SUBJECTIVE DECISIONMAKING AND UNCONSCIOUS DISCRIMINATION

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INTRODUCTION

The world has changed dramatically since 1964, when Title VII of the Civil Rights Act was passed, and it became illegal to discriminate in hiring and other employment decisions on the basis of race or gender.[1] Gone are the days of "Whites Only" signs on the doors of offices unwilling to offer a job to an African-American applicant. No longer do many employers tell female applicants directly that they should stay home and have babies. But discrimination is still pervasive, now more often in the form of stereotyping or unconscious bias. As a consequence, for many women and minorities, the removal of explicit barriers to opportunity has not resulted in truly equal opportunity. Willie Thomas is just one example.

For more than 25 years, Willie Thomas worked for the Troy City, Alabama, school system.[2] He was a school administrator for 14 years, and was assistant school superintendent for five of those years. He had a master's degree and had made significant progress towards obtaining his doctorate.[3] In 1996, Mr. Thomas was one of 18 applicants for the position of superintendent of the Troy City Schools.[4] The Alabama Association of School Boards deemed eight of the applicants qualified for the position. Of these eight, three—including Mr. Thomas—were African-American.[5] The Association of School Boards selected interview candidates from this group by

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-15 (2004) [hereinafter TitleVII]. Title VII also prohibits discrimination on the basis of national origin and religion, and other federal laws prohibit discrimination on the basis of age and disabilities. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000); The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000). Many of the same issues of unconscious discrimination arise in interpreting and applying these statutes. For purposes of this Article, I will focus my discussion on Title VII's prohibition of discrimination on the basis of race and gender.
2. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1305 (M.D. Ala. 2004).
3. *Id.* at 1308.
4. *Id.* at 1306.
5. *Id.* at 1306 n.2.

first having each Association member rank the applicants, then tallying total scores for each. The four candidates with the highest total score in this subjective ranking process were interviewed. Neither Mr. Thomas nor the other two African-American candidates made the list of interviewees.[6] The candidate selected for the position was a white male.[7]

Mr. Thomas brought suit against the Troy City Board of Education, charging that the decision not to hire him as superintendent violated Title VII.[8] In response to his claims, the defendant explained that its "main criterion for choosing a new superintendent was the ability to improve academics"; that the candidate selected had a more academically focused background than Mr. Thomas; that its candidate had more education than Mr. Thomas; and that questions had been raised about Mr. Thomas' credit history during the application process.[9] Mr. Thomas responded to each of these explanations, noting again his extensive administrative experience, pointing out that when he completed his doctorate, he would have a more advanced degree than the candidate selected had obtained, and asserting that the information the Board had received about his credit history was incorrect.[10]

The district court granted the Troy City School Board's motion for summary judgment. Specifically, the court determined that the reasons offered for the Board's decision were "honest" and that, because he had not shown them to be false, Mr. Thomas had failed to provide evidence to allow an inference of impermissible discrimination.[11] Interestingly, while the court felt constrained by law to grant the defendant's summary judgment motion because of the honesty of the Board's proffered explanations, the judge was clearly uncomfortable with the decision. Indeed, the opinion ends with an extended reflection that the court's decision "does not necessarily mean that no discrimination occurred in the selection process."[12] The difficulty, in the judge's view, was that "[t]he judicial focus on the search for unconstitutional discriminatory animus obscures the fact that it is possible that the board chose the individual it perceived to be the 'best' candidate and, yet still, that Thomas was subjected to discrimination; the two are not mutually exclusive."[13] A decisionmaking process where the subjective judgments of the selecting officials are the primary criteria is particularly at risk for this type of discrimination. "Such subjective decision-making processes," explained the *Thomas* court, "are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the

6. *Id.*
7. *Id.* at 1306.
8. *Id.* at 1305.
9. *Id.* at 1307-08.
10. *Id.* at 1308.
11. *Id.* at 1309-10.
12. *Id.* at 1309.
13. *Id.*

difficulty of ferreting out discrimination as a motivating factor."[14] Despite this clearly expressed sense that discrimination may have played a role in Mr. Thomas's case, the court felt constrained to grant the defendant's summary judgment motion because of its "either-or approach" to Title VII liability: either the Board's explanation was honest and the decision was not discriminatory, or the decision was discriminatory and the Board's explanation could be shown to be false.

The either-or approach to discrimination finds a parallel in the scholarly literature. In that arena, the key distinction is framed in terms of conscious (and prohibited) discrimination versus unconscious (and unremedied) discrimination. Regardless of how one formulates this distinction, many scholars and courts agree that conscious racial or sexual animus is currently a necessary element of a Title VII claim. A number of academics thus argue that Title VII falls short of its goals and should be revised so that it will explicitly cover instances of unconscious discrimination.[15] In sharp distinction to these courts and commentators, I argue in this Article that Title VII holds out more promise for remedying unconscious discrimination than has previously been recognized. Specifically, I argue that the either-or reading of Title VII that the *Thomas* court felt compelled to take (and that most other courts take as well) is both legally unnecessary and inappropriate. Second, the dichotomy between conscious and unconscious discrimination is one that cannot be maintained in light of antidiscrimination law's basic proof structures. Finally, in cases challenging employers' subjective decisionmaking processes, plaintiffs have undoubtedly been combating unconscious discrimination for quite some time.

In Part I, I argue that—independent of its legal merits—the either-or approach does not accurately reflect the ways in which discrimination enters into employment decisions. Contemporary sociological and psychological research reveals that discriminatory biases and stereotypes are pervasive, even among well-meaning people. In fact, recent studies have focused particular attention on the unconscious biases of people whose consciously held beliefs are strongly egalitarian.

In Part II, I argue that the either-or framework applied by most courts to individual claims of discrimination is by no means required—and in fact is unwarranted—under Title VII. A close reading of the statute and the case-

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14. *Id.*

15. *See, e.g.*, Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) [hereinafter *Content of our Categories*]; Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2014-15 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 901 (1993); *see also* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498 n.22, 498-99 (2001) (observing that "[i]ntent, as various commentators have correctly noted, is best understood not as animus but as a causation concept," but also that "in examining whether disparate treatment has occurred, lower courts continue to search for conscious intent").

law reveals that the either-or framework is more a judicial invention than a mandatory aspect of Title VII. Even if there would have been merit to the either-or approach under the original statute, such a reading is no longer permissible in light of the Civil Rights Act of 1991[16] and the Supreme Court's 2003 decision in *Desert Palace v. Costa*.[17] The 1991 amendments to Title VII made clear that a plaintiff could prove a violation of the law when more than one factor motivated the decision; in other words, a defendant can have both legitimate and illegitimate reasons for taking a particular action. Thus, honesty about the nondiscriminatory reason for a defendant's actions cannot alone preclude the existence of a discriminatory motivation. In *Desert Palace*, the Supreme Court corrected the mistaken assumption of many lower courts that this mixed motive approach was available only when plaintiffs could provide direct evidence of a discriminatory motive.[18] I argue that the *Desert Palace* decision allows plaintiffs to challenge decisions where there is evidence to suggest that the employer honestly believed it was relying on nondiscriminatory reasons, but other evidence points to racial or gender bias in the process.

In Part III, I assess how this legal framework has been and should be applied to claims alleging that an employer's decisionmaking processes are excessively subjective. These claims are particularly likely to target less conscious forms of discrimination because the potential for unconscious stereotypes and biases to intrude into the evaluation process is greatest when subjective judgments are involved.[19]

Claims of excessive subjectivity in decisionmaking can arise in individual cases challenging a particular employment decision, or in class action suits more broadly challenging an employer's policies and practices. I first consider the law applied to suits brought by individual plaintiffs. Numerous courts have concluded that evidence of subjective decisionmaking processes may raise an inference of discrimination, particularly when combined with other circumstantial evidence. However, problems of proof will always present barriers to the ability of some individual plaintiffs to successfully demonstrate discriminatory motivation, whether conscious or unconscious. Thus, this Article additionally addresses the use of class action suits to attack unconscious bias as a pervasive social harm. Unfortunately, courts are sharply divided over the appropriateness of certifying classes alleging excessively subjective decisionmaking. While some of the most famous employment discrimination class actions in recent years have been certified on

16. 42 U.S.C. § 2000e-2(m) (2004).
17. 539 U.S. 90 (2003).
18. *Id.* at 101-02.
19. *See* Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 AM. PSYCHOL. 1049, 1056 (1991); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1137-38 (1999) ("The potential for these types of cognitive mechanisms to play a role would be greatest when assessments have an important subjective component—and especially where employers are making complex, multifactorial, discretionary judgments about ongoing workplace performance.").

precisely these grounds, many judges are extremely resistant to the notion that an employer might have a generally applicable policy of excessive subjectivity.

I conclude that the existing Title VII framework provides significant potential for challenging unconscious discrimination. In both individual cases and class litigation, plaintiffs have successfully challenged the use of the unfettered discretion that most commonly permits cognitive biases to infect decisionmaking. The very nature of these claims, however, often makes them the "hard cases." This difficulty is compounded by the fact that, like employers, judges are subject to cognitive biases and may be unable to see beyond their own assumptions in evaluating the merits of a case.

I. THE INFLUENCE OF UNCONSCIOUS BIAS ON EMPLOYMENT DECISIONS

There is little doubt that unconscious discrimination plays a significant role in decisions about hiring, promoting, firing, and the other benefits and tribulations of the workplace. As former Secretary of Labor Robert B. Reich put it: "subtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a 'myopia' on the part of many white male managers who 'unthinkingly discriminate' without having any idea they are doing so."[20] Extensive social psychological literature documents the ways in which unconscious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking.[21]

For the first half of the twentieth century, psychologists and social theorists viewed prejudice primarily as a psychopathology, "a dangerous aberration from normal thinking."[22] From this perspective, correcting prejudice was a matter of identifying prejudiced people and punishing or changing them. This view of prejudice did not leave room for the possibility that all, or substantially all, people engage in unconscious discrimination and stereotyping. Title VII was enacted in the shadow of this approach, and early caselaw interpreting the statute reflected a strong belief that an employer's actions could be explained either as untainted business judgments or as conscious and intentional discrimination, and that the job of the courts was to figure out which of the two was at play.[23]

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20. Catherine S. Manegold, *"Glass Ceiling" is Pervasive, Secretary of Labor Contends*, N.Y. TIMES, Sept. 27, 1994, at B1, *available at* 1994 WL 2080277.

21. This Article touches only briefly on the current research into unconscious discrimination. A number of legal scholars have explored the topic in greater detail. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95-99 (2003) [hereinafter *Toward a Structural Account*]; Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 421-26 (2000); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1258-76 (1998); *Content of Our Categories, supra* note 15, at 1186-1211; Oppenheimer, *supra* note 15, at 902-15.

22. John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 830 (2001), *available at* http://www.blackwell-synergy.com/links/doi/iv.iiii/0022-4537.00244/pdf.

23. *See, e.g.*, Furnco Const. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[W]e presume these acts, if

In the second half of the last century, social psychologists began to recognize that bias was the product of normal developmental processes.[24] Research into the process of socialization and development of social norms led to an understanding that the development of stereotypes—and consequent biases and prejudices—is not a function of an aberrational mind, but instead an outcome of "normal cognitive processes associated with simplifying and storing information of overwhelming quantity and complexity that people encounter daily."[25] Indeed, some amount of stereotyping—categorizing things and people according to generalizations—is necessary to survival.[26] Moreover, much stereotyping is the product not of explicit, consciously held attitudes, but of implicit beliefs that are "automatically activated by the mere presence (actual or symbolic) of the attitude object,"[27] and that "commonly function in an unconscious and unintentional fashion."[28]

These unconscious attitudes affect our interactions, assumptions, and expectations throughout the life of a relationship. Linda Hamilton Krieger's excellent exploration of the development of stereotyping schemas explains that "discrimination is not necessarily something that occurs 'at the moment of decision.'"[29] By focusing the legal inquiry on the employer's intent at the moment an employment decision is made, the law fails to recognize that discrimination "can intrude much earlier, as cognitive process-based errors in perception and judgment subtly distort the ostensibly objective data set upon which a decision is ultimately based."[30] By the time an employment decision is made, the employer may quite firmly believe that a black employee's record is not as good as a white counterpart's—a belief formed over time by the significance assigned, sometimes quite unconsciously, to particular acts and omissions on the part of each employee. Indeed, the research on development of stereotypes demonstrates that even before having any interaction with a particular individual, background assumptions will influence how a decisionmaker perceives a job candidate. A white candidate may be viewed as more charismatic, thoughtful, collegial, or articulate than a black candidate, not because the white candidate in fact possesses those higher qualifications, but because of the decisionmaker's preexisting assumptions.[31]

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otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."); *see also Content of our Categories*, *supra* note 15, at 1177.

24. *See* Dovidio, *supra* note 22, at 831; *Content of our Categories*, *supra* note 15, at 1186-88.

25. Dovidio, *supra* note 22, at 831.

26. *See, e.g.*, *Content of our Categories*, *supra* note 15, at 1163-64 (pointing out the ways that parents teach their children to "stereotype" about potentially dangerous animals or interactions with strangers in order to guide children to safe choices).

27. John F. Dovidio et al., *Why Can't We Just Get Along, Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOL. 88, 94 (2002).

28. *Id.*

29. *Content of our Categories*, *supra* note 15, at 1121.

30. *Id.*

31. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with*

Compounding the effects of these unconscious cognitive processes is what researchers in the past decade have come to recognize as a pervasive "conflict between the denial of personal prejudice and the underlying unconscious negative feelings and beliefs."[32] Recognition of this conflict runs across a number of different models that attempt to explain contemporary racism and sexism.[33] These models share in common the conclusion that as a consequence of this conflict, discrimination is most likely to occur in contexts where it can be justified as something other than discrimination. Studies of "aversive racism" are especially interesting and potentially problematic for employment discrimination law, as they focus on the unconscious behavior of people for whom being unbiased is an important part of their self-concept. Research done by proponents of the aversive racism framework demonstrates that "many people who explicitly support egalitarian principles and believe themselves to be nonprejudiced also unconsciously harbor negative feelings and beliefs about blacks and other historically disadvantaged groups."[34] These studies suggest that aversive racists will not

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Unconscious Racism, 39 STAN. L. REV. 317, 322-25 (1987). In his remarkable article, Lawrence ties notions of unconscious discrimination to the broader shared American experience, noting the impact of the

> historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this belief system has influenced all of us, we are all racists. . . . We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.

Id. at 322; *see also* Terry Smith, *Everyday Indignities: Race, Retaliation, & the Promise of Title VII,* 34 COLUM. HUMAN RTS. L. REV. 529, 537 (2003) ("[M]odern culture feeds and reinforces black stereotypes of incompetence, occupational instability, primitive morality, and similar derogatory perceptions."). Numerous researchers have explored how assumptions about appropriate gender behavior can have similar consequences for evaluation of male and female job applicants. *See, e.g.,* Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks,* 89 J. APPLIED PSYCH. 416, 416 (2004); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense,* 7 EMPLOYEE RTS. & EMP. POL'Y J. 401, 405-12 (2003) (describing how gender stereotypes affect perceptions of women's "fit" with particular jobs); Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders,* 109 PSYCHOL. REV. 573, 576 (2002).

32. Dovidio et al., *supra* note 27, at 90.

33. The dominant explanatory theories for contemporary prejudice are called "modern," "symbolic," and "aversive" racism. See Janet K. Swim et al., *Sexism and Racism: Old-Fashioned and Modern Prejudices,* 8 J. PERSONALITY & SOC. PSYCH. 199, 199 (1995). Because aversive racism has particular relevance to employment discrimination, it is discussed in greater detail in the text. Theories of "modern" and "symbolic" racism are focused more on explaining public policy preferences than on individual decisionmaking. These theories suggest that many whites feel considerable resentment towards black Americans because of a perception that discrimination is a problem of the past, and a belief that black Americans receive "special favors" despite the substantial elimination of past discrimination. *See* M.J. Monteith & C.V. Spicer, *Contents and Correlates of Whites' and Blacks' Racial Attitudes,* 36 J. EXPERIMENTAL SOC. PSYCHOL. 125, 127 (2000). However, these models suggest that because "Whites are genuinely committed to the abstract principles of justice (i.e., equality, fairness, and freedom) . . . modern racists express negative attitudes towards Blacks that supposedly can be justified by invoking nonprejudiced explanations." *Id.*

34. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999,* 11 PSYCHOL. SCI. 315, 315 (2000); *see also* Brief Amicus Curiae of the American Psychological Association in Support of Respondents, Grutter v. Bollinger and Gratz v. Bollinger, Nos. 02-241 & 02-516, at p. 6 ("Thus, many people who firmly believe that they have open and favorable attitudes about

discriminate in situations where the discrimination would be obvious, but that "because aversive racists do possess negative feelings, often unconsciously, discrimination occurs when bias is not obvious or can be rationalized on the basis of some factor other than race."[35]

In a particularly interesting study illustrating this point, researchers simulated an interview process in which job candidates ranged along a spectrum from unqualified to very qualified and included both black and white applicants. White participants were asked to select from among groups of these job candidates.[36] The self-described "non-racist" study participants made apparently unbiased choices when black candidates were either plainly qualified or plainly unqualified. But when these participants were presented with a marginally qualified black candidate, they gave that candidate significantly weaker recommendations than they gave a comparably qualified white candidate.[37] The study was conducted in 1989, and again in 1999. In both instances, the results were the same. The participants in the 1999 study were noticeably less direct in their verbal expression of racial prejudice, but their actual selection behavior did not change.[38] This confirms other research suggesting that "unconscious racism governs behavior among white employers who would not consciously choose to discriminate against African Americans."[39] This behavior can affect all aspects of an employment decision, but psychologists recognize in particular that "subjective judgments of interpersonal skills and collegiality are quite vulnerable to stereotypic biases."[40]

The effect that unconscious stereotyping has on employment decisions has not escaped judicial notice. Recall that Willie Thomas' judge noted that "subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of."[41] And, the First Circuit recently recognized that discrimination can occur "re-

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people of various races and ethnicities will demonstrate that they implicitly (unconsciously) harbor a variety of racial and ethnic prejudices that can translate into subtle discriminatory behaviors.").

