION

A solution is within our grasp. Congress ought to amend the text of Title VII to force courts to take a new approach to workplace discrimination claims. The amendment should establish the presumption of bias in any Title VII workplace discrimination claim. That is, when a worker makes a prima facie showing that she is a member of a protected class and has experienced a bad outcome at work, that showing should trigger a rebuttable presumption that the employer unlawfully discriminated against the worker. That presumption—the "bias presumption," as we call it—places all further burdens of proof and persuasion on the defendant until the defendant can rebut it by a showing of clear and convincing evidence that its action was *not* discriminatory.

This proposal essentially elevates the *McDonnell Douglas* treatment out of its self-made quagmire of seesawing shifts. At the same time, it rearranges the burdens of proof and production along more equitable lines. Perhaps most importantly, it forces courts to reckon with the implicit and structural biases that they are—by nature and composition—disinclined to see. By design, it represents a significant shift away from accepted practices, because sixty years of accepted

183. *Id.* at 383.

184. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705 (2006).

185. *Id.* at 706.

practices have not gotten us nearly far enough. In other words, it's a big swing at a big problem.

A. THE PROPOSED STATUTORY LANGUAGE

The bias presumption should be added to Title VII by amendment replacing 42 U.S.C. § 2000e-2(k) to read the following:

> Presumption of Bias
>
> (1) An unlawful employment practice based on disparate treatment or disparate impact is established under this subchapter if:
>
> (A) a complaining party demonstrates that she or he is a member of a protected class on the basis of her or his race, color, religion, sex, or national origin;
> (B) the complaining party demonstrates that she or he experienced an adverse workplace outcome including but not limited to dismissal, detrimental transfer, failure to be promoted, or failure to be hired; and
> (C) the respondent cannot demonstrate by clear and convincing evidence that the adverse outcome was solely job related for the position in question.

In this way, once the plaintiff shows that she is a member of a protected class and has experienced an adverse outcome, the whole burden of proof and the entire question of production are put upon the employer. There is no longer the necessity for a plaintiff to seek a smoking gun to show disparate treatment. She will no longer need to compile reams of statistical analysis to attempt to demonstrate disparate impact. The back-and-forth burden shifting will vanish in a puff of logic as the party with the power over its actions and the necessary proof at last becomes the party responsible to account for those actions.

It may be illustrative to return to a case discussed in the introduction, *Ash v. Tyson Foods, Inc*. In that case, the plaintiffs seeking promotions had been repeatedly called "boy" and claimed they had superior qualifications.[186] They did not receive the promotions and a jury found discrimination.[187] The result was half a million dollars in compensatory damages and three million in punitive damages.[188] The Eleventh Circuit got hung up on whether the plaintiff's proof of pretext was sufficient and reversed the jury's award.[189]

However, the bias presumption would shift the burden to the employer. The employer would always be required to convince a jury, and possibly an appellate court, that its actions were not discriminatory. Under our proposal, Tyson Foods would have had to prove anti-pretext: that its reasons for not promoting the plaintiffs were clear, true, and job related. The plaintiffs in *Ash v. Tyson Foods, Inc*. would have met a different outcome both at the district court as well as at the Eleventh Circuit.

---

186. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (per curiam).
187. *Id*. at 455.
188. Ash v. Tyson Foods, Inc., 664 F.3d 883, 887 (11th Cir. 2011).
189. *Ash*, 546 U.S. at 455–56.

B. THE PRACTICAL EFFECTS

If this proposal were enacted tomorrow, the effect on both the workplace and on workplace discrimination litigation would likely be immediate and dramatic. It would suddenly establish the following benefits: (1) more plaintiffs who experienced discrimination—and particularly those who experienced discrimination as a result of implicit bias or structural bias—would survive summary judgment and be better positioned to settle or prevail at trial, (2) more employers would be held accountable for their explicit and implicit biases because courts would require them to *prove* that their actions were related completely to the job or else hold them liable, (3) all employers (with at least fifteen employees) would of necessity be forced to consider employment policies and actions in the broader context of structural biases, and (4) courts would become more socially attuned institutions as they, too, would be required to consider employment actions in the broader context of structural biases. This latter outcome would likely spill over into courts' assessments of other types of claims.

More plaintiffs would survive summary judgment and prevail at trial because, under this new statutory regime, courts would not accept the standard pretextual explanations for discriminatory actions. If courts no longer accept such explanations, employers will cease offering them. This new burden on employers would have two beneficial effects for them. First, it would force them to avoid discriminatory practices, and second, it would force them to take stock of their actions. They would have to really think about the procedures they have in place and the actions they might take in the future.

Under this revision, employers could still easily escape liability where their hands are truly clean. In cases where they took adverse but not discriminatory action, they would only need to "show their work," as it were: that is, explain to the court the considered and entirely job-related reason for their action. This is reasonable for employers, so long as their administrative and human-resource policies and procedures align with sound employment practices.

Courts, too, would be required to consider how the cases they hear are situated within a broader social context. Presuming bias is an enormous change to business as usual. Adopting the stance that businesses must show they're not acting in a biased manner would prompt a major question: what exactly are we doing to make principled, consistent, and business-focused employment decisions? The answer would require a broader lens of analysis: to zoom out from the particular facts of any individual case and to consider each case in its big-picture business and social environment.

But why presume bias? Because the bias is there. It hides, implicit, sticky, and impactful, but invisible. Why should we presume that every employer discriminates? Because employers are people, and every person holds biases.[190] Most

190. "Implicit biases are *pervasive*. Everyone possesses them . . . ." KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, *supra* note 144.

importantly, we ought to presume bias so that we can stop it. We ought to presume bias so that we stop pretending it only exists where we can *see* it.

A bias presumption makes courts consider a feature of cases that they haven't often recognized: that every case is part of the American tapestry, with all the implicit and structural biases that entails. This new consideration would likely have effects not just on workplace discrimination cases, but on courts' thinking about discrimination of all kinds. Judicial decisions informed by a deeper consideration of structural biases are likely to lead to more equitable outcomes.

Furthermore, this sort of consideration is vital to establishing a functional social inclusivity: human beings discriminate by nature and by training.[191] To overcome implicit biases and structural biases requires thoughtfulness, attention, intention, and hard work. By broadening courts' focus to encompass the whole instead of just a single part, the bias presumption would force courts to better respond to workplace discrimination.

C. SOME LIKELY OBJECTIONS

We anticipate four major lines of criticism of the bias presumption.

1. A Flood at the Courthouse?

Some observers will object by claiming that this approach (which requires such little showing from plaintiffs) would subject courthouses to a flood of new litigation. This criticism is partly misguided, partly inaccurate, and partly off-point.

This objection is in part misguided because new litigation is the *point* of this strategy. That is, there is likely to be a significant uptick in court filings, but (1) the uptick would not be enough to offset the decline in cases in the years since *Twiqbal*,[192] and (2) one of the most significant advantages of this proposal is that it would effectively give plaintiffs an end-run around the bar *Twiqbal* set in front of the courthouse doors. Since the statutory requirement for a cognizable claim is so low under the bias presumption model, plaintiffs who have experienced discrimination should have no trouble meeting *Twiqbal*'s heightened pleading standards.

Second, the criticism is in part inaccurate: inasmuch as any new litigation involves an increase in fraudulent or frivolous claims, those can be easily dealt with and properly dismissed by courts upon an answer from employers that simply provides by clear and convincing evidence the real, nonpretextual reason for

191. *See, e.g.*, *Discussing Discrimination*, AM. PSYCH. ASS'N (2016), https://www.apa.org/topics/racism-bias-discrimination/keita [https://perma.cc/J3Q3-3GZ7] ("Humans are naturally motivated to categorize people and objects. This is normal cognitive behavior."); Lawrence III, *supra* note 80, at 330 ("[U]nlike other forms of irrational and dysfunctional behavior, which we think of as deviant or abnormal, racism is 'normal.' It is a malady that we all share, because we have all been scarred by a common history.").

192. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); *see also* Michael O'Neil, Twombly *and* Iqbal*: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 169 (2012) ("One of these problems [with the *Twiqbal* heightened pleading standard] is that hostile work environment plaintiffs—and indeed female plaintiffs in general—are subjected to a higher claim disposal rate at summary judgment.").

the adverse outcome. In other words, the higher standard of proof demanded from employers is not too high to surmount for those with clean hands and sound recordkeeping. At the same time, it gives courts a clear and logical means to dispense with plaintiffs who bring bad claims.