35. Dovidio & Gaertner, *supra* note 34, at 315.

36. *Id.* at 316-17.

37. *Id.* at 317.

38. *Id.*

39. Oppenheimer, *supra* note 15, at 902; *see also* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 850 (2003); Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCH. BULL. 117, 121 (1994). Significant research about stereotyping and bias regarding work and family issues and gender discrimination demonstrates how cultural assumptions inform and infect employment decisions along gender lines as well. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against On the Job*, 26 HARV. WOMEN'S L.J. 77, 77 (2003) (discussing how this operates for women who have recently had children); Tracy Anbinder Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 271 (1994); *see also* Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflict Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 460 (2002) (noting that the research on aversive racism has been extended to attitudes toward women).

40. Fiske et al., *supra* note 19, at 1056.

41. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004).

gardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."[42]

Often these moments of judicial recognition are overshadowed by a more general approach to discrimination claims that regards employment decisions as made either for solely legitimate or illegitimate reasons. As current research recognizes, this view fails to capture how discrimination actually infects evaluative judgments. Social psychology teaches us that human decisionmaking is rarely, if ever, so binary. Indeed, it is precisely when decisions can be justified on some other basis that decisionmakers may be most likely to allow discriminatory impulses to creep into the process.

II. UNCONSCIOUS DISCRIMINATION IN CURRENT LAW: CHALLENGING AND CHANGING THE BASIC FRAMEWORK

In *McDonnell-Douglas Corp. v. Green*,[43] the Supreme Court asserted that Title VII "tolerates no racial discrimination, subtle or otherwise."[44] This claim no doubt overstates the reach and force of federal antidiscrimination law as it actually operates.[45] It is true, however, that Title VII not only prohibits outright expressions of discriminatory intent, but also provides some redress when unthinking discrimination infects employer decisionmaking.

This fact—that Title VII reaches unthinking discrimination—is often misunderstood or discounted by both courts and scholars. In the courts, the misunderstanding takes the form of a judicially created requirement of employer dishonesty in Title VII litigation. Among scholars, it has largely emerged as a distinction drawn between "conscious" and "unconscious" discrimination, with many reformers arguing that the law must be changed to accommodate challenges to the latter. The unconscious or unthinking "bias [that creeps] into everyday social interactions and judgments on the job"[46] is described in the academic literature with terms including "stereotyping,"[47] "subtle discrimination,"[48] "second generation discrimination,"[49]

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42. Thomas v. Eastman Kodak, Co., 183 F.3d 38, 58 (1st Cir. 1999).

43. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

44. *Id.* at 801.

45. *See, e.g.*, Flagg, *supra* note 15, at 2014-15; McGinley, *supra* note 21, at 455-58; Krieger & White, *supra* note 15, at 495-99; Chamallas, *supra* note 15, at 752. Chamallas notes:

> Although courts still frequently state that the law is designed to capture subtle as well as overt forms of discrimination, a common complaint among feminist and critical race commentators is that current legal doctrines are inadequate to handle contemporary manifestations of bias against women, racial minorities, and other disfavored social groups.

Id.

46. Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 659 (2003) [hereinafter *Targeting Workplace Context*].

47. *See, e.g.*, Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 4 (2003); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1267 (2000); David B. Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L. Q. 921, 957 (1996).

48. *See, e.g.*, Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUMAN RTS. L. REV. 529, 540-44 (2003) (giving examples of "subtle" discrimination); Michael

and simply "unconscious discrimination."[50] Whichever of these terms is used, the categorical distinction drawn between conscious or overt discrimination and subtle or unconscious discrimination assumes an unnecessary limit on the reach of Title VII that is mirrored by the dishonesty requirement imposed by many courts. One of my principal aims in this Article is to argue that this distinction must be abandoned. In making this argument, however, I am forced to choose a vocabulary that acknowledges the distinction currently drawn. I therefore use the term "unconscious discrimination" to refer to circumstances in which a decisionmaker is honestly unaware of the extent to which race and gender play a role in an employment decision. However, if it were possible to identify all of the judgments that went into the challenged decision, the decisionmaker's assumptions and beliefs about the race or gender of the applicant would prove to have played a motivating part in the decision. I use the term "unconscious discrimination" rather than a term like "subtle discrimination" because I want to capture explicitly the idea that the discriminator's awareness of her motivations is not a necessary element of a Title VII claim.

Assessing the law's response to discrimination, whether conscious or not, requires some evaluation of both the doctrine and its operation. This section focuses on doctrine and, in particular, on the standards for proving what is called disparate treatment discrimination. In a disparate treatment suit, a plaintiff alleges that a particular adverse employment action was taken "because of" a protected characteristic.[51] Title VII also allows plaintiffs to bring so-called "disparate impact" claims, challenging facially neutral employer policies that have a disproportionate effect on members of a protected class.[52] The great majority of employment discrimination suits in

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Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1237 (1999) ("The difficulty that arises from determining when behavior can be defined as unconscious in nature is one reason why I now prefer to use the term 'subtle discrimination' to define discrimination that relies on circumstantial evidence for proof."); Flagg, *supra* note 15, at 2013 (describing subtle discrimination as white transparency—the unconscious imposition of white norms, thought to be race-neutral or objective, without regard to the subordinate position in which such norms place people of color).

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

> "[s]econd generation" claims involve social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups. Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate. Structures of decisionmaking, opportunity, and power fail to surface these patterns of exclusion, and themselves produce differential access and opportunity.

Id.

50. *See, e.g.*, Krieger & White, *supra* note 15, at 509; McGinley, *supra* note 21, at 426; Lawrence, *supra* note 31, at 322; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 509 (1996).

51. The relevant section of Title VII, Section 703(a), provides that

> [i]t shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

52. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1973); 42 U.S.C. § 2000e-2 (2004). I will

federal courts, however, are brought by individual plaintiffs asserting disparate treatment claims.[53]

In this Part, I discuss the procedural framework that courts have long used to evaluate disparate treatment discrimination claims, and I challenge the assumption of employer dishonesty that courts have imported into that framework. I then explain how the Civil Rights Act of 1991, as interpreted by the Supreme Court last year, eliminated any support for this misplaced focus on dishonesty and should lead courts to a more realistic assessment of discrimination claims. As I argue below, the current framework for evaluating employment discrimination law does in fact make space for recognition of the complexity of human decisionmaking. What remains is for courts to apply the law with this same recognition.

A. Disparate Treatment and the McDonnell-Douglas *Framework*

From the earliest days of Title VII litigation, courts have recognized that proving that a prohibited factor motivated an employment decision is not an easy task.[54] It is an exceedingly rare case in which a plaintiff has true direct evidence of discriminatory intent, such as a statement from the employer that "we don't hire Mexicans, so you can't have this job." Most Title VII cases are therefore proved through circumstantial evidence. To support her claim, a plaintiff may have evidence of disparaging remarks made by her employer suggesting stereotypical views about particular racial minorities or women.[55] Alternatively, the plaintiff may be able to demonstrate procedural irregularities or differential treatment that suggests the employer did not give her the same chances it gave to other employees.[56] A plaintiff may present evidence about the make-up of the employer's workforce that suggests an unwillingness to hire minorities or women or a tendency to segregate them into lower-status jobs.[57] Or, a plaintiff's circumstantial case may

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discuss disparate impact claims in Part III.B.

53. *See, e.g.*, J. Piette & Douglas G. Sauer, *Legal and Statistical Approaches to Analyzing Allegations of Employment Discrimination*, 3 J. LEGAL ECON. 1, 2-3 (1993) ("The vast majority (over 90%) of all employment discrimination cases are filed on behalf of either a single plaintiff or group of multiple plaintiffs. Only a small proportion are class action litigations."); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 314 (1992) ("By and large, 'disparate impact' cases are fairly infrequent, as compared to cases alleging intentional discrimination.").

54. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 528 (1993) (recognizing that requiring direct evidence of discriminatory intent would be imposing too great a burden on a plaintiff); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) (recognizing that direct evidence of discriminatory intent is difficult to establish and that discriminatory intent is more likely established by inference); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977).

55. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (presenting strong evidence of sex stereotyping); James O. Castagnera & Edward S. Mazurek, *Sex Discrimination Based Upon Sexual Stereotyping*, 53 AM. JUR. TRIALS § 26 (2004).

56. *See, e.g.*, Garrett v. Hewlett-Packard, 305 F.3d 1210, 1217 (10th Cir. 2002).

57. *See, e.g.*, Simms v. Oklahoma, 165 F.3d 1321, 1328 (10th Cir. 1999); Colon-Sanchez v. Marsh, 733 F.2d 78, 81 (10th Cir. 1984); Aracne v. Lucky Stores Inc., No. C81394RPA, 1983 WL 495, at *4 (N.D. Cal. Mar. 4, 1983) (stating that the plaintiff provided evidence that the employer had not hired any new women to work in his plant from 1974 to 1983).

simply involve presenting evidence about the plaintiff's job qualifications, and arguing that the employer must have been illegally motivated in not selecting him for the job, given those qualifications.[58]

Whatever the evidence a plaintiff may offer in support of a claim, the Supreme Court has articulated a framework for evaluating the evidence that is both well-established and still evolving.[59] The framework, established in *McDonnell-Douglas Corp. v. Green*,[60] is a three-step burden-shifting approach to the presentation of evidence. It does not create any particular standard for liability, but instead is a procedural device designed to help courts focus the discussion in light of the difficult issues of proof that arise in discrimination cases.[61] The *McDonnell-Douglas* framework has been the subject of considerable judicial and academic criticism,[62] but it remains the accepted approach to evaluating most claims of discrimination.

The first step in the *McDonnell-Douglas* framework requires the plaintiff to establish a prima facie case of discrimination. The plaintiff has the burden to demonstrate that (1) she is a member of a protected class; (2) she was qualified for the position she sought, or was successfully meeting the requirements of her current position; (3) she applied for, and did not receive, the position or promotion; and (4) the position remained open or was

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58. *See, e.g.*, EEOC v. Ins. Co. of North America, 49 F.3d 1418, 1419 (9th Cir. 1995) (stating that although the plaintiff was unsuccessful in his claim, he brought forth evidence that he was more qualified for the position than the person ultimately hired by the defendant); Chisholm v. U.S. Postal Service, 516 F. Supp. 810, 831 (W.D.N.C. 1980) (holding that the plaintiff brought forth evidence of many black employees being turned down for promotions that less qualified and less experienced white employees received).

59. The "evolving" nature of a standard that has been applied for the past thirty years is a consequence of judicial and academic uncertainty over the relationship between the framework discussed here and the standards set forth in the Civil Rights Act of 1991. In a 2003 decision, the Supreme Court laid to rest the argument that disparate treatment law has two tracks: one for cases involving direct evidence, and one for cases involving circumstantial evidence. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98-99 (2003). Courts and commentators are now struggling to integrate the 1991 law's "motivating factor" standard with the traditional framework. For a more extended discussion of this point, see Part II.B.

60. 411 U.S. 792 (1973).

61. *See, e.g.*, Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[The *McDonnell-Douglas* approach] was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

62. *See, e.g.*, Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately) ("The *McDonnell Douglas* framework only creates confusion and distracts courts from 'the ultimate question of discrimination *vel non*.'") (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983)); Higareda v. Ford Motor Co., No. 011182CVWHFS , 2003 WL 22110496, at *4 (W.D. Mo. Nov. 6, 2003) (observing that many cases over-emphasize the *McDonnell-Douglas* analysis); Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 659, 659 n.3 (1998); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 703-05 (1995) (criticizing all aspects of the three-part *McDonnell-Douglas* framework); Hannah Arterian Furnish, *Formalist Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353, 372 (1984); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236 (1995) (arguing for the abandonment of the *McDonnell-Douglas* structure).

filled by someone else.[63] This serves the purpose of eliminating the most obvious non-discriminatory reasons that an employment decision might have been made—the plaintiff was not qualified, did not apply, or there was no position available.[64] By eliminating these possible explanations for the adverse action, the plaintiff establishes a presumption that the action was the product of discrimination.[65]

At this point, the burden of production shifts to the defendant to articulate some legitimate non-discriminatory reason for the adverse employment action.[66] The defendant's burden of production is quite minimal; all that is necessary is to offer some response to the plaintiff's prima facie case. At this stage, the defendant's proffered explanation does not need to be the actual reason for the employment decision, or even a particularly plausible reason.[67] But the quality of the defendant's response will obviously have a considerable impact on the outcome of the litigation.

After the plaintiff has presented a prima facie case, and the employer has responded with its reasons for the decision, the factfinder is presented squarely with the question of whether the adverse action was taken "because of" race or sex. At this point, "the *McDonnell Douglas* framework—with its presumptions and burdens—disappear[s], and the sole remaining issue [i]s discrimination."[68] Despite this purported "disappearance," the third stage of the *McDonnell-Douglas* framework is where most of the action, and most of the confusion, seems to be. What is clear at this point is that the plaintiff bears the ultimate burden of convincing the factfinder that discrimination was the reason—or at least a reason—for the employer's actions.[69] Less clear is what evidence the plaintiff can use to meet this burden.

It is a question with considerable procedural importance. The *McDonnell-Douglas* framework is intended to help courts evaluate whether a claim of discrimination should go to trial. Nearly every court of appeals in the country has concluded that the technicalities of the burden-shifting framework should not be presented to the jury.[70] Similarly, when appellate courts

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63. *Burdine*, 450 U.S. at 253 n.6; *McDonnell-Douglas*, 411 U.S. at 802. Some courts have described this fourth element as requiring the plaintiff to show that she "was rejected under circumstances giving rise to an inference of unlawful discrimination." Obi v. Anne Arundel County, 142 F. Supp. 2d 655, 662 (D. Md. 2001). These elements will obviously shift slightly under the particular facts of a given case. If a plaintiff is challenging a firing, for example, the third element would require proof that she was fired.

64. *See Burdine*, 450 U.S. at 253-54; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 & n.44 (1977).

65. *See Burdine*, 450 U.S. at 254. Because this presumption is established, the plaintiff is entitled to judgment if the defendant says nothing in response to the plaintiff's prima facie case. *Id.*

66. *Id.*

67. *Id.* at 254-55; *see also* Chin & Golinsky, *supra* note 62, at 665 (noting that the defendant's burden at this stage is so light that "there is not a single reported case in which a plaintiff prevails at the second step in a discrimination lawsuit because a defendant employer is unwilling or unable to articulate a legitimate, nondiscriminatory reason for its employment action.").

68. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000) (citation and internal quotation omitted).

69. *See id.* at 143; Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003).

70. *See, e.g.*, Sharkey v. Lasmo (AUL Ltd.), 214 F.3d 371, 374 (2d Cir. 2000) ("We agree that juries should not be charged on the *McDonnell Douglas* burden-shifting framework."); Gordon v. New York

review a judgment after a trial on the merits (as opposed to after summary judgment), they look not at the three-part structure, but at the evidence in the record as a whole.[71] For the plaintiff, getting past this third stage of the burden-shifting framework therefore means surviving summary judgment and getting to a jury. Both plaintiffs and defendants seem to hold the view quite strongly that a plaintiff who can get to a jury in a discrimination case is likely to win. That perception, whether accurate or not, means that a case that makes it past summary judgment is much more likely to settle.[72]

The procedural significance of the third stage in the burden-shifting process makes the question of the kind of evidence needed to satisfy the plaintiff's burden extremely important. In *McDonnell-Douglas*, the Supreme Court described this step in the framework for presentation of evidence as the "pretext" stage, and noted that a plaintiff must be "given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact *a coverup* for a racially discriminatory decision."[73] The Court has used language in other cases suggesting that the plaintiff's burden is to prove both that the defendant lied in describing the reasons behind a decision and that the decision was the product of discrimination.[74] Unfortunately, many lower courts have interpreted this to mean a plaintiff is required to show dishonesty on the part

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City Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000) ("The jury . . . does not need to be lectured on the concepts that guide a judge in determining whether a case should go to the jury."); Pivirotto v. Innovation Sys., Inc., 191 F.3d 344, 347 n.1 (3d Cir. 1999) (holding that jury instructions should not include the technical aspects of *McDonnell-Douglas*); Mullen v. Princess Anne Volunteer Fire Co. Inc., 853 F.2d 1130, 1137 (4th Cir. 1988) (holding that burden-shifting instructions "are beyond the function and expertise of the jury, which need never hear the term '*prima facie* case.'"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing."); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (holding that the trial judge acted correctly in declining "to walk the jury through the paradigm established by *McDonnell Douglas*"); Williams v. Valentec Kisko, Inc., 964 F.2d 723, 731 (8th Cir. 1992) (reiterating that "the *McDonnell Douglas* ritual is not well suited as a detailed instruction to the jury") (citation and internal quotation omitted); Costa v. Desert Palace, Inc., 299 F.3d 838, 855 (9th Cir. 2002) (en banc) ("[I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury."), *aff'd*, 539 U.S. 90 (2003); Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) ("The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury."); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis.").

71. *See, e.g.*, Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672, 675 (7th Cir. 2002). *Cf. United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983) ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*.").

72. *See, e.g.*, Robert E. Talbot, *A Practical Guide to Representing Parties in EEOC Mediation*, 37 U.S.F. L. REV. 627, 671 (2003); Laurence H. Reece III, *Valuation and Settlement of Employment Disputes*, *in* WINNING THROUGH SETTLEMENT § 7.4.5 (Mass. Continuing Legal Educ., ed. 2001).

73. 411 U.S. at 805 (emphasis added).

74. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508-11 (1993); *Burdine*, 450 U.S. at 253 ("[P]laintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.").

of an employer in order to meet the burden at the third stage of the *McDonnell-Douglas* test.[75]

However, evidence of employer dishonesty is not required by Title VII itself. The statute requires only that a plaintiff demonstrate that her employer's decision was taken "because of race, sex or some other prohibited characteristic."[76] In spite of using some language suggesting that dishonesty is an element of a discrimination claim, the Supreme Court has never held that evidence of mendacity is the only form of proof available to a Title VII plaintiff. In fact, in one of its more recent opinions construing Title VII, the Court noted that evidence suggesting a defendant's explanation for an employment practice is "unworthy of credence is simply *one form* of circumstantial evidence that is probative of intentional discrimination."[77] As the Court recognized, a plaintiff does not have to prove that her employer lied in order to raise a reasonable inference that discrimination played a role in the decision.[78]

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75. The most extreme articulation of this view comes from the Seventh Circuit. In *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002), the court stated:

> Pretext means a lie, specifically a phony reason for some action. The question is not whether the employer properly evaluated the competing applicants, but whether the employer's reason for choosing one candidate over the other was honest. "Pretext for discrimination" means more than an unusual act; it means something worse than a business error; "pretext" means deceit used to cover one's tracks.

Id. (citations and internal quotations omitted); *see also* Clay v. Holy Cross Hosp., 253 F.3d 1000, 1005 (7th Cir. 2001); Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 685 (7th Cir. 2000); Jordan v. Summers, 205 F.3d 337, 343 (7th Cir. 2000); Brill v. Lante Corp., 119 F.3d 1266, 1273 (7th Cir. 1997); Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995). This standard appears to have been used only by courts in the Seventh Circuit, with two exceptions. *See* Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1261 (11th Cir. 2001) (quoting a Seventh Circuit case); Garcia-Cabrera v. Cohen, 81 F. Supp. 2d 1272, 1281 (M.D. Ala. 2000) (quoting a Seventh Circuit case), *aff'd*, 237 F.3d 636 (11th Cir. 2000). Other courts, while using less extreme language, nonetheless refer to the plaintiff's burden of proving that the employer's proffered reason was not its true reason. *See, e.g.*, Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356, 1365 n.8 (M.D. Fla. 2001) (defining pretext as "a false or weak reason or motive advanced to hide the actual or strong reason or motive") (citations omitted); Gray v. Univ. of Arkansas, 658 F. Supp. 709, 723 (W.D. Ark. 1987) ("Pretext doesn't simply mean that the reasons given are wrong or false. Webster's New Collegiate Dictionary defines 'pretext' as 'a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.'"), *aff'd*, 883 F.2d 1394 (8th Cir. 1989); Turner v. Tex. Instruments, Inc., 555 F.2d 1251, 1255 n.3 (5th Cir. 1977) (asserting that the Court, in *McDonnell-Douglas*, intended pretext to mean "the use, by employers, of legitimate reasons for action to hide racial animus in decision making.").

76. 42 U.S.C. § 2000e-2(a) (2000).

77. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (emphasis added).

78. Given the serious consequences of the focus on dishonesty, it is surprising that it has received relatively little judicial or academic attention. During the 1990s, the "pretext" stage of the burden-shifting framework was the topic of significant debate, but the question was not whether proof of dishonesty was required, but whether both proof of dishonesty and some other evidence of discrimination should be required. *See, e.g.*, Malamud, *supra* note 62, at 2305-11; *see also* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991); Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-*Hicks *Environment*, 26 FLA. ST. U. L. REV. 49 (1998). Some courts had read language in the Supreme Court's 1993 decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), as suggesting that a plaintiff could not get to a jury if she had only her prima facie case plus evidence of employer dishonesty. These courts, adopting a "pretext-plus" approach, concluded that a plaintiff would have to also have some additional evidence to suggest discrimi-

Examining the kinds of evidence that successful plaintiffs regularly use to support their cases, it is clear that despite the language of dishonesty that some courts employ, many allow plaintiffs to survive summary judgment without actual proof of mendacity. Of course, a plaintiff can meet his "pretext" burden by exposing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons,"[79] but a plaintiff can also rebut a defendant's proffered explanation by providing evidence of "prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities . . . and the use of subjective criteria."[80] Evidence of this sort may call the employer's explanation for the decision into question, or suggest that it is not the only reason for the decision, but it does not necessarily prove that the explanation was a lie. An employer's explanation may be entirely honest in the sense that the employer felt she was making a neutral, unbiased decision for particular reasons, but the plaintiff may be able to point to circumstances surrounding the decision that call into question the employer's own "honest" understanding of her reasons for the decision. When a court concludes that a plaintiff has proved that her employer was dishonest, it is simply assuming that an explanation, once called into question by the circumstances surrounding the decision, was a lie.

Courts requiring a showing of dishonesty necessarily suggest that a discriminating employer acted with a consciously formed intent to discriminate. Only an employer who knew she had acted for impermissible reasons—a conscious discriminator—would seek pretextual or dishonest explanations for her conduct. An employer who had acted with unconscious bias would have no motivation to cover up her reasons for acting. The employer found liable thus becomes, as a legal matter, both a discriminator and a liar. The assumption that employers who discriminate must be doing so with conscious intent has a number of negative consequences. As Linda Hamilton Krieger has argued, this assumption makes a "villain" out of any

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nation. *See, e.g.*, Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1291 (D.C. Cir. 1998) (en banc); Fisher v. Vassar C., 114 F.3d 1332, 1137 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996); Theard v. Glaxo, Inc., 47 F.3d 676, 680 (4th Cir. 1995); Woods v. Friction Materials, Inc., 30 F.3d 255, 260 (1st Cir. 1994). Other courts concluded that the plaintiff's prima facie case plus evidence of employer dishonesty would be enough to get to a jury. *See, e.g.*, Kline v. Tennessee Valley Auth., 128 F.3d 337, 343 (6th Cir. 1997); Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1129 (1997); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1111 (8th Cir. 1994), *cert. denied*, 513 U.S. 946 (1994); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1125 (7th Cir. 1994); Washington v. Garrett, 10 F.3d 1421, 1429 (9th Cir. 1993). The Supreme Court ended the debate, adopting the latter rule, in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-49 (2000). In all the debate about "pretext" versus "pretext-plus," very little notice was paid to the requirement of "pretext."

79. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

80. Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1217 (10th Cir. 2002) (quoting Simms v. Oklahoma, 165 F.3d 1321, 1328 (10th Cir. 1999)).

decisionmaker found liable for discrimination.[81] The stigma attached to being a "discriminator" is such that a decisionmaker will tend to aggressively defend her innocence, and will be unlikely to be open to the possibility that unconscious discrimination had a motivating role in the decision.[82] These serious implications of a finding of liability may also make judges more hesitant to rule in favor of a plaintiff. And, the linguistic focus on employer dishonesty gives the appearance that Title VII does not provide any remedy for unconscious discrimination.[83]

But, just as proof of mendacity is not a requirement of Title VII, proof of conscious intent to discriminate is not a requirement either.[84] When courts assert that a successful plaintiff has proven discriminatory intent, what they mean is that, in the absence of another explanation, given the weight of the circumstantial evidence, they are inferring that the employer acted with bad intent.[85] The widely accepted legal fiction in such cases is that while there may be little external evidence of discriminatory attitude or motivation in a supervisor's actions, if there were a way to discover what that supervisor actually was thinking, we would learn that his or her impulses were overtly racist or sexist.[86] Given that most cases are proved by

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81. *Content of our Categories*, *supra* note 15, at 1180-81. Describing her work as a plaintiff's attorney, Kreiger explains that

> pretext theory not only permitted, but indeed compelled me to argue that the plant manager's stated reasons were a "sham," a post hoc fabrication to cover up intentional discrimination. It would not suffice to urge that the employer was a well-intentioned " good person" who, through lack of care, did a " bad thing." The pretext story boards required me to paint him as an intentional wrongdoer who was lying to the court.

Id. (citation omitted).

82. *See, e.g.*, Lawrence, *supra* note 31, at 325-26. According to Lawrence:

> Understanding the cultural source of our racism obviates the need for fault, as traditionally conceived, without denying our collective responsibility for racism's eradication. We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy will be lessened.

Id. (citation omitted); *see also* Mijha Butcher, *Using Mediation to Remedy Civil Rights Violations When the Defendant is Not an Intentional Perpetrator: The Problems of Unconscious Disparate Treatment and Unjustified Disparate Impacts*, 24 HAMLINE J. PUB. L. & POL'Y 225, 234-35 (2003).

83. Some commentators have asserted as much. *See, e.g.*, Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 926 (1999) (asserting that Title VII "omit[s] any recognition of unconscious bias" and "require[s] proof of conscious, discriminatory intent to state a claim and obtain relief for employment discrimination.") (citation omitted).

84. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997). Selmi states:

> What the Court means by intent is that an individual or group was treated differently because of race. Accordingly, a better approach is to concentrate on the factual question of differential treatment. In this way, the key question is whether race made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states.

Id.; *see also* Chamallas, *supra* note 15, at 753 (noting that "the meaning of intent has always been contested, particularly in Title VII cases.").

85. *See, e.g.*, Krieger & White, *supra* note 15, at 498 & n.22 (citing with approval a number of scholars who have argued that "intent" in the Title VII context is actually a causation concept).

86. The best-known articulation of this idea is Justice Brennan's statement in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989):

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we re-

circumstantial evidence, however, there is no necessary legal difference between discrimination that a decisionmaker is truly unaware of, and discriminatory attitudes that the decisionmaker simply never expresses out loud. Indeed—absent a dramatic courtroom confession—it is unlikely that a court will ever truly know which is at play.

B. The Impact of the Civil Rights Act of 1991 and the Decision in Costa

In addition to importing a misplaced dishonesty requirement into Title VII, courts applying the *McDonnell-Douglas* framework mistakenly assume that employment decisions are motivated by a single factor—either honest business judgment or dishonest discriminatory motivation. This idea is out of step with the reality of human cognitive processes.[87] Even without the insights of social psychology, most of us would acknowledge that when we make decisions, a variety of factors contribute to the process. Psychological research supports that common sense view, and recent research on aversive racism demonstrates that race may play a role in an employment decision *especially* when some other explanation can be offered to justify the decision.[88] Thus, employment decisions are not either-or events, but events with multiple motivations.

Whether intended or not, Congress and the Supreme Court have provided the doctrinal tools needed to bring legal evaluation of discrimination claims more in line with the realities of discrimination. Title VII, as modified by Congress in 1991, recognizes that employment decisions may be motivated both by impermissible bias and and also by legitimate factors.[89] Unfortunately, for more than a decade following the enactment of the 1991 law, lower courts applied its "mixed motive" provision to only a small handful of cases. The reluctance to recognize plaintiffs' claims that employer decisions had multiple motivating factors was the consequence of a judicially imposed requirement that a plaintiff present "direct evidence" of discrimination in order to argue that an employer with a legitimate explanation for its actions was also motivated by prejudice or bias. In *Desert Palace Inc. v. Costa*,[90] the Supreme Court laid to rest the direct evidence requirement, making it clear that Title VII claims can always be (and most often will be) proven by circumstantial evidence. In so doing, the Court opened the way for any plaintiff to argue that race or gender was one, even if not the only, factor in an adverse employment action.

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ceived a truthful response, one of those reasons would be that the applicant or employee was a woman.

Id.

87. *See supra* Part I.

88. *See supra* Part I.

89. *See* 42 U.S.C. § 2000e-2(m) (2000).

90. 539 U.S. 90 (2003).

1. Mixed Motives Analysis and the "Motivating Factor" Standard

In 1991, Congress enacted amendments to the Civil Rights Act in response to a series of 1989 Supreme Court decisions. Among these decisions was *Price Waterhouse v. Hopkins*,[91] in which the Supreme Court had for the first time recognized a "mixed motive" claim under Title VII.[92] The *Price Waterhouse* Court held that if a plaintiff shows that race or gender is one of several factors motivating a decision, she may have a legitimate claim of discrimination. However, if the employer could demonstrate that it would have made the same decision without considering the impermissible factor, this would be a complete affirmative defense and the employer would not have violated Title VII.[93]

The mixed motive claim thus defined was, at best, a mixed blessing for plaintiffs. On the one hand, it went a step toward eliminating the notion that an employee has been discriminated against only if race or gender was the exclusive motivator for the decision. On the other hand, an employer could use discriminatory factors in the decisionmaking process but still avoid any liability if it could show that it would have made the same decision anyway. Imposing a further limitation on the potential for mixed motive claims, Justice Sandra Day O'Connor concurred separately to opine that a mixed motive claim should be available only when a plaintiff has "direct evidence" of discrimination.[94] In subsequent years, many courts and commentators took Justice O'Connor's concurring view as the holding of the Court because her vote had been necessary to obtain a majority, and could therefore be read as necessary to the opinion.[95] Thus, the *Price Waterhouse* mixed motive claim was not only limited by an exceedingly generous affirmative defense, but also was available only to the small number of plaintiffs who might have direct evidence to support their claims.[96]

Responding to the decision, Congress enacted two provisions in the Civil Rights Act of 1991. The first relevant provision, section 703(m), pro-

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91. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991) (stating Congress's goal "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (noting that the Civil Rights Act was enacted in response to a number of court cases, including *Price Waterhouse*); Michael M. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 584 (1996).

92. 490 U.S. 228 (1989).

93. *Id.* at 244-45.

94. *Id.* at 276 (holding that the burden shifts to the employer to show that it would have reached the same decision only where "a disparate treatment plaintiff [can] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision") (emphasis added).

95. *See* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2d Cir. 1992) ("Despite the inarguable fact that only *four* justices in *Price Waterhouse* would have imposed a 'direct evidence' requirement for 'mixed-motives' cases, most circuits have engrafted this requirement into caselaw."), *cert. denied*, 506 U.S. 826 (1992). *See generally* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case . . . 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

96. *See* Zimmer, *supra* note 91, at 582-83.

vides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[97] The second provision, section 706(g), creates an affirmative defense that does not eliminate liability, but potentially limits the employer's damages. Specifically, if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the court "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment."[98] Even if the affirmative defense is shown, however, the court may award declaratory and injunctive relief and "attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m)."[99]

With these changes, the legislature repudiated the *Price Waterhouse* view that illegal discrimination has not occurred if the same action would have been taken absent the discrimination. Instead, Congress clarified that, even if other factors motivate a decision, when prohibited discrimination forms any part of the decision, the law has been violated. However, employers who can show that they would have made the same employment decision in the absence of the improper motive will face significantly smaller financial penalties.

These amendments explicitly incorporate into the Title VII framework the reality that decisions are generally made for more than one reason. The statute requires a plaintiff to prove that an adverse action was taken "because of" a prohibited characteristic, and explains that an action is taken because of a prohibited characteristic when that characteristic was "a motivating factor" in the decision.[100] Courts evaluating a plaintiff's disparate treatment claims at summary judgment should no longer require that the plaintiff demonstrate a single, illegal explanation for an adverse employment action. Instead, if a plaintiff provides sufficient evidence to suggest that race or gender bias contributed to the decision, the plaintiff has met her burden, even if the court also believes the "truth" of the employer's proffered reason.

Reading Title VII to incorporate mixed motives directly into the definition of what it means to discriminate "because of" race or gender makes the statute more consistent with current sociological and psychological understandings of how discrimination works. As discussed in Part I, most of the significant psychological models for racism today suggest that discrimination most often occurs when the decisionmaker can justify the decision in some other way.[101] Well-meaning study participants, confronted with a

97. 42 U.S.C. § 2000e-2(m) (2000).
98. 42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii).
99. 42 U.S.C. § 2000e-5(g)(2)(B)(i).
100. 42 U.S.C. §§ 2000e-2(a), -2(m).
101. *See supra* Part I.

black candidate and a white candidate in a simulated job selection process, did not discriminate when the candidates' qualifications were unambiguous.[102] Race became a factor in the decisions when the qualifications of the candidates were marginal and the nonselection of the black candidate could therefore be justified by the study participant as based on a factor other than race.[103] This suggests that race is less likely to be the exclusive motivator for a decision than it is to be one among a number of motivating factors. By allowing a plaintiff to show that a decision, while potentially justifiable on other grounds, was also motivated by race, the statute is more consistent with real experience than if it presents a "truth versus lies" vision of discriminatory motivation.

This mixed motive approach to discrimination also has what may be a benefit of creating a class of cases in which, although discriminatory motivation is acknowledged as a violation, the defendant faces minimal damages. Because of the interaction among the various relevant provisions of Title VII, a discrimination suit has a number of possible outcomes. A plaintiff could demonstrate that race or gender motivated the employment decision, and there could be no believable evidence that anything else truly motivated the decision. This is the traditional successful disparate treatment claim. A plaintiff could demonstrate that race or gender was a motivating factor, and the evidence could also suggest that other factors did motivate the decision. Liability attaches, but the question of damages remains to be resolved. If the defendant is unable to meet its burden of convincing the factfinder that it would have made the same decision absent consideration of the impermissible factor, then the plaintiff is entitled to the same damages she would be entitled to in the traditional disparate treatment context.[104] But, the defendant may persuade the factfinder that it would have taken the same action even absent the impermissible factor. In that case, the defendant will not be required to pay damages to the plaintiff.[105]

This structure, in effect, recognizes two different levels of culpability for what might be described as two different kinds of discrimination. In cases where discrimination seems to have caused both the economic harm of lost opportunity and the expressive harms that flow from discrimination independent of the lost opportunity, a defendant will be liable to the plaintiff for damages. In cases where the defendant can show that the tangible harm suffered by the plaintiff would have happened even absent the expressive harm of discrimination, the defendant will not have to compensate the plaintiff for that lost opportunity. Neither, however, will the law pretend that no harm was done at all. This structure is by no means a perfect method for

102. *See* Dovidio & Gaertner, *supra* note 34, at 316-17.
103. *See id.*
104. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (creating an affirmative defense); 42 U.S.C. § 2000e-5(g)(1) (setting forth the damages available for a violation of Title VII).
105. *See* 42 U.S.C. § 2000e-5(g)(2)(B)(ii). The defendant may face responsibility for attorney's fees as well as declaratory and injunctive relief. 42 U.S.C. § 2000e-5(g)(2)(B)(i).

recognizing different levels of culpability,[106] but it may further aid efforts to challenge unconscious discrimination by creating a middle ground that will make courts comfortable with acknowledging the role that discrimination can play even in cases where employers can otherwise justify their decisions. And, by eliminating any argument that a finding of discrimination requires the conclusion that the employer is a liar, it reduces some of the "moral opprobrium" from a finding of Title VII liability in certain circumstances.[107]

2. *Incorporating Mixed Motives into* McDonnell-Douglas

Reading Title VII, as amended in 1991, to incorporate the "motivating factor" standard into all claims of discrimination under the statute should hardly be controversial. The language of the statute is quite clear.[108] Section 703(a) provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate . . . because of" a protected characteristic.[109] Section 703(m) states that "[e]xcept as otherwise provided in this [title], an unlawful employment practice is established when the complaining party demonstrates [that a protected characteristic] was a motivating factor for any employment practice."[110] Section 703(m) thus purports to establish a general rule, subject only to explicit exceptions, of proof of "an unlawful employment practice." Since section 703(a) also defines "an unlawful employment practice" and includes no explicit exception from the general rule of section 703(m), there is no reason to imagine that they are mutually exclusive provisions.[111]

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106. *See, e.g.*, Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO L. J. (forthcoming 2005).
Unpacking Causation in Disparate Treatment Law, 57-63 (Dec. 28, 2004) (unpublished manuscript) (on file with the Alabama Law Review) (arguing that the 703/706(g) interaction risks a windfall to defendants and may lead to under-enforcement because plaintiffs will be reluctant to pursue claims in which they face the possibility of no damages).

107. *Content of Our Categories*, *supra* note 15, at 1244. Krieger has suggested a more explicit division between conscious and unconscious discrimination, in which what she describes as "moral opprobrium" may be limited in cases of unconscious discrimination by making the damages available for unconscious cognitive bias track the damages available for disparate impact discrimination. *Id.* at 1243-44.

108. *See* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 101-03 (2004) (arguing that mixed motive and pretext cases should be treated similarly); Tristin K. Green, Comment, *Making Sense of the McDonnell-Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983, 1008 (1999) ("Thus, from the plain language of the Act, it appears that sections 703(m) and 706(g)(2) of the amended Civil Rights Act were intended to apply to all Title VII disparate treatment claims."); Benjamin C. Mizer, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 242 (2001); Zimmer, *supra*, note 91 at 600 ("Whenever the issue is whether a Title VII-protected characteristic motivated the employer in taking the action challenged by the plaintiff, the burden-shifting approach of sections 703(m) and 706(g)(2)(B) is appropriate.").

109. 42 U.S.C. § 2000e-2(a) (2000).

110. 42 U.S.C. § 2000e-2(m) (2000).

111. The damages-limiting affirmative defense created in Section 706(g) provides the only textual argument against reading 703(a) and 703(m) together. 706(g) refers to "prov[ing] a violation under section [703]m" and provides for attorney's fees "demonstrated to be directly attributable only to the

And yet, even in the face of the statute's plain language, courts considering the application of the 1991 Civil Rights Act for over a decade have declined to apply the "motivating factor" standard to all but a handful of cases. These courts restricted application of the new standard because they grafted the direct evidence requirement from Justice O'Connor's *Price Waterhouse* concurrence onto the statutory analysis.[112] Under the resulting two-track approach to employment discrimination claims, cases were designated either "mixed motive" or "pretext." Only those plaintiffs with admittedly hard-to-obtain direct evidence could argue that discrimination was one factor, even if not the only factor, motivating an employment decision. The vast majority of plaintiffs, proving their cases with circumstantial evidence, were forced through the traditional *McDonnell-Douglas* framework, with its judicial emphasis on pretext.[113]

A unanimous Supreme Court rejected this direct evidence requirement in *Desert Palace v. Costa*, noting that the plain language of 703(m) and its absence of any special evidentiary burden on the plaintiff can only be read to mean that a plaintiff can demonstrate mixed motives through either circumstantial or direct evidence.[114] The Court began its analysis of the Civil Rights Act by observing that the statutory text provides that a plaintiff must "demonstrate" that race or gender was a motivating factor in the decision, but does not offer any suggestion of a "heightened showing through direct evidence."[115] Furthermore, the Court observed, Congress defined the term "demonstrate" at another point in the statute, explaining that it requires meeting the "burdens of production and persuasion."[116] If Congress had meant to include a heightened standard for the plaintiff, it could have done so.[117] Given the parallel use of the term "demonstrate" in the affirmative

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pursuit of a claim under section [703](m)." 42 U.S.C. §2000e-5(g)(B)(i). These references could be read to suggest that a claim under 703(m) is independent of a claim under 703(a). A better way to understand the references, however, would be as distinguishing claims that an action was taken "because of" or motivated in any part by race or gender from claims for retaliation, which is also prohibited by Title VII, but for which the statute does not recognize the possibility of a mixed motive claim. *See* 42 U.S.C. § 2000e-3 (explaining retaliation); 42 U.S.C. § 2000e-2(m) (not including retaliation in the list of prohibited factors covered by the provision); *see also* Peterson v. Scott County, Civ. No. 02-4737 (RHK/AIB), 2004 U.S. Dist. LEXIS 9579, at *31 (D. Minn. May 27, 2004) (discussing the relationship between mixed motive and retaliation claims).

112. *See, e.g.*, Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Bd. of Trustees of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1141-42 (4th Cir. 1995).

113. *See* Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 661-62 (2000) (describing conflict in the courts over whether Section 703(m) applies only in direct evidence cases); *cf.* Waltman v. Int'l Paper Co., 875 F.2d 468, 481 (5th Cir. 1989). The *Waltman* court applied *Price Waterhouse* and noted that

> [i]n a mixed motive case, an employer may have legitimate *and* discriminatory reasons for taking action injurious to a plaintiff. In a pretext case, an employer has either a discriminatory *or* a non-discriminatory rationale for its actions. The elements the parties must prove depend upon the classification of the claim as a mixed motive case or a pretext case.

Id.

114. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003).

115. *Id.* at 98-99.

116. *Id.* at 99 (citation omitted).

117. *Id.* The Court notes that this is particularly clear given that Congress has provided heightened

defense provision allowing a defendant to limit damages by "demonstrat[ing]" that it would have taken the same action, the Court observed that it would be particularly odd to impose—without mentioning it—a different proof standard in the two provisions.[118] Finally, the Court emphasized that circumstantial evidence is a staple of civil litigation, and that judges should not assume that Congress meant to eliminate use of such evidence absent a clear statement to that effect.[119]

In spite of its unanimity and relative clarity, the *Costa* opinion still managed to create some uncertainty. In a footnote that one court has described as "a strategically placed fig leaf designed to obscure the otherwise clear implications of *Desert Palace's* reading"[120] of the statute, the Court observed that "[t]his case does not require us to decide when, if ever, [the motivating factor provision] applies outside of the mixed-motive context."[121] The Court thus purported to leave open the possibility that the motivating factor standard would not apply in some cases.

Despite this footnote, it is hard to imagine when the motivating factor approach would not be available to a plaintiff. In most (if not all) discrimination cases, a plaintiff will start by asserting simply that the defendant acted with a discriminatory motive. The defendant will respond that it did not have a discriminatory motive, and that in fact the reasons for its decision are entirely legitimate. In many (perhaps most) cases, there will be some evidence to support both claims. There is no logical way to separate cases involving mixed motives from cases in which a plaintiff claims that only a single, illegitimate factor motivated the decision without imposing obligations not contemplated by the statute or basic rules of civil procedure. While a plaintiff could, in theory, be required to choose at some early point in the litigation whether she was planning to allege a single motive or mixed motives, this requirement is not contained in the statute. It could be done only as a judicially imposed obligation without any textual support. Moreover, any such requirement would be contrary to the general rule that a plaintiff in federal court may plead any number of different theories for relief.[122] Thus, even if a court were to view mixed motive and single motive discrimination as two different kinds of claims, there would be no basis for forcing a plaintiff to choose between them.

In the year since *Costa* was decided, a few courts have retained a two-track structure for considering Title VII claims.[123] In some respects, these

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proof requirements in other parts of Title VII. *Id.* at 98-99.

118. *Id.* at 101. The Court observed that "[a]bsent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue." *Id.*

119. *Id.* at 100.

120. Carey v. Fedex Ground Packaging Sys., Inc., 321 F. Supp. 2d 902, 915 (S.D. Ohio 2004); *see also* Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d. 1180, 1196 n.1 (N.D. IA 2003).

121. *Costa*, 539 U.S. at 94 n.1.

122. *See* FED. R. CIV. PRO. 8(a) ("Relief in the alternative or of several different types may be demanded.").

123. *See, e.g.*, Louis v. E. Baton Rouge Parish Sch. Bd., 303 F. Supp. 2d 799, 803 (M.D. La. 2003);

decisions seem to ignore the *Costa* holding entirely. One court, for example, while acknowledging that it could no longer require direct evidence in order to apply the motivating factor standard, framed the question instead as whether the plaintiff had strong enough circumstantial evidence "to proceed with the direct method of proof."[124] The difference between the requirement of direct evidence and the requirement of strong enough circumstantial evidence to apply a "direct method of proof" is not immediately apparent. And, just as the former finds no support in the statute, the latter is also entirely without textual basis.

The principal justification that courts offer for retaining this bifurcation is that the *McDonnell-Douglas* framework does not recognize mixed motives.[125] This argument is based on a cramped and overly formalistic view of *McDonnell-Douglas,* and it presents the problematic specter of a procedural device drastically limiting a substantive legal provision. What these courts ignore is that the *McDonnell-Douglas* burden-shifting framework is not a standard of liability, but a procedural device designed to facilitate the orderly presentation of evidence.[126] This three-step procedural device can be applied to employment discrimination cases without regard to the substantive standard of liability applied to the claims. Certainly, it can be applied to the standards that Congress established in the Civil Rights Act of 1991.

Under *McDonnell-Douglas*, a plaintiff must first prove a prima facie case. The defendant then responds with legitimate nondiscriminatory reasons, and the plaintiff retains the burden of ultimately proving that the prohibited characteristic was "a motivating factor" in the decision. One way that the plaintiff can make this showing is by demonstrating that the defendant's proffered reasons are dishonest—what some people would call the traditional pretext showing. However, as discussed in the preceding section, the plaintiff is not required to prove that the defendant was dishonest. She can meet her burden by pointing to other evidence sufficient to create an inference of discrimination.[127] The plaintiff can also meet her ultimate burden by presenting evidence "that the defendant's reason, while true, is only *one* of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic."[128]

Sartor v. Spherion Corp., No. 02C4312, 2003 WL 22765049, at *4 (Nov. 21, 2003 N.D. Ill.) ("A plaintiff alleging race and sex discrimination may proceed along one of two routes in proving her case . . . .") (citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 799 (1973)).

124. *Sartor*, 2003 WL 22765049, at *4 (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 (2003)); *cf.* Rowland v. Am. Gen. Fin., 340 F.3d 187, 191 (4th Cir. 2003) (holding that the plaintiff should get a mixed motive instruction because of the quality of her circumstantial evidence).

125. *See, e.g.*, Sanders v. City of Montgomery, 319 F. Supp. 2d 1296, 1314 (M.D. Ala. 2004).

126. *See infra* Part II.B (discussing three-part burden shifting).

127. *See supra* Part II.A.

128. Dunbar v. Pepsi-Cola Gen. Bottlers of Iowa, Inc., 285 F. Supp. 2d 1180, 1198 (N.D. Iowa 2003); *see also* Rachid v. Jack in the Box, Inc., No. 0310803, 2004 WL 1427046, *5 (5th Cir. June 25, 2004); Peterson v. Scott County, No. 024737, 2004 WL 1179368, at *8-*9 (D. Minn. May 27, 2004) (adopting a "modified" structure for *McDonnell-Douglas* analysis); Walker v. Northwest Airlines, Inc., No. 002604, 2004 WL 114977, at *5-*6 (D. Minn. Jan. 14, 2004); Brown v. Westaff (USA), Inc., 301 F. Supp. 2d 1011, 1016-19 (D. Minn. 2004); Jones v. Southcorr, LLC, No. 103CV00499, 2004 WL

The benefits of this approach for a plaintiff like Willie Thomas could be significant. The Troy City School Board explained that it did not select Mr. Thomas because of his credit history and his relative lack of academic experience and education. As the court explained, there was no reason to doubt the defendant's honest belief that these factors motivated the decision.[129] Under the either-or approach to discrimination, the inquiry ended there. But, it was also the case that a predominantly white group of selectors ranked a slate of eight candidates and relegated all three of the admittedly qualified black applicants to the bottom half of the list.[130] If the court had been focusing not on the honesty of the employer's proffered reasons, but instead on whether the evidence raised an inference that race was a motivating factor in the process, Mr. Thomas might well have survived summary judgment.[131]

The 1991 amendments to the Civil Rights Act, together with *Costa*'s reminder that discrimination can be (and usually is) proven by circumstantial evidence, bring some clarity to two important points in antidiscrimination law. First, an employer's honesty or dishonesty is not the appropriate focus of a Title VII inquiry. Instead, the question courts must ask is simply whether the available evidence raises any inference of discrimination. While employer dishonesty may be sufficient to raise that inference, it is not necessary. Second, a court will rarely, if ever, be able to say with certainty whether discriminatory actions were taken consciously or unconsciously. This is an inevitable consequence of the centrality of circumstantial evidence to the inquiry. While circumstantial evidence can allow a factfinder to conclude that the facts surrounding an employment decision suggest that race or gender played a role, no amount of circumstantial evidence will permit the factfinder to determine whether the discriminatory impulse at play was conscious but unspoken or was the product of the decisionmaker's unconscious stereotypes and biases. Those courts and commentators that have focused on the distinction between conscious and unconscious discrimination—suggesting that Title VII reaches one but not the other—are drawing a distinction that the law does not require and that cannot, in any event, be applied.

1541597, at *8 (M.D.N.C. July 8, 2004); Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 860 (M.D.N.C. 2003); Carey v. Fedex Ground Packaging Sys., Inc., 321 F. Supp. 2d 902, 914 (S.D. Ohio 2004); Loyd v. City of Bethlehem, No. 02CV00830, 2004 WL 540452, at *5 (E.D. Pa. Mar. 2, 2004).

129. Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d. 1303, 1308-09 (M.D. Ala. 2004).

130. *Id.* at 1306 n.1.

131. Of course, if Mr. Thomas's case had survived summary judgment and gone to trial, there is a reasonable chance that the Troy City Board of Education could have successfully demonstrated that it would have taken the same action even absent the impermissible motivating factor. If that were to happen, Mr. Thomas could not receive damages and would not be instated to the position of superintendent. *See* 42 U.S.C. § 2000e-5(g)(B)(ii). The benefit of the finding of liability would be that it might force the Board of Education to reexamine its practices and to be more aware of the possibility of unconscious biases in the process. For Mr. Thomas himself, it would likely be a somewhat bitter victory.

III. CHALLENGES TO UNCONSCIOUS DISCRIMINATION: POSSIBILITIES AND LIMITS

In this section, I examine how courts have treated cases alleging that excessive subjectivity in an employer's decisionmaking process resulted in discrimination. These claims, which are as likely to be targeting unconscious bias as hidden, conscious bias, expose the impossibility of distinguishing between the two. Moreover, to the extent that plaintiffs have been successful in pressing these claims, they further demonstrate that Title VII has long prohibited even unconscious discrimination. Allegations of excessive subjectivity can be made in individual disparate treatment cases—typically at the final stage of the *McDonnell-Douglas* framework—or in class action suits in which large groups of employees challenge an employer's general policy of delegating uncabined discretion to decisionmakers in the workplace. I consider both approaches here, concluding that neither is without some difficulty, but both have potential for targeting unconscious discrimination.

A. Individual Claims of Excessively Subjective Decisionmaking

In individual disparate treatment cases, arguments about the excessive subjectivity of the decisionmaking process are generally raised at the third stage of the *McDonnell-Douglas* framework. Every court of appeals in the federal system has recognized that "subjective evaluations 'are more susceptible of abuse and more likely to mask pretext,'"[132] and a demonstration of excessive reliance on subjective criteria has been accepted as evidence supporting an inference of discrimination.[133] As one court has explained it, "when that evaluation is to any degree subjective and when the evaluators

132. Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990) (quoting Fowle v. C & C Cola, 868 F.2d 59, 64-65 (3d. Cir. 1989)); *see also* Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1218 (10th Cir. 2002) ("Courts view with skepticism subjective evaluation methods such as the one here."); Saleh v. Upadhyay, Nos. 992137, 992188, 001744, 2001 WL 585085, at *13 (4th Cir. May 31, 2001)); Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136, 1142 (9th Cir. 2001); Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998);Walker v. N.Y. State Office of Mental Health, No. 977367, 1998 WL 639392, at *2 (2d Cir. Apr. 6, 1998) ("[G]reater possibilities for abuse are inherent in the utilization of such subjective values."); Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998) ("It is true that an employer's use of subjective criteria may leave it more vulnerable to a finding of discrimination, when a plaintiff can point to some objective evidence indicating that the subjective evaluation is a mask for discrimination."); McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998); Waltman v. Int'l Paper Co., 875 F.2d 468, 482 (5th Cir. 1989) ("[T]he criteria IPCO used to make promotion decisions was highly subjective, which, as this court has held in previous cases, makes it easier to discriminate."); Tye v. Bd. of Educ. of the Polaris Joint Vocational Sch. Dist., 811 F.2d 310, 315 (6th Cir. 1987), *cert. denied*, 484 U.S. 924 (1987); Maddox v. Claytor, 764 F.2d 1539, 1548 (11th Cir. 1985); Carroll v. Sears, Roebuck & Co., 708 F.2d 183, 192 (5th Cir. 1983); Bell v. Bolger, 708 F.2d 1312, 1319-20 (8th Cir. 1983) ("[S]ubjective promotion procedures are to be closely scrutinized because of their susceptibility to discriminatory abuse."); Bauer v. Bailar, 647 F.2d 1037, 1046 (10th Cir. 1981) ("[S]ubjective decision making provides an opportunity for unlawful discrimination."); Senter v. Gen. Motors Corp., 532 F.2d 511, 528-29 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); Shacke v. Southworth, 521 F.2d 51, 55-56 (6th Cir. 1975).

133. *See, e.g.*, *Garrett*, 305 F.3d at 1217; *McCullough*, 140 F.3d at 1129.

are themselves not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision may be subject to particularly close scrutiny."[134]

Focusing the discussion of subjectivity on the third stage of the *McDonnell-Douglas* framework is, in itself, a modest victory for plaintiffs hoping to get past summary judgment. Recall that, as an element of the prima facie case, a plaintiff is required to show that he is qualified for the position sought.[135] Employers have argued that the plaintiff should therefore have to demonstrate as part of his prima facie case that he was qualified according to the subjective criteria applied by the employer. If this requirement were imposed, it would be unlikely that any plaintiff could make out a prima facie case and survive summary judgment, because the very fact that the plaintiff did not get the position sought tends to prove that he did not meet the employer's subjective standards. As a consequence, "the use of subjective [hiring] could go unchallenged."[136] Courts, therefore, have consistently rejected this approach, concluding that "an employer may not 'utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process . . . is challenged as discriminatory.'"[137]

Instead, to make out a prima facie case, an employee must show that she met the objective or minimum qualifications for the position in question. She is not required to show that she met her employer's subjective standards. It is the employer's burden to raise these subjective standards in response to the plaintiff's prima facie case. Once the defendant has raised a lack of qualification as a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff can point to the subjective nature of the decisionmaking process as support for an argument that the decision was motivated by discrimination. A plaintiff in an individual case can thus use evidence of excessive subjectivity to survive summary judgment, and ultimately to prove that discrimination played a role in the adverse employment action.[138]

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134. Page v. Bolger, 645 F.2d 227, 230 (4th Cir. 1981).

135. *See supra* Part II.A.

136. Burrus v. United Tel. Co. of Kansas, Inc., 683 F.2d 339, 342 (10th Cir. 1982).

137. Medina v. Ramsey Steel Co., 238 F.3d 674, 681 (5th Cir. 2001) (quoting Crawford v. Western Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980); *cf.* Lindsey v. Prive Corp., 987 F.2d 324, 327 (5th Cir. 1993); Weldon v. Kraft, Inc., 896 F.2d 793, 798 (3d Cir. 1990); Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 132, 135 (7th Cir. 1985); Lee v. Conecuh County Bd. of Educ., 634 F.2d 959, 963-64 (5th Cir. 1981); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1344-45 (9th Cir. 1981).

138. *See, e.g.*, Hernandez v. Data Sys. Int'l, Inc., 266 F. Supp. 2d 1285, 1305 (D. Kan. 2003); *Garrett*, 305 F.3d at 1217-18; *Medina*, 238 F.3d at 681 ("[D]istinguishing legitimate employment decisions based entirely on subjective criteria and those in which subjective criteria serve as pretext for discrimination can only be made by weighing the employer's credibility."); Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 321 (3d Cir. 2000); McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998); Thomas v. Cal. State Dep't of Corr., No. 9115870, 1992 WL 197414, at *3 (9th Cir. Aug. 18, 1992); *Lee*, 634 F.2d at 963-64; *see also* Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1399 (6th Cir. 1990) (reversing a district court's grant of judgment notwithstanding the verdict and concluding that "the alleged use of subjective criteria was merely a poor disguise for discriminatory action by the Board").

These claims of excessive subjectivity do not—and cannot—distinguish between subjectivity that allows unconscious bias into the decision and subjectivity that allows a consciously biased decisionmaker to make a discriminatory choice. Not surprisingly, when courts talk about the risks of excessively subjective decisionmaking, they tend to talk in terms of the potential for masking *intentional* discrimination rather than the potential for intrusion of unconscious discriminatory attitudes.[139] Essentially, "evidence of subjective, standardless decisionmaking by company officials, which is a convenient mechanism for discrimination," is treated by many courts as satisfying the requirement that the plaintiff prove intent because of the possibility that unrestricted subjective decisionmaking processes mask bad intent.[140] But, allowing plaintiffs to demonstrate pretext by showing subjective decisionmaking also allows the survival of cases in which the discrimination was unconscious.[141]

In a few cases, courts confronting subjective decisionmaking processes have specifically recognized the possibility that unconscious discrimination played a role in the decision.[142] The First Circuit, for example, has explicitly concluded that a system of uncabined reliance on supervisory judgment resulting in discrimination against a black plaintiff is impermissible "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."[143] In

139. *See, e.g.*, Clay v. Holy Cross Hosp., 253 F.3d 1000, 1005 (7th Cir. 2001); Brill v. Lante Corp., 119 F.3d 1266, 1272-73 (7th Cir. 1997); Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995); Jordan v. Summers, 205 F.3d 337, 343-44 (7th Cir. 2000).

140. Boykin v. Georgia-Pacific Corp., 706 F.2d 1384, 1390 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); *see also* Rowe v. Gen. Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972); *cf.* Hill v. K-Mart Corp., 699 F.2d 776, 781 (5th Cir. 1983).

141. *See, e.g.*, Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1331 (1995) ("[I]f disparate treatment plaintiffs can prove discrimination simply by disproving defendants' explanations for the challenged actions, discrimination based on the unconscious use of racial stereotypes can trigger liability unless factfinders were explicitly admonished to immunize this type of discrimination."); Wax, *supra* note 19, at 1149-50 (noting that there is no doctrinal barrier to plaintiffs succeeding on claims of unconscious discrimination).

142. *See Thomas*, 1992 WL 197414, at *3 (noting that the defendant's reliance on the plaintiff's answers to questions in an oral interview as the justification for non-selection "should be carefully scrutinized for pretext because it is subjective and vague . . . . Were we to hold that the unsupported claim that a particular candidate was a 'superior' interviewee was sufficient without more to require summary judgment for an employer, we would immunize from effective review all sorts of conscious and unconscious discrimination."); Johnson v. Stone, 58 Fair Empl. Prac. Cas. (BNA) 656, 658 (D. Colo. 1992) (finding for the plaintiff in a race discrimination case where the plaintiff presented evidence that he was not promoted and that his employer had nicknamed him "Bub," but without other evidence suggesting discrimination); Nichelson v. Quaker Oats Co., 752 F.2d 1153, 1156 (6th Cir. 1985) ("We are aware that employment discrimination based on race can occur both in subtle and obvious ways, both of which are contrary to the equal opportunity goals set out by Congress in Title VII."); EEOC v. Inland Marine Indus., 729 F.2d 1229, 1235 (9th Cir. 1984) ("[T]he court ruled that Inland Marine had discriminated without 'malice.' The court's finding that this discrimination manifested itself subtly, rather than through the 'culpability' of the foreman, or though a 'scheme or plan,' does not diminish the fact that the court did find intentional discrimination.") (citations omitted), *cert. denied sub. nom.*, 469 U.S. 855 (1984); *Lynn*, 656 F.2d at 1343; Sweeney v. Bd. of Tr. of Keene State Coll., 604 F.2d 106, 113 n.12 (1st Cir. 1979); Bush v. Commonwealth Edison Co., 990 F.2d 928, 931-32 (7th Cir. 1993) (considering whether the plaintiff had produced evidence that the employer's subjective judgments "reflect[ed] unconscious racial bias").

143. Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999).

Thomas v. Eastman Kodak Co.,[144] the court faced a challenge to the legitimacy of performance appraisals that had been relied on to include the plaintiff in a reduction in force. [145] Myrtle Thomas had been employed at Kodak for almost twenty years when she was laid off because of relatively low performance appraisals in the years immediately preceding her layoff. For the ten years preceding the negative appraisals, Ms. Thomas's performance at Kodak had been universally praised. Both supervisors and customers described her as dedicated, professional, and integral to the Kodak team. She received regular pay raises, awards, and bonuses. Her performance ratings were fives and sixes on a seven-point scale.[146]

In 1989, Ms. Thomas's circumstances changed considerably when Kodak appointed a new Customer Support Manager. Ms. Thomas described her relationship with the new manager as professional and did not identify any racially derogatory comments or other overtly racially motivated misconduct.[147] However, the new manager made it significantly more difficult for Ms. Thomas to perform her responsibilities by interfering with client relationships and treating her worse than other Customer Support Representatives. As well, Ms. Thomas's performance ratings dropped precipitously, falling to twos and threes in one year.[148] Kodak's performance appraisal system allowed the subjective judgment of one supervisor to control an employee's evaluation.[149]

In bringing suit, Ms. Thomas did "not argue that Kodak has articulated a false reason for her layoff (for example, excessive tardiness) in order to disguise the actual, unrelated reason (her race)—what one might describe as a 'truth versus lies' claim—rather, she challenge[d] the racial neutrality of the proffered reason itself."[150] Reversing the district court's grant of summary judgment to the employer, the First Circuit concluded that Ms. Thomas had a legitimate claim for disparate treatment. The court explained:

> [I]f an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to "discriminat[ion] . . . because of . . . race" . . . . The ultimate question is whether the employee has been treated disparately "because of race." This is so regardless of whether the employer

144. *Id.*
145. *Id.* at 43.
146. *Id.* at 43-44.
147. *Id.* at 45.
148. *Id.*
149. *Id.* at 44.
150. *Id.* at 58.

> consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.[151]

The court thus explicitly recognized that in a subjective evaluation system, there is a risk that evaluations will be based on unconscious discriminatory attitudes, and that a process infected by this subtle bias is no more permissible than a decision influenced by conscious racism or sexism. The *Kodak* case is one of a few exceptions to the general rule that courts assume, without discussion, that any evidence of racial or gender motivation is evidence of conscious bias.[152] *Kodak* appropriately recognized that the conscious or unconscious status of the discriminatory intent does not matter for the purpose of proving liability. Despite the language of conscious intent that has become standard in Title VII cases, the law does not care in these instances whether the discrimination faced by the plaintiff was conscious or not.

The facts in *Kodak* do not present any more evidence about whether the discrimination was conscious or unconscious than do those in other cases in which summary judgment is deemed inappropriate in light of the subjectivity of the process. For example, in *McCullough v. Real Foods*,[153] a white woman with a sixth-grade education was promoted to a deli manager position, while a college-educated black woman was passed over.[154] The promotion decision was not based on any formal criteria, but instead on one man's "perception of each of the two employees' abilities, work ethic, and dedication to the job."[155] The only evidence specifically suggesting that the decisionmaker was racially prejudiced was an incident described by the plaintiff "in which [the decisionmaker] greeted a white employee while ignoring her."[156] Reversing the district court's grant of summary judgment to the employer, the Eighth Circuit noted that "the extremely subjective nature of the employer's stated promotion criteria" was "critical to [its] analysis."[157] The Eighth Circuit reasoned that, although a college degree might not be necessary to manage a deli, Ms. McCullough's qualifications were better than those of the woman selected to be deli manager, enough so that it was reasonable to assume that "something other than" sound business judgment

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151. *Id.* (citation omitted).

152. *See Toward a Structural Account*, *supra* note 21, at 130 ("*Thomas* is significant for the court's willingness to formulate the conception of discrimination underlying traditional disparate treatment theory to include differences in treatment based on unconscious bias as well as conscious animus.").

153. 140 F.3d 1123 (8th Cir. 1998).

154. *Id.* at 1125.

155. *Id.*

156. *Id.* at 1126. The court also noted that between 1985 and 1998, the store had employed four black managers at different times. There were six total managerial positions, although three of them saw next-to-no turnover. *Id.* Without more information about the length of time each of these managers was employed and the applicant pool for managerial positions, it is difficult to assess the significance of these numbers.

157. *Id.* at 1129.

motivated the decision.[158] That something else could have been racial bias.[159]

There was no more evidence of conscious intent (or employer dishonesty) in *McCullough* than in the First Circuit's *Kodak* decision. In either case—and in any circumstance where a decisionmaker has exercised subjective judgment—the decisionmaker could have been acting with conscious intent to discriminate or could have been motivated by unconscious bias. In both of these cases, however, there was some evidence (including the subjectivity of the evaluation process) that was sufficient to raise questions about the role that racial bias—whatever its cognitive source—might have played in the decisions. Both *Kodak* and *McCullough* were decided using the traditional *McDonnell-Douglas* framework. If these cases, and others like them, had been decided after *Costa*, the plaintiff's burden—to demonstrate that race or gender was a motivating factor in the decision—would have been much lighter than the onerous burden of providing sufficient evidence to create an inference of employer dishonesty. This change would not have affected Ms. Thomas or Ms. McCullough, as their cases survived even under the more burdensome standard, but the motivating factor approach might, and should, alter the outcome in some cases that would otherwise end because of the plaintiff's inability to catch her employer in a lie.

Of course, even taking the mixed motive approach, not all cases challenging subjective decisionmaking will, or should, survive summary judgment. Courts have been very careful to observe that "nothing in Title VII bans outright the use of subjective evaluation criteria."[160] Many courts, the United States Supreme Court among them, have emphasized that subjective criteria may be essential to any number of job categories, and that employers must be permitted to evaluate job candidates based on those subjective criteria where they are relevant.[161] "Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be

158. *Id.* at 1128-29.

159. *Id.*

160. Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998); *see also* Denney v. City of Albany, 247 F.3d 1172, 1186 (11th Cir. 2001) ("It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation."); Chapman v. AI Transp., 229 F.3d 1012, 1033-34 (11th Cir. 2000); Richter v. Revco D.S., Inc., 959 F. Supp. 999, 1010 (S.D. Ind. 1997), *aff'd*, 142 F.3d 1024 (7th Cir. 1998); Weihaupt v. Am. Med. Ass'n, 874 F.2d 419, 429 (7th Cir. 1989); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986); Vitug v. Multistate Tax Comm'n, 88 F.3d 506, 514 (7th Cir. 1986) ("Title VII does not forbid subjective selection processes.").

161. *See Chapman*, 229 F.3d at 1033 ("[S]ubjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy."); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988); *Denney*, 247 F.3d at 1185-86; Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986) ("Indeed, in many situations [subjective criteria] are indispensable to the process . . . ."); Robertson v. Sikorsky, 2000 WL 33381019, at *3-*4 (D. Conn. July 5, 2001); *see also Targeting Workplace Context*, *supra* note 46, at 713; *Toward a Structural Account*, *supra* note 21, at 103-05; Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 987 (1982).

measured accurately through standardized testing techniques."[162] Courts may be particularly deferential to an employer's subjective judgment in jobs requiring significant public interaction,[163] or in supervisory and management positions.[164] Thus, "a plaintiff can not ultimately prove discrimination merely because his/her employer relied upon highly subjective qualities (i.e. 'drive' or 'enthusiasm') in making an employment decision."[165]

Recognition of the role that subjective judgment may legitimately play in employment decisions has created two limitations for plaintiffs challenging a subjective process. First, if an employer "articulates a clear and reasonably specific factual basis upon which it based its subjective opinion," courts tend to be more deferential to that opinion.[166] As one court has explained the standard, using a hypothetical applicant for a sales clerk position:

> [I]t might not be sufficient for a defendant employer to say it did not hire the plaintiff applicant simply because "I did not like his appearance" with no further explanation. However, if the defendant employer said, "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt," the defendant would have articulated a "clear and reasonably

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162. *Watson*, 487 U.S. at 991.

163. *See, e.g.*, *Chapman*, 229 F.3d at 1033. In *Chapman*, the court stated:

> Take, for example, a job requiring continuing interaction with the public, such as a sales clerk or wait staff position. Attitude, articulateness, and enthusiasm, as well as appearance, can be vitally important in such a job, yet there are few if any ways to gauge such qualities objectively or from a written application. Interviews give prospective employers a chance to see if an applicant has the kind of personal qualities a service job requires and can be the best way an employer has to determine how a person interacts with others.

Id.

164. *See, e.g.*, *Watson*, 487 U.S. at 991; *Chapman*, 229 F.3d at 1033-34. The *Chapman* court noted:

> Personal qualities also factor heavily into employment decisions concerning supervisory or professional positions . . . . Traits such as "common sense, good judgment, originality, ambition, loyalty, and tact" often must be assessed primarily in a subjective fashion, yet they are essential to an individual's success in a supervisory or professional position.

Id.; *see also* Risher v. Aldridge, 889 F.2d 592, 597 (5th Cir. 1989) ("Subjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions.") (citation omitted).

165. Goosby v. Johnson & Johnson Med. Inc., 228 F.3d 313, 321 (3d Cir. 2000).

166. *Chapman*, 229 F.3d at 1034; *see also* Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 104-105 (2d Cir. 2001) ("[W]e have also cautioned that 'an employer may not use wholly subjective and unarticulated standards to judge employee performance for purposes of promotion' . . . . Accordingly, an 'employer's explanation of its reasons must be clear and specific' in order to 'afford the employee a full and fair opportunity to demonstrate pretext.'") (citations omitted); Obi v. Anne Arundel County, 142 F. Supp. 2d 655, 663-64 (D. Md. 2001) (accepting the employer's conclusion that the plaintiff's interview performance was inferior to that of the individual selected for the position where the employer explained in detail the particular elements of the interview that had not gone well for the plaintiff); EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1280 n.17 (11th Cir. 2000); Conner v. Fort Gordon Bus Co., 761 F.2d 1495, 1500 (11th Cir. 1985); Colon-Sanchez v. Marsh, 733 F.2d 78, 82 (10th Cir. 1984).

specific" basis for its subjective opinion—the applicant's bad (in the employer's view) appearance.[167]

Second, plaintiffs challenging an employer's subjective practices generally need to point to some evidence beyond the subjective evaluation system itself to support their claims.[168] This evidence may include comments suggesting stereotypical attitudes in the workplace,[169] statistical evidence showing race or gender disparities in hiring or promotion,[170] evidence that the person selected for the position had significantly poorer qualifications than the plaintiff,[171] or evidence that the plaintiff was treated differently from white or male employees.[172] Thus, while a subjective evaluation system will raise a red flag, the plaintiff must generally provide additional support to prevail on her claim that the subjective decisionmaking process allowed race or gender to play a part in the decision.[173]

While these requirements limit which cases will survive summary judgment, they also suggest a limit on which cases *should* survive. One of the frustrating implications of current sociological and psychological research is that we all act with unconscious biases and stereotypes—no matter how good our intentions. Given that possibility, it seems at least arguable that every time a minority or woman is denied a job or a promotion, or suf-

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167. *Chapman*, 229 F.3d at 1034.

168. *See, e.g.*, Nichols v. Caroline, No. JFM023525, 2004 WL 350337, at *5 n.9 (D. Md. Feb. 23, 2004); Snoddy v. City of Nacogdoches, 98 Fed. Appx. 338, 342 (5th Cir. 2004); Brooks v. Ameren UE, 92 FEP Cases 1328, 1330 (8th Cir. 2003) (stating that "subjectivity alone does not render an employment decision infirm" where the plaintiff has no other evidence to suggest pretext); Green v. Maricopa County Cmty. College Sch. Dist., 265 F. Supp. 2d 1110, 1125 (D. Ariz. 2003) ("[A] plaintiff may combine proof of reliance on subjective criteria with other evidence to show pretext."); Sattar v. Motorola, Inc., 138 F.3d 1164, 1170 (7th Cir. 1998) (noting that subjective criteria can support a finding of discrimination when other "evidence indicat[es] that the subjective evaluation [was] a mask for discrimination," and that "[i]t is that extra piece of objective evidence that Sattar has not provided"); Richter v. Revco D.S., Inc., 959 F. Supp. 999, 1010-11 (S.D. Ind. 1997) (presented no evidence in an age discrimination case tending to show that the employer's subjective decisionmaking allowed stereotyping to occur); Jauregui v. City of Glendale, 852 F.2d 1128, 1135 (9th Cir. 1988) ("The use of subjective factors to evaluate applicants for hire or promotion is not illegal per se.").

169. *See, e.g.*, Garrett v. Hewlett-Packard, 305 F.3d 1210, 1215 (10th Cir. 2002) (noting that the manager told the plaintiff that he and others "were tired of hearing about 'that diversity stuff'"); Malarkey v. Texaco, Inc., 983 F.2d 1204, 1210 (2d Cir. 1993); Fakete v. Aetna, Inc., 308 F.3d 335, 339 (3d Cir. 2002); Hunt v. City of Markham, 219 F.3d 649, 652 (7th Cir. 2000).

170. *See, e.g.*, Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1112 (E.D. Ark. 2000) ("[S]ubjective employment procedures are to be closely scrutinized in disparate treatment cases because of their susceptibility to discriminatory abuse and, coupled with statistical evidence of a pattern of a discrimination, may be evidence of pretext."); Bell v. Bolger, 708 F.2d 1312, 1320 (8th Cir. 1983); *see also* Voltz v. Coca-Cola Enterprises Inc., No. 021010, 2004 WL 100507, at *7 (10th Cir. Jan. 22, 2004) (stating that the plaintiff's statistical evidence actually suggested that Coca-Cola made strong efforts to hire minority candidates; these statistics limited the court's willingness to assume that subjectivity lead to impermissibly motivated decisions).

171. *See, e.g.*, McCullough v. Real Foods, Inc., 140 F.3d 1123, 1128 (8th Cir. 1998).

172. *See, e.g.*, *Garrett*, 305 F.3d at 1216-17; *Sattar*, 138 F.3d at 1170-71 (holding that a plaintiff can show pretext in subjective criteria by pointing to evidence that "others whose work style was similar to his received consistently better subjective evaluations").

173. *See, e.g.*, Casillas v. U.S. Navy, 735 F.2d 338, 345 (9th Cir. 1984) ("An employer's use of subjective criteria is to be considered by the trial court with the other facts and circumstances of the case.").

fers some other adverse employment action, race or gender played some role in the decision. If that is true, how can the law accommodate that reality?

A number of commentators have argued that in light of the considerable tangible effects of unconscious discrimination on the employment opportunities of women and minority job applicants, the law should be reformed to acknowledge the pervasiveness of unconscious discrimination.[174] Some of the proposals that have been made are quite interesting. David Oppenheimer, for example, recommends recognizing a claim for what he calls "negligent discrimination": holding employers responsible for failing to carefully scrutinize decisions in which a minority or female applicant was not selected for a position.[175] Linda Hamilton Krieger recommends adopting a two-tiered structure for Title VII liability, with compensatory and punitive damages available on a finding of conscious intent to discriminate, and more limited damages available when discrimination motivated the decision in an unconscious fashion.[176] Without rejecting any of these suggestions as interesting ways to interpret or refine current law, I argue that there is a necessary limit on what private litigation can do to remedy unconscious discrimination.

The reach of cases not already encompassed (in theory) by existing law includes primarily those cases in which the plaintiff has no—or very little—evidence beyond his prima facie case to support a claim of discrimination. Imagine an African-American lawyer who applies for a position as an associate in a law firm. He meets the firm's minimum qualifications; in fact, he graduated near the top of his class at a good law school. He is one of four candidates interviewed for the position in a day-long series of interviews. The other three candidates are white, and one of them is female. The firm hires a white man to fill the position.

The rejected candidate files suit. He has no difficulty making out a prima facie case: he is a member of a protected class, he applied for a position for which he was qualified, and someone else was selected to fill the position. The employer explains, as its legitimate, non-discriminatory reason for the selection decision that although all of the candidates interviewed were qualified, they selected the applicant who seemed to fit best with the firm. After discovery, the plaintiff has the following information: the candi-

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174. *See, e.g.*, *Content of Our Categories*, *supra* note 15, at 1162-66; Oppenheimer, *supra* note 15, at 967-72; Flagg, *supra* note 15, at 2038-51; McGinley, *supra* note 21, at 480-90; *Toward a Structural Account*, *supra* note 21, at 144-57.

175. Oppenheimer, *supra* note 15, at 969-70. Oppenheimer argues that

> [w]henever an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur, it should be held negligent. Liability should also be recognized when an employer breaches the statutorily established standard of care by making employment decisions which have a discriminatory effect, without first scrutinizing its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping.

Id.

176. *Content of Our Categories*, *supra* note 15, at 1243.

date selected had qualifications almost identical to the plaintiff's; the firm's associate ranks show a slight racial imbalance in proportion to the qualified pool of applicants, but it is similar to most law firms in the city; the firm has strong EEOC policies and an affirmative action plan to recruit minority hires through its summer associate program; there is no evidence of racially derogatory or racially stereotyping remarks made by any of the lawyers who conducted the interviews or who were on the firm's hiring committee; and none of the firm's current or former associates have been willing to offer complaints about the firm's culture with regard to race relations.

The plaintiff remains firmly convinced that his lack of "fit" with the firm's culture reflects racial bias, but he does not have legally admissible evidence to support his conviction. He might find an expert to testify that law firm culture generally exhibits significant racial bias and that the subjective criterion of "fit" is precisely the kind of ambiguous standard that allows unconscious biases into play.[177] But, successful expert testimony has generally used statistics or stereotyped comments from the particular workplace to explain the operation of unconscious bias in a particular instance.[178] Because he does not have that type of evidence, our plaintiff may have some difficulty obtaining a quality expert report.

In this case, how is a judge, even with the best of intentions, to distinguish our plaintiff's case from any other suit in which a plaintiff makes out a prima facie case but has little else to support his claim? If it is not possible to separate the cases in which unconscious discrimination actually played a role from those in which it did not (and the research raises substantial questions about whether there are any cases in which unconscious bias plays no role), then there is no way to assess which plaintiffs should win and which should lose.[179]

Furthermore, if our plaintiff can win his case, then how is an employer—even acting with the best of intentions—to avoid violating the law? One of the primary goals of Title VII is to change employer behavior in order to avoid the harms of discrimination.[180] Requiring that a Title VII

177. *See* Wilkins & Gulati, *supra* note 50,at 493 (discussing the culture of corporate law firms and considering explanations for the small numbers of African-Americans among the associate and partner ranks).

178. *See, e.g.*, Fiske et al., *supra* note 19, at 1051 (describing testimony offered in *Price Waterhouse*); Deborah Dyson, Note, *Expert Testimony and "Subtle Discrimination" in the Workplace: Do We Now Need a Weatherman to Know Which Way the Wind Blows*, 34 GOLDEN GATE U. L. REV. 37, 55-56 (2004) (describing expert testimony on subtle discrimination offered in a race discrimination case).

179. *See, e.g.*, Dukes v. Wal-mart, Inc., 222 F.R.D. 189, 192 (N.D. Cal. 2004) (noting that defendants' "most significant criticism" of the conclusions drawn by an expert on sex stereotyping "is that [the expert] cannot determine with any specificity how regularly stereotypes play a meaningful role in employment decisions"); Wax, *supra* note 19, at 1134 (noting that "if unconscious bias is indeed 'subtle' . . . determinations of liability will very often be in error").

180. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998) ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (citations omitted); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998).

plaintiff provide some evidence of discrimination creates an incentive for employers to operate their workplaces in a less discriminatory fashion. If an employer knows that careful adherence to procedure, avoiding differential treatment of employees, and maintaining and enforcing policies to encourage a diverse workforce will aid the employer in avoiding liability, it will be more likely to adopt these behaviors. If engaging in this kind of good behavior does not provide some defense to legal liability in an individual case, there will be a reduced incentive to behave well.[181]

This is not to say that employers should not be held liable for unconscious bias because it is too hard to fix, or that judges should not recognize claims in which unconscious bias was at play because they are too hard to see. In fact, while current research suggests that eliminating bias completely may not be possible,[182] decisionmakers can certainly be aware of the possibility that unconscious biases are affecting their decisions, and can act with some effort to control for that possibility.[183] Employers can, and should, carefully examine employment decisions that could contain any element of discriminatory bias, whether conscious or not.[184] And, as I have argued above, judges should stop imposing the unreasonable burden that plaintiffs prove employer "dishonesty" and should be more receptive to claims in which unconscious bias may have been operating. The relevant distinction to be drawn is not between cases of conscious and unconscious bias, but between cases in which there is sufficient proof of bias and cases in which there is not. Shifting the focus of analysis off of an employer's honesty or dishonesty, and recognizing that employer decisions can have both discriminatory and non-discriminatory motivations would greatly improve the relationship between how decisions are actually made and how the legal standards are applied to those decisions. But, even if judges and employers take these steps, some plaintiffs will not be able to prove that discrimination played a role in their individual circumstances.

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181. Of course, allowing formalistic adherence to "good policies" to serve as an easy defense without continued evaluation of what is actually happening in a workplace risks insulating discrimination from view. *See* Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 3 (2001); Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 1 (1999); *Targeting Workplace Context*, *supra* note 46, at 705-08.

182. *See, e.g.*, Wilson & Brekke, *supra* note 39, at 117-22; John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effect*, *in* DUAL-PROCESS THEORIES IN SOC. PSYCHOL. 361, 361 (Shelly Chaiken & Yaacov Trope eds., 1999); Wax, *supra* note 19, at 1161-69.

183. *See, e.g.*, Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, *in* 1 THE HANDBOOK OF SOC. PSYCHOL. 357, 384 (Daniel T. Gilbert et al. eds., 1998).

184. *See* Oppenheimer, *supra* note 15, at 967-72 (arguing for a theory of negligent discrimination).

B. Using Class Action Litigation to Challenge Unconscious Discrimination

Class action lawsuits may provide a solution to some of the proof problems presented in individual claims. By targeting workplace policies more generally, without reference (at least initially) to the specific merits of each individual case, class litigation has the potential to challenge employer policies that permit the uncabined exercise of subjective judgment.[185] Class litigation has the added benefit that it can go beyond an individual instance of discrimination to challenge the intrusion of both conscious and unconscious discrimination into the culture and structure of the workplace.[186]

In her recent article, *Targeting Workplace Context*, Tristin Green argues for the potential of class actions to "identify and address organizational sources of discrimination."[187] She observes that employment discrimination class litigation today has a somewhat different approach from the early Title VII class suits, in that it "seek[s] the type of organizational change that is intended to reduce the incidence of discriminatory decisions based on subtle, often unconscious bias in individuals rather than to remove systems or structures that themselves perpetuate past segregation or discrimination."[188] Modern employment class litigation seeks these new remedial forms because it is targeted to modern discrimination—less overt, but no less important to challenge.

The number of employment discrimination class actions filed in federal court has gradually increased over the past 15 years, with about 73 or 74 cases filed in federal court each year for the past three years.[189] Allegations that an employer's hiring, firing, promotion, or other practices are based on

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185. Class litigation has long been understood to have a "public law" aspect that may make it particularly suitable for addressing a problem as far-reaching and insidious as the intrusion of stereotypes and unconscious bias as an impediment to true equal employment opportunity. *See, e.g.*, Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291-92 (1976) (describing the evolution of class action suits as part of the demise of the private litigation bipolar structure and as a mechanism for presenting group interests for adjudication); Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 906 (1978) (describing Title VII as implicating public law rights); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 321 (1988) (identifying consent decrees in employment discrimination cases as a hallmark of public law); Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 572 (2002) ("The public law litigation model emphasizes the increased importance of the remedial, or post-judgment phase of litigation, often critical in class actions and useful as a model for the dynamics of those class actions that are resolved through settlement.").

186. *See Targeting Workplace Context*, *supra* note 46, at 660 ("Without attention to the context and complexity of decision making, an individual instance of discrimination may be resolved while the structures, cultures, and practices that facilitated that discrimination in the first place remain unchanged."); Sturm, *supra* note 49, at 460 (noting that instances of unconscious discrimination may "be visible only in the aggregate").

187. *Targeting Workplace Context*, *supra* note 46, at 661; *see also* Tristin Green, *Work Culture and Discrimination*, 93 CAL. L. REV. (forthcoming 2005).

188. *Targeting Workplace Context*, *supra* note 46, at 688.

189. *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 820 n.31 (2004); *see also* 2003 ADMIN. OFF. U.S. CTS. ANN. REP., at tbl. X-5, *available at* http://www.uscourts.gov/judbus2003/appendices/x5.pdf (Sept. 30, 2003).

excessively subjective decisionmaking are among the issues raised most frequently in these class suits.[190] The past decade has seen dozens of class action suits claiming discrimination against a protected class because of an employer's subjective decisionmaking.[191] Perhaps the most famous class action in recent memory—the sex discrimination claim brought against Wal-Mart stores throughout the country—was certified in June 2004 on the basis of precisely this theory of excessive subjectivity.[192] As the *Wal-Mart* court explained in certifying the class of at least 1.5 million women, "where, as here, [excessive] subjectivity is part of a consistent corporate policy and supported by other evidence giving rise to an inference of discrimination, courts have not hesitated" to find that the requirements for class certification have been met.[193]

In order to bring a class action suit alleging discrimination in employment, plaintiffs in federal court must meet the requirements of Federal Rule of Civil Procedure 23, which imposes a two-step class certification analysis. Plaintiffs must first demonstrate that their proposed class meets the requirements of 23(a)—numerosity, commonality, typicality, and adequacy of representation.[194] The class must then fit into one of the categories defined in 23(b).[195] In employment litigation, classes are certified as either (b)(2) "injunctive" classes (where the defendant has acted or failed to act in such a way that declaratory or injunctive relief to the class as a whole is appropriate), or as (b)(3) classes (a catch-all provision for classes that do not fit neatly into the other categories).[196] Both aspects of the Rule 23 analysis have posed difficulties for employment discrimination class claims.[197]

Most courts analyzing whether to certify classes alleging excessively subjective decisionmaking have focused on the requirements of 23(a) and particularly on the element of commonality.[198] While courts considering whether to certify a proposed class are not technically ruling on the merits of claims—indeed, the Supreme Court has emphatically held quite the opposite[199]—the reality is that the procedural decisions are often hard to distinguish from the substantive analysis. For instance, it is particularly hard to separate the substantive question of whether the plaintiffs have identified a

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190. *See Targeting Workplace Context*, *supra* note 46, at 683; Robert L. Clayton & Bethany Brantley Johnson, *An Overview of Employment Class Actions*, 14 No. 4 PRAC. LITIGATOR 33, 36 (July 2003); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 417 (2000) ("Allegations of employers' 'excessively subjective' decisionmaking frequently form the basis of these class actions.")

191. *See infra* notes 197-98.

192. *See* Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (granting in part and denying in part a motion for class certification).

193. *Id.* at 149-50.

194. FED. R. CIV. P. 23(a).

195. FED. R. CIV. P. 23(b).

196. *See* Hart, *supra* note 189, at 816; *Targeting Workplace Context*, *supra* note 46, at 698-705.

197. *See* Hart, *supra* note 189, at 821-25.

198. Rule 23(a) requires that "there [be] questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).

199. *See* Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 177 (1974).

specific practice that is harming a protected class from the procedural question of whether the plaintiffs have identified common questions of law or fact. In both, the court is considering whether plaintiffs have identified a common policy that affected the entire class.[200] Thus, courts have observed that "at this point the class action and merit inquiries essentially coincide."[201]

Not only is the certification question in this context analytically difficult to separate from the substantive questions posed by the suit, but as a practical matter the class certification decision is often the only judicial decision in class litigation. The vast majority of employment discrimination class litigation succeeds or fails at the moment of the certification decision. Studies have indicated that most cases in which a class is certified will settle without litigating the merits of the claims.[202] Almost no employment class litigation has proceeded to trial in the past 15 years.[203]

Given the significance of the certification decision, and the near identity of the merits questions with the procedural standards for certification, most discussion of subjective decisionmaking in class litigation has come up in the context of decisions on class certification. A review of class actions challenging excessively subjective decisionmaking reveals that courts are

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200. *See, e.g.*, Cook v. Billington, No. 820400, 1988 WL 142376, at *2 (D.D.C. Dec. 13, 1988) ("This subjective decision-making is, according to the plaintiffs, the common thread connecting the claims of the proposed class members and justifying class certification."); Wagner v. Taylor, 836 F.2d 578, 589 (D.C. Cir. 1987); Caridad v. Metro-N. Commuter R.R. Co., 191 F.3d 283, 292-93 (2d Cir. 1999) (delegating discretionary authority to supervisors for discipline and promotion constitutes a policy or practice sufficient to satisfy the commonality requirement); Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349, 355-57 (E.D. Mo. 1996); Neal v. Moore, No. 93-2420, 1994 U.S. Dist. LEXIS 21339, at *22-*24 (D.D.C. 1994); Brown v. Eckerd Drugs, Inc., 564 F. Supp. 1440, 1446 (W.D.N.C. 1983).

201. Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 274 (4th Cir. 1980); *see also* Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 423 (N.D. Ill. 2003) (reasoning that "the inquiry into whether the plaintiffs meet the commonality requirement (and to some extent the typicality and adequacy of representation requirements) necessarily overlaps with the merits of the plaintiffs' claim") (citations omitted); Rowe v. Philadelphia Coca-Cola Bottling Co., No. 01-6965, 2003 U.S. Dist. LEXIS 19561, at *20-*23 (E.D. Pa. 2003); Abram v. United Parcel Serv. of Am., Inc., 200 F.R.D. 424, 427 (E.D. Wis. 2001); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action.") (citation omitted); Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987).

202. *See* Kramer, *supra* note 190, at 416 ("Once plaintiffs obtain class certification, the defendant's exposure, plus projected costs of defending hundreds or thousands of individual claims, places almost overwhelming and irresistible pressure on the defendant to settle, regardless of the merits of the claims.") (citation omitted); *see also* Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U. L. REV. 74, 142-44 (1996) (presenting evidence that suggests that many class action settlements occur shortly after or at the time of certification: "certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified. The percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%."); Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 IND. L.J. 497, 501-04 (1987) (noting that most class actions settle prior to trial, that certification is the crucial stage for settlement, and that a decision not to certify "reduces the bargaining power of the plaintiff and the will to continue the fight").

203. *See* Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 LAB. LAW. 33, 56 (2003).

sharply divided on whether to certify these claims. The divide cannot be explained by whether the claims are framed as disparate impact or disparate treatment, nor can it be explained consistently by assessing the evidence presented in each of the cases. In fact, the split among courts seems less about the merits of any particular suit than about individual judges' views about the legitimacy of this type of claim more generally.

1. Disparate Impact Litigation

Disparate impact claims provide a means for plaintiffs to attack an employer's facially neutral policy if the challenged policy has a disproportionate impact on a protected group and cannot be justified as a business necessity.[204] As the Supreme Court has explained, "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[205]

Although initially a creation of judicial decision,[206] the current disparate impact framework is set out in some detail—if not perfect clarity—in Title VII as amended by the Civil Rights Act of 1991.[207] A plaintiff or plaintiffs seeking to prove a disparate impact claim must identify a particular employer policy or practice that causes the disparate impact.[208] Having identified the policy or policies to be challenged, the plaintiff must offer statistical evidence to demonstrate that a protected group is adversely affected by the application of that policy.[209] The defendant may then offer countervailing statistical analyses of the impact of a particular practice, or may challenge the statistical evidence offered by the plaintiff. Thus, the bulk of the evidence in a disparate impact case is likely to focus heavily on statistical disparities in the representation of different groups in a particular workplace, and on competing explanations for these disparities.[210] Even if the plaintiffs win this statistical battle, and establish that a specific employer practice does have a significant impact on a protected group, the employer has an opportunity to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[211] If the

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204. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988) ("In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent.").

205. *Id.* at 987.

206. *See* Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971).

207. *See* 42 U.S.C. § 2000e-2(k) (2000).

208. If an employer's policies are not capable of separation, the employee may focus on the impact of a combination of policies, but the burden will be on the plaintiff to show that the policies were not capable of separation for analysis. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

209. *See Watson*, 487 U.S. at 994-95 ("Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.").

210. *See id.* at 987; *Griggs*, 410 U.S. at 432.

211. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

employer makes this showing, the plaintiffs may still win, but only if they can show an alternative practice that would be as effective for the employer's legitimate business purpose, but would have a lesser impact on the protected group.[212]

In many ways, an employer policy of permitting decentralized, entirely subjective decisionmaking seems like a perfect candidate for disparate impact analysis. It is a facially neutral policy, and plaintiffs challenging the policy are likely to point to statistical disparities in the workplace to support the claim that the policy has had a disproportionate effect on minorities or women. For some jobs, the employer may be able to justify the use of subjective evaluation criteria as a business necessity.[213] But for others, plaintiffs may be able to demonstrate that a less subjective process would have a less negative impact, but would nonetheless serve the employer's purposes.[214]

Perhaps this is why it is in the context of disparate impact litigation that the Supreme Court has most clearly endorsed claims of excessively subjective decisionmaking.[215] In *Watson v. Fort Worth Bank & Trust*,[216] the Supreme Court held that "committing promotion decisions to the subjective discretion of supervisory employees"[217] can be an employment practice subject to challenge for its disparate impact on a particular racial group.[218] The Court tied its reasoning at least in part to the problem of unconscious discrimination:

> Especially in relatively small businesses like respondent's, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. *Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain* . . . . If an em-

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212. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

213. As I discuss in Part III.A, courts are careful to recognize the need for subjective criteria in selecting candidates for professional and supervisory positions and in jobs with significant public interaction.

214. *See, e.g.*, Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608, 619 (5th Cir. 1983) (describing a remedial order in which the district court appointed a special master to, among other things, oversee the creation of objective written criteria for positions that had previously been gender and race segregated due to channeling and subjective criteria).

215. *See Watson*, 487 U.S. at 986-87.

216. 487 U.S. 977 (1988).

217. *Id.* at 982.

218. *Id.* at 991. Prior to that time, the Court's disparate impact jurisprudence had focused on the effects of objective tests like requiring high school diplomas, standardized testing, and height and weight requirements. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (focusing on diplomas or their equivalents); Albemarle Paper Co. v. Moody, 422 U.S. 405, 428 (1975) (focusing on standardized tests); Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977) (focusing on height and weight requirements).

> ployer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.[219]

Since *Watson* was decided, however, plaintiffs have rarely pursued suits alleging exclusively disparate impact discrimination.[220] A number of factors may explain the relative scarcity of disparate impact suits. The judicially imposed standards for prevailing in a disparate impact case have become so onerous that plaintiffs may be making the extremely sensible judgment that they will be unable to prevail on these claims.[221] Moreover, the potential rewards for success in a disparate impact suit are significantly smaller than for disparate treatment claims. In the Civil Rights Act of 1991, Congress increased the damages available to plaintiffs who are successful in disparate treatment claims by adding compensatory and punitive damages to the available relief.[222] These added damages are not available for impact claims.[223]

Another possible explanation for the near absence of suits alleging exclusively disparate impact may be that despite *Watson*'s very explicit holding, lower courts have resisted applying impact analysis to claims of excessive subjectivity. A number of courts, appearing to disregard *Watson,* have concluded that "[p]laintiffs do not and cannot allege that subjective decision making itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which several different managers are able to discriminate intentionally."[224] Employing this reasoning, courts have berated plaintiffs for bringing "disparate treatment claims parading under the guise of a disparate impact label."[225] Although this hostility towards

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219. *Watson*, 487 U.S. at 990-91 (emphasis added).

220. *See, e.g.*, Pauline T. Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace*, 96 NW. U. L. REV. 1497, 1527 (2002). Kim notes that:

> disparate impact cases have become increasingly rare. Employers moved away from using the objective tests most vulnerable to a disparate impact challenge, while courts made establishing proof of a differential impact more difficult. In recent years, disparate impact suits represented only a small proportion of cases filed under Title VII.

Id.; *see also* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998 n.57 (1991) (estimating that disparate impact cases accounted for less than 2% of all discrimination suits filed between January 1, 1985 and March 31, 1987).

221. *See, e.g.*, Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1492-96 (1996) (discussing generally how difficult it is for plaintiffs to succeed with disparate impact claims).

222. 42 U.S.C. § 1981(a) (2000).

223. *Id.*

224. Brooks v. Circuit City Stores, Inc., No. DKC953296, 1996 WL 406684, at *4 (D. Md. 1996), *order vacated by* Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998); *see also* Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 541 (N.D. Ala. 2001); Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539, 554 (D.S.C. 2000).

225. *Lott*, 200 F.R.D. at 553. The court held that

> [t]he situation prevailing in a bona fide disparate impact case in which an employment test or policy, neutral on its face and applicable to all employees, impacts adversely on the protected

disparate impact challenges to the policies of excessive subjectivity may not be universal, only one reported case has certified a subjective decisionmaking class alleging exclusively disparate impact discrimination.[226]

As a result, plaintiffs are more likely to frame their challenges in terms of disparate treatment where both theories are available, or to argue in the alternative, alleging both disparate treatment and disparate impact.[227] Whether because of lack of interest on the part of plaintiffs due to obstacles in proof and limitations on damages, or because of judicial resistance to the claims, disparate impact litigation has not been a productive approach to challenging employer policies of excessive subjectivity.[228]

2. *Disparate Treatment Litigation*

Disparate treatment "pattern-or-practice" class suits have shown significantly greater potential for success in challenging the kind of employer-wide policy of subjective decisionmaking that may permit both conscious and unconscious discriminatory conduct to survive largely unchecked.

When disparate treatment plaintiffs allege that an employer has discriminated against a class of employees "because of" a prohibited characteristic, they are required to demonstrate that the employer maintained a "pattern or practice" of discrimination, or that discrimination is the "company's standard operating procedure—the regular rather than the unusual practice."[229] Plaintiffs can meet that burden through statistical evidence demonstrating disparities between the employer's workforce and the available, relevant labor pool.[230] They can bolster the statistical showing with anecdoctal evidence and expert testimony about the employer's policies.[231]

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class is not present here. Another element figures prominently: the intervening conscious decisions of a multitude of diverse managers and supervisors.

Id.

226. *See* McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 273 (E.D. Tex. 1999) ("Allocating employment opportunities according to subjective traits can function as a discriminatory employment practice.").

227. A number of plaintiff classes have pursued both disparate treatment and disparate impact claims. *See, e.g.*, Taylor v. D.C. Water & Sewer Auth., 205 F.R.D. 43, 46 (D.D.C. 2002); Webb v. Merck & Co., 206 F.R.D. 399, 400-01 (E.D. Pa. 2002); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 468 (S.D. Ohio 2001); Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1105 (E.D. Ark. 2000); Smith v. Texaco, Inc., 88 F. Supp. 2d 663, 669 (E.D. Tex. 2000); Thornton v. Mercantile Stores Co., Inc., 180 F.R.D. 437, 438 (M.D. Ala. 1998); Butler v. Home Depot, Inc., No. C944335SI, 1996 WL 421436, at *3 (N.D. Cal. Jan. 25, 1996); Shores v. Publix Supermarkets, Inc., No. 951162CIVT25(E), 1991 WL 407850, at *7 (M.D. Fla. Mar. 12, 1996); Griffin v. Home Depot, Inc., 168 F.R.D. 187, 189 (E.D. La. 1996); Appleton v. Deloitte & Touche, L.L.P., 168 F.R.D. 221, 223-24 (M.D. Tenn. 1996); McKnight v. Circuit City Stores Inc., No. 395CV964, 1996 WL 454994, at *2 (E.D. Va. Apr. 30, 1996).

228. In any event, disparate impact is arguably not the appropriate model for handling these claims. *See, e.g.*, *Content of our Categories*, *supra* note 15, at 1231-37 (criticizing the notion of disparate impact litigation as a suitable tool for challenging unconscious discrimination).

229. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977); *see also Bacon*, 205 F.R.D. 466, 477; Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1285 (5th Cir. 1994).

230. *See* Hazelwood v. United States, 433 U.S. 299, 307-08 (1977) ("[G]ross statistical disparities . . . alone may in a proper case constitute prima facie [evidence] of a pattern or practice of discrimination."); *Teamsters*, 431 U.S. at 337; Bell v. EPA, 232 F.3d 546, 553 (7th Cir. 2000) ("In a pattern and practice disparate treatment case, statistical evidence constitutes the core of a plaintiff's prima facie case.");

After the plaintiffs make out a prima facie case that the employer's policies constitute a pattern or practice of discrimination, the employer can respond by challenging the statistical proof offered, or by suggesting other explanations for the apparent statistical anomaly.[232] If the defendant is not successful in rebutting the plaintiffs' prima facie case, the class of plaintiffs has won the liability portion of the litigation. At this point, a court may order injunctive or other class-wide relief, but the question of damages to any individual plaintiff remains to be resolved.[233] The plaintiffs' victory at the liability phase establishes a presumption that each individual employment decision was the product of the employer's discriminatory practices, but the employer can overcome that presumption in a particular case by demonstrating that the employment action taken against that employee was not discriminatory.[234]

There is considerable debate among lower courts as to the legitimacy of applying this pattern-or-practice framework to claims alleging excessively subjective decisionmaking. The Supreme Court has never faced the issue head-on, but a footnote in the Court's 1982 decision in *General Telephone Co. v. Falcon* provided the minimal text whose interpretation fuels the debate.[235] In *Falcon*, the Court confronted the appropriateness of so-called "across-the-board" class actions, in which a group of plaintiffs challenged all of an employer's practices—hiring, promotion, firing, etcetera—as discriminatory.[236] The Court rejected the across-the-board class action employment claim, holding that a representative plaintiff who claimed he had been discriminatorily passed over for promotion could not represent a class of plaintiffs who had not been hired, because failing to promote is a distinct practice from refusing to hire.[237] However, in doing so, the majority noted that the employer might face a suit by a class of employees whose claims were addressed to a variety of different practices if the plaintiffs could demonstrate a general policy of discrimination that operated in the same manner with regard to the full range of employment practices being challenged.[238] For example, the Court specifically noted, that plaintiffs might allege that an

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Forehand v. Fla. State Hosp. at Chattahoochee, 89 F.3d 1562, 1574-75 (11th Cir. 1996).