Furthermore, while there may be some plaintiffs hoping for a windfall from a meritless claim, such people already exist, and there's no compelling reason to believe they'll only now begin to come out of the woodwork in droves (especially considering the low average settlement amounts discussed above[193]). Businesses that institute cogent, thoughtful procedures that help them make nondiscriminatory employment decisions will be well armed with the right ammunition to ward off bad claims.[194] Therefore, so long as they are taking thoughtful steps to avoid acting on biases, employers ought to find themselves in a better position to deal with frivolous claims while their employees reap the benefits of their newly thoughtful and nondiscriminatory policies.

Finally, the "new-litigation" criticism is in part off-point because it fails to consider it is more likely that employers, and not courts, will see any increased workload caused by the new and lower pleading requirement as they investigate employee claims. But employers already have EEOC-mandated obligations.[195] Requiring employers to make good faith efforts at eliminating bias in their processes wouldn't create a significant new workload for courts. To cut off frivolous claims before trial, employers will have to prepare an affirmative defense by clear and convincing evidence, and this new, higher standard will likely mean an increase in attention employers pay to their policies and procedures in *advance* of any claims. Yet, since the bias presumption would not itself remove the statutory requirement that claimants first exhaust available administrative remedies, it's not clear how requiring more than pretext from employers would in fact create any substantial increase in time spent on employee claims. Instead, a presumption of bias would simply lead to employers using more thought and care *before* adverse actions, not *afterward*.

2. A Mere Proposal for Just Cause?

One could object that this proposal seems like a thin disguise for simply requiring employers to have "just cause" for terminating their workers. Employers generally enjoy broad autonomy to make employment decisions, inhabiting an at-will regime that is often summed up in the adage that one can be fired for a good

193. *See* BERREY ET AL., *supra* note 22, at 60–65.

194. *See* Areheart, *supra* note 24, at 1966–73 (arguing instituting procedurally just measures—built around transparency, accountability, and freedom of choice—can increase justice).

195. *See, e.g.*, *Legal Requirements*, U.S. EEOC, https://www.eeoc.gov/employers/small-business/legal-requirements [https://perma.cc/8UAR-XR7G] (last visited Feb. 22, 2024) ("Employers who have at least 100 employees and federal contractors who have at least 50 employees are required to complete and submit an EEO-1 Report (a government form that requests information about employees' job categories, ethnicity, race, and gender) to EEOC and the U.S. Department of Labor every year.").

reason, a bad reason, or no reason at all.[196] This at-will regime is generally only subject to contractual protections and discrimination laws.[197] Scholars have objected to the at-will legal regime for a host of reasons, and many have proposed mandating that employers have "just cause" for their adverse employment decisions.[198] Under a just cause regime, employers are barred from making "arbitrary or socially condemnable" employment decisions but can still be guided by economic factors.[199]

This Article's proposal is different than merely requiring cause.

A universal just cause standard for termination would still be a relatively weak cause of action.[200] Rachel Arnow-Richman has observed that such a reform would only protect workers who can prove "they were fired for purely arbitrary reasons" and would still allow the termination of workers for economic reasons.[201] In contrast, our proposal would force the decision to be solely job related—and would bar terminations that are driven by a balancing of economic costs and benefits.

Just as important, our proposal is likely to protect racial minorities more than a cause regime. Over two decades ago, Hilary Silver conducted a study of terminations in the federal sector, where just cause requirements are common.[202]

196. The at-will doctrine could be seen as a relic of the past, but it most certainly is not. There has admittedly been a proliferation of regulatory interventions into the private sector over the last century. These statutory interventions might be seen as beginning in the 1930s, when the National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449, and the Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060, were passed. The 1960s oversaw the beginnings of a legislative explosion: the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602; and the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590. More recently, Congress passed several broader protections: the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327; the Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6; and the Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881. Nonetheless, the at-will doctrine continues to exert a gravitational pull on nearly every legal aspect of the workplace. We can discern at-will as influencing several legal doctrines that are otherwise difficult to understand, such as gendered dress codes or the adverse action doctrine. Under the latter, certain employer actions—such as giving a worker lower evaluations or additional work—are often not considered serious enough to be actionable under discrimination laws. *See* Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031, 2035–36 (2015).

197. Montana is the one state that provides employees with "cause" protection. MONT. CODE ANN. § 39-2-904(1)(b) (2021); *see also Termination Guidance for Employers*, USA.GOV (Dec. 6, 2023), https://www.usa.gov/termination-for-employers [https://perma.cc/UK9V-UELA].

198. *See, e.g.*, Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 596; Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1511 (1996).

199. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 5–6 (2010).

200. *Id.* at 6–7 (observing that "a universal just cause standard for termination" would provide only "a weak cause of action to a relatively narrow subset of terminated workers. It protects only those workers who can prove in court that they were fired for purely arbitrary reasons. It fails to account for the tremendous practical challenges that arbitrarily terminated workers will face in establishing the absence of cause, and it does nothing to address the justifiable, but still devastating, termination of workers for economic reasons.").

201. *Id.* at 5–7.

202. Stephen Barr, *OPM Finds Blacks Fired at Higher Rate*, WASH. POST (Apr. 19, 1995), https://www.washingtonpost.com/archive/politics/1995/04/19/opm-finds-blacks-fired-at-higher-rate/aba3abd4-

Specifically, Silver examined one particular year in which almost 12,000 federal workers were fired and found that "52 percent were members of minority groups" even though they made up only twenty-eight percent of the federal employee workforce.[203] She also found that Black employees were over two times more likely to be fired than white workers.[204] Accordingly, there is no obvious reason to believe that just cause requirements—if implemented in the private sector—would adequately protect racial minorities, or victims of discrimination more generally.[205]

Moreover, our proposal has expressive value that would not be captured by merely requiring cause. Law has important social functions beyond securing rights or deterring certain behaviors.[206] In this light, at least some of our proposed amendment's value is the expressive opportunity to signal something on behalf of victims of discrimination.[207] This amendment would communicate that discrimination, understood broadly, is more likely to be at play than previously recognized. That is, we ought to presume rather than dismiss allegations of bias. A focus on an employer's need to find cause minimizes the "moral valence" of fighting discrimination,[208] whereas a presumption of discrimination indicates that the law has historically overlooked evidence of bias and that there is a moral consensus around rectifying that.

Finally, flipping the burden of proof to require that employers have evidence a decision was job related is *different* than merely requiring cause. Part of the difference lies in the fact that historically "cause" has been interpreted so inconsistently as not to provide much guidance.[209] Scholars have lamented the inability of judges and arbitrators to settle on any useful definition.[210] On the contrary, requiring job decisions to be "solely job related for the position in question" has a much more straightforward meaning and application.

---

f277-4f19-8a10-bbe1159f8217/; *see* IRENE TUNG, PAUL SONN & JARED ODESSKY, NAT'L EMP. L. PROJECT, 'JUST CAUSE' JOB PROTECTIONS: BUILDING RACIAL EQUITY AND SHIFTING THE POWER BALANCE BETWEEN WORKERS AND EMPLOYERS 22 (2021), https://s27147.pcdn.co/wp-content/uploads/Just-Cause-Job-Protections-2021.pdf [https://perma.cc/DA3H-NBEY] (noting that most federal public employees "are protected by a just-cause standard").

203. Barr, *supra* note 202.

204. *Id.*

205. *See* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 362 (2001).

206. *See* sources cited *supra* note 66 (canvasing expressivism in the law).

207. *Cf.* Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061 (2016) (exploring the expressive effects of the ADA).

208. Eyer, *supra* note 139, at 1356 (considering the "lost moral valence of moving away from claims of discrimination towards an increased focus on claims" that are "designed to be less morally and socially charged").

209. *See* Abrams & Nolan, *supra* note 198, at 599–600 ("Just cause is obviously not a precise concept. It cannot be applied to a particular dispute by an employer or an arbitrator without analysis and the exercise of judgment. The concept is so vague, in fact, that it produces confusion and inconsistent arbitration awards." (footnote omitted)).

210. *Id.* at 600–01 ("There will never be a simple definition of 'just cause,' nor even a consensus on its application to specific cases . . . .").

3. The End of At-Will Employment?

A third, and more accurate, objection may come from those who support the prevailing national posture favoring at-will employment. This camp will point out that if the burden falls on an employer to prove that a decision to fire an employee was not discriminatory, then in many—perhaps all—cases, the employer will be able to do so only by providing some legitimate cause rooted in the employee's behavior. After all, if to make out her prima facie case of discrimination, the employee only must show that she is (1) a woman who (2) was fired, then any time a company fires a woman (or any other member of a protected class), it may be forced to account for its decision in a court pleading. If the employer will have to defend its decision in court, that means its decisions will now be subject to judicial review under which the employer must prove it did not discriminate. Such a scheme will naturally erode at-will employment.