231. Stender v. Lucky Stores, Inc., No. C881467MHP, 1991 WL 127073, at *6 (N.D. Cal. Apr. 4, 1991) ("[W]here statistics alone do not establish a *prima facie* case of disparate treatment [in a class action suit], direct and anecdotal evidence of intentional discrimination must be strong."); *see also* Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1260-61 (N.D. Cal. 1997); Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 863 (D. Minn. 1993); Griffin v. Carlin, 755 F.2d 1516, 1520-21 (11th Cir. 1985).

232. *See Hazelwood*, 433 U.S. at 308-09; Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 161 (2d Cir. 2001); EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1285-86 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

233. *Teamsters*, 431 U.S. at 361-62.

234. *See id.*; Shuford v. Ala. State Bd. of Educ., 968 F. Supp. 1486, 1506 (M.D. Ala. 1997); Harrison v. Lewis, 559 F. Supp. 943, 946-47 (D.D.C. 1983).

235. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 159 n.15 (1982).

236. *Id.* at 156-57.

237. *Id.* at 157.

238. *Id.* at 159 n.15.

employer had a "general policy" of employing "entirely subjective decisionmaking processes."[239]

In the years since *Falcon* was decided, numerous courts have recognized the kind of claim hinted at in footnote 15, where the common thread that makes class litigation appropriate is an employer's policy of delegating decisionmaking authority so completely that the process constitutes "subjective, standardless decision-making."[240] To be successful in pressing these claims, plaintiffs generally need two things: a system of decisionmaking that is "entirely subjective" or that allows "standardless subjective decisions,"[241] and persuasive statistical evidence suggesting that minorities are treated less well than whites (or women than men) in the particular workplace.[242] In a fairly typical class action suit alleging a pattern-or-practice of excessively subjective decisionmaking, a group of female employees sued Home Depot on behalf of all female employees in the home improvement store's West Coast Division.[243] The plaintiffs in *Butler v. Home Depot, Inc.* alleged that the defendant operated an "entirely subjective" system for "hiring, job assignment, training, promotions, and compensation," that there were no objective criteria for hiring or for setting pay, and that "local gender biased male managers [were] therefore left broad discretion to make decisions that [had] an adverse effect upon women."[244] To bolster these allegations, the plaintiffs offered statistical evidence demonstrating that Home Depot's workforce was highly gender-segregated and anecdotal evidence of individual instances of discrimination.[245] The *Butler* class was cer-

239. *Id.*

240. Boykin v. Georgia Pac., 706 F.2d 1384, 1390 (5th Cir. 1983); *see also In re* Pepco Employment Litig., No. 860603(RCL), 1992 WL 442759, at *12 (D.D.C. Dec. 4, 1992) ("The subjectivity that infects PEPCO's hiring process is another fact common to all applicant claims."); *id.* at *20 (noting that the plaintiffs' statistical studies "when combined with plaintiffs' anecdotal evidence and evidence of subjective decision-making prove that a discriminatory promotion and transfer claim is common to plaintiffs' proposed subclass"); Payne v. Travenol Labs., Inc., 673 F.2d 798, 815-18 (5th Cir. 1982) (finding that reliance on recommendations of supervisors in promotion decisionmaking has a discriminatory effect); Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 546 (5th Cir. 1980) (recognizing "that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination").

241. *See* Griffin v. Dugger, 823 F.2d 1476, 1487 (11th Cir. 1987) ("We caution, however, that although district courts should give real meaning to *Falcon's* footnote fifteen, that footnote should not be used to defeat the general dictates of *Falcon*."); Page v. U.S. Indus., Inc., 726 F.2d 1038, 1053 (5th Cir. 1984) (discussing a "standardless subjective system"); Bacon v. Honda of Am., 205 F.R.D. 466, 476 (M.D. Ohio 2001) (declining to apply footnote 15 because the employer based its decisions in some part on objective criteria); Vinson v. Seven Seventeen HB Philadelphia Corp., No. 006334, 2001 WL 1774073, at *22 (E.D. Pa. Oct. 31, 2001) ("In applying Footnote 15, lower courts have demanded that plaintiffs show that a defendant's decision making process is *entirely* subjective before permitting an across-the-board attack."); Wynn v. Dixieland Food Stores, Inc., 125 F.R.D. 696, 701 (M.D. Ala. 1989) (stating that footnote 15 applies only where the defendants used one entirely subjective selection system, employing the same selection process regardless of the type or level of job filled).

242. *See, e.g., Page*, 726 F.2d at 1047-48.

243. Butler v. Home Depot, Inc., No. C9444335SI, 1996 WL 421436, at *1 (N.D. Cal. Jan. 25, 1996).

244. *Id.*

245. *Id.* at *1-*2.

tified and ultimately settled.[246] In the past two decades, at least twenty cases have been certified on this theory.[247]

But, while many courts have accepted these pattern-or-practice claims, more have not.[248] Indeed, in the disparate treatment context, as in disparate impact suits, some courts are extremely hostile to the entire notion of "entirely subjective decision-making" as an employment practice.[249] As one court has explained it, "what we have here are evaluations and decisions made by hundreds of supervisors and managers on a variety of things besides promotions, such as job assignments, salary determinations, merit increases, etc. From a practice standpoint, it is impossible to put these all under one roof."[250] Other courts have expressed the fear that an employer

246. *See id.* at *1; *Targeting Workplace Context*, *supra* note 46, at 684-85; Sturm, *supra* note 49, at 509-19.

247. *See, e.g.*, Caridad v. Metro-N. Commuter R.R. Co., 191 F.3d 283, 286 (2d Cir. 1999); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 593-94 (2d Cir. 1986) (reversing decertification); Shipes v. Trinity Indus., 987 F.2d 311, 324 (5th Cir. 1993); McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 440 (D.D.C. 2002); Taylor v. Dist. of Columbia Water & Sewer Auth., 205 F.R.D. 43, 45-47 (D.D.C. 2002); Beck v. Boeing Co., 203 F.R.D 459, 462-68 (W.D. Wash. 2001); Drayton v. W. Auto Supply Co., 203 F.R.D. 520, 528-29 (M.D. Fla. 2000); Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1130 (E.D. Ark. 2000); McClain v. Lufkin Indus., Inc., 187 F.R.D. 267, 272-74 (E.D. Tex. 1999); Shores v. Publix Super Mkts., Inc., No. 951162CIVT25(E), 1996 WL 407850, at *5-*7 (M.D. Fla. Mar. 12, 1996); *Butler*, 1996 WL 421436, at *1-*7; McKnight v. Circuit City Stores, Inc., No. 395CV964, 1996 WL 454994, at *3-*5 (E.D. Va. Apr. 30, 1996); Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349, 354-57 (E.D. Mo. 1996); Griffin v. Home Depot, Inc., 168 F.R.D. 187, 189-91 (E.D. La. 1996); *In re Pepco Employment Litig.*, 1992 WL 442759, at *1; Jenson v. Eveleth Taconite Co., 139 F.R.D. 657, 660-62 (D. Minn. 1991); Cook v. Billington, No. 820400, 1988 WL 142376, at *4-*5 (D.D.C. Dec. 13, 1988); Warren v. Xerox Corp., No. 01CV2909(JG), 2004 WL 1562884, at *2, *8-*10 (E.D.N.Y. Jan. 26, 2004).

248. *See, e.g.*, Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 580 (6th Cir. 2004); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 425-26 (5th Cir. 1998); *Page*, 726 F.2d at 1056; Thompson v. Merck & Co., Inc., No. CA011004, 2004 WL 62710, at *3-*5 (E.D. Pa. Jan. 6, 2004); Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 428-30 (N.D. Ill. 2003); Robertson v. Sikorsky Aircraft Corp., 258 F. Supp. 2d 33, 42-43 (D. Conn. 2003); Webb v. Merck & Co, 206 F.R.D. 399, 401-02 (E.D. Penn. 2002); Vance v. City of Nacogdoches, 198 F. Supp. 2d 858, 859-61 (E.D. Tex. 2002); Carson v. Giant Food, Inc., 187 F. Supp. 2d 462, 468-69 (D. Md. 2002); Clayborne v. Omaha Pub. Power Dist., 211 F.R.D. 573, 599-601 (D. Neb. 2002); Reap v. Cont'l Cas. Co., 199 F.R.D. 536, 544-46 (D.N.J. 2001); *Vinson*, 2001 WL 1774073, at *21-*22; Miller v. Hygrade Food Prods. Corp., 198 F.R.D. 638, 643-45 (E.D. Pa. 2001); Cooper v. S. Co., 205 F.R.D. 596, 610-27 (N.D. Ga. 2001); Adams v. R.R. Donnelley & Sons, No. 98C4025, 2001 WL 336830, at *21-*22 (N.D. Ill. Apr. 6, 2001); Wright v. Circuit City Stores, Inc., 201 F.R.D. 526, 539-42 (N.D. Ala. 2001); Riley v. Compucom Systems, Inc., No. 398CV1876L, 2000 WL 343189, at *3-*5 (N.D. Tex. Mar. 31, 2000); Hively v. Northlake Foods, Inc., 191 F.R.D. 661, 666-67 (M.D. Fla. 2000); Allen v. Chicago Transit Auth., No. 99C7614, 2000 WL 1207408, at *9-*10 (N.D. Ill. Jul. 31, 2000); Faulk v. Home Oil Co., Inc., 184 F.R.D. 645, 655-69 (M.D. Ala. 1999) (*cert. denied on* Allison *grounds*); Abram v. United Parcel Serv. of Am., Inc., 200 F.R.D. 424, 428-33 (E.D. Wis. 2001); Appleton v. Deloite & Touche, L.L.P., 168 F.R.D. 221, 229-33 (M.D. Tenn. 1996); Brooks v. Circuit City Stores, Inc., No. DKC953296, 1996 WL 406684, at *5-*6 (D. Md. Jun. 17, 1996); Hartman v. Duffey, 19 F.3d 1459, 1461 (D.C. Cir. 1994).

249. *See Targeting Workplace Context*, *supra* note 46, at 690-98 (discussing examples of judicial resistance to finding commonality in class suits challenging subjective decisionmaking).

250. Robertson v. Sikorsky Aircraft Corp., No. 397CV1216(GLG), 2000 WL 33381019, at *5-*6 (D. Conn. July 25, 2001); *see also Brooks*, 1996 WL 406684, at *1, *rev'd in part on other grounds*, 148 F.3d 373 (4th Cir. 1998)); *Wright*, 201 F.R.D. at 541 ("[T]he purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof."); Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539, 553-54 (D.S.C. 2000); *Abram*, 200 F.R.D. at 433; Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 239 (W.D. Tex. 1999).

would be subject to a pattern-or-practice suit whenever it gave supervisors discretion to make decisions.[251]

This judicial resistance to class claims challenging excessively subjective decisionmaking policies that infect an employer's entire corporate operation is unwarranted. Obviously, not every class alleging that an employer allows largely unfettered discretion to its decisionmaking supervisors should be certified. Courts reasonably require some level of credible evidence suggesting a broadly applicable discriminatory practice in order to allow these cases to proceed under Rule 23. But, as with individual claims of excessive subjectivity, the issue is one of proof in the particular case, not the viability of the claim in the abstract. When a class of plaintiffs can support its allegations with specific evidence that an employer has a centralized and widely applicable policy of allowing supervisors to exercise entirely subjective judgment in hiring, firing, promotions, and other decisions on the job, as well as statistical evidence demonstrating that decisions made across the workplace are excluding minorities and women or are relegating them to lower paying, lower status positions, Title VII requires some evaluation of why this is happening. Rule 23 permits that evaluation on a class-wide scale. Indeed, class suits may be particularly important and appropriate to challenge employee claims of excessive subjectivity in an employer's decisionmaking processes. When an employer permits largely uncabined discretion to its supervisors, the risk of the pervasive operation of unconscious biases and stereotypes in decisionmaking is considerable. While any particular plaintiff may lack sufficient proof to mount a successful challenge to a specific decision or series of decisions, evaluation of those individual decisions in the aggregate may reveal a pattern that could thrive unchecked without the class action device. When an employer is, or should be, aware of the demonstrable consequences of permitting individual supervisors unguided independence in employment decisionmaking, its decision to continue that unguided independence is a company policy that should be subject to challenge, like any other employer policy or practice whose consequence is the denial of equal opportunities.

CONCLUSION

The strong judicial resistance to the very notion that there could be illegal discrimination in a system-wide practice of permitting excessively subjective decisionmaking is just one of many instances in Title VII litigation where the biggest obstacle plaintiffs face may not be the law, but the court. The application of a strong requirement that a plaintiff must prove employer

251. *See, e.g.*, Sperling v. Hoffman-LaRoche, Inc., 924 F. Supp. 1346, 1363 (D.N.J. 1996) (stating that "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systemic, companywide policy of intentional discrimination"); Webb v. Merck & Co., 206 F.R.D. 399 (E.D. Pa. 2002).

dishonesty in order to prevail on a claim of individual disparate treatment is another, and the grafting of a direct evidence requirement onto the mixed motive provisions of the Civil Rights Act of 1991 is a third. In each of these instances, the doctrine does not require the harsh standards that courts have applied. Unfortunately, as these examples suggest, Title VII is often applied by judges in a stingy and, as Michael Zimmer describes it, "unsympathetic" manner.[252]

Legal realists have long recognized that the outcome of a case will depend as much on the attitudes of the decisionmakers as on the substance of the law applicable to the case.[253] One of the particularly difficult issues with allegations of employment discrimination is that one's view of what "actually happened" in a situation will be shaped substantially by one's background convictions and experiences.[254] Unfortunately, research shows a dramatic gap in perceptions of racial equality between black and white Americans.[255] Many studies in recent years demonstrate that "blacks and whites disagree about whether or not racial discrimination persists, to what extent, and to what effect."[256] Indeed, "despite the compelling evidence of contemporary racial disparities, between 40% to 60% of Whites responding to a recent survey . . . viewed the average Black in the United States as faring about as well, and often better, than the average White."[257]

Judges are human, and thus are just as susceptible to these perceptual gaps as the rest of us.[258] Regardless of what claims Title VII may support,

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252. Michael Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 576 (2003).

253. *See, e.g.*, Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925).

254. *See, e.g.*, Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003) ("Those who see discrimination as a pervasive and unjust aspect of our society are far more likely to interpret ambiguous events as the product of discrimination, while those who believe, or want to believe, that discrimination has receded in importance will attribute observed inequalities to forces other than discrimination.").

255. A 2002 study, for example, found that black employees are five times more likely than their white co-workers to believe that African-Americans are the most likely targets of discrimination. John J. Heldrich Center For Workforce Dev., *A Workplace Divided: How Americans View Discrimination and Race on the Job, at* http://www.heldrich.rutgers.edu/Resources/Publication/19/Work_Trends_020107.pdf (Jan. 2002). And, while only about one-half of black employees believe that employment practices such as hiring, salaries, and promotion are fair to all employees, 94% of white employees believe that such practices are uniformly applied. *Id. See also* Joseph Lelyveld, HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART 385 (2002) (reporting that 73% of white Americans believe that blacks are not treated unfairly in the workplace; only 40% of blacks agreed); The Washington Post/Kaiser Family Foundation/Harvard University, *Race and Ethnicity in 2001: Attitudes, Perceptions and Experiences, available at* http://www.kkf.org/kaiserpolls/3143-index.cfm (Sept. 27, 2001).

256. Selmi, *supra* note 254, at 663 (quoting Claire Jean Kim, *Managing the Racial Breach: Clinton, Black-White Polarization, and the Race Initiative*, 117 POL. SCI. Q. 55, 58 (2002)).

257. Dovidio et al., *supra* note 27, at 88-89 (citations omitted); *see also* Davis, *supra* note 61 (describing differing perceptions of racial inequalities in the legal system).

258. *See, e.g.*, Vicki Schultz & Stephen Patterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167 (1992) ("There is little disagreement that judges' political, social, and personal values may affect their decisions."); Judge Howard T. Hogan, *Some Thoughts on Juries in Civil Cases*, 50 A.B.A. J. 752, 753 (1964) ("Our judgment of issues of facts must always be based in part upon what we, as indi-

some judges will be unlikely to see bias in an interaction that did not involve a direct, explicit statement of discriminatory intent.[259] Others will be more likely to look at an interaction in which subjective value judgments played a central role and to suspect that culturally embedded stereotyping infected those judgments.[260] Unfortunately for Title VII plaintiffs, the hostility of the federal judiciary to employment discrimination claims has been widely recognized.[261] Just as employers should be conscious of the ways in which their background prejudices affect workplace decisions, so should judges evaluating evidence in a discrimination case take special care that their unconscious assumptions and biases do not become a motivating factor in their decisions.

Employment discrimination plaintiffs face considerable hurdles when they mount challenges to biased workplace decisions. Sociological and psychological research suggests that many challenges may be particularly difficult because discriminatory attitudes are even more likely to play a role when a decisionmaker can justify her decision with a non-discriminatory explanation. A plaintiff may, as a result, have considerable trouble catching her employer in a "lie" about the reasons for an employment decision, but

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viduals, are—the sum total of our experiences, our backgrounds, our prejudices and our limitations.").

259. Chad Derum and Karen Engle have argued that Title VII has become less effective as applied because of shifts in the background assumptions