It is important to note that forcing employers to be more thoughtful about their policies and procedures is not a *bug*; it's a *feature* that is central to the design of the bias presumption. One point of this proposal is to require employers to think about individual employee interactions within their larger social context. Facing a presumption of bias, employers will have to prove nondiscrimination, so they will be more careful about making decisions ex ante. This kind of forced contemplation might be the only way to achieve the buy-in from employers that is required to fight systemic and implicit biases. Whether or not it's the only way, it's likely to be an effective one.

Second, an erosion of at-will employment would be an ancillary effect of this proposal. But that doesn't mean it's a *defect* in the proposal; many credible experts believe that the current at-will regime is actually harmful to *employers*.[211] Such an outcome may in fact be an ancillary benefit of this proposal. After all, ending at-will employment would have the benefit to employees of greater job security. But it would also give employers the benefit of freeing workers from the tyranny of please-the-boss-at-all-costs-ism. Conformity out of fear of losing your job is the kind of mentality that traditionally prevents innovation, fruitful discourse, and the breakthroughs that accompany meaningful collaboration.[212]

4. A De Facto Quota System?

The final objection to the bias presumption model may come in the form of a claim that its implementation would force employers into adopting—at least

211. *See, e.g.*, Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 353 n.22 (2014) (noting the de facto requirement of an explanation may "reduce discrimination and other types of dismissal claims," and citing studies for this proposition); Liz Ryan, *Ten Ways Employment at Will Is Bad for Business*, FORBES (Oct. 3, 2016, 12:51 PM), https://www.forbes.com/sites/lizryan/2016/10/03/ten-ways-employment-at-will-is-bad-for-business/#753e8294157b ("One of the most far-reaching examples of the Law of Unintended Consequences is the damage done to U.S. employers by the legal doctrine of Employment at Will . . . ."). *See generally* Ellen Dannin, *Why At-Will Employment Is Bad for Employers and Just Cause Is Good for Them*, 58 LAB. L.J. 5 (2007).

212. *See* Ryan, *supra* note 211.

informally—illegal quota systems for hiring to avoid liability by a showing of "diversity" in past hiring decisions. In other words, if a plaintiff can state a claim by merely asserting that she is (1) Black and (2) wasn't hired, then companies who want to avoid liability will have to think carefully about the policies that guide their hiring decisions, with one eye fixed on treating protected classes fairly.

Again, that portion of the outcome is by design. Employers *should* be thoughtful and intentional about their hiring practices. But thinking about hiring practices doesn't require imposing a quota system, either formally or in fact. Instead, employers can build intentional and explicit inclusivity into their hiring (and other) processes. Having a clear policy that favors a broad and diverse group of applicants in hiring—and using it—is not the same as implementing a quota system.

The bias presumption model will make things more difficult for employers, in that it will require them to really commit in action to working out thoughtful procedures for hiring, retaining, and promoting their employees with careful attention given to avoiding biases. But just because something is hard doesn't mean we shouldn't do it. In fact, sometimes the fact that a thing is hard is a very good reason *to* do it.[213]

CONCLUSION

Workplace discrimination occurs for a variety of reasons, most of which involve no animus on the employer's part. People are susceptible to implicit biases and constrained by structural forces that require thought, care, and hard work to overcome. Since so many of the forces that operate together to create discrimination are bigger than any individual, the solution to them will require buy-in from institutions, and the law is well suited to demand such buy-in.

Thus, a change in the law can affect a change in the social climate which can then act to improve our implicit understandings of one another. It is for precisely this reason that a shift to a bias presumption method of adjudicating workplace discrimination claims offers a meaningful counterweight against the often-invisible structural forces that favor discrimination. This model is radical and will be difficult for employers, but its potential benefits far outstrip its costs. The bias presumption model represents a promising path forward toward a bias-free workplace.

213. *See* KENDI, *supra* note 31, at 23 (explaining that antiracist choices are often difficult because they cut against the grain of history and that they often require "a radical reorientation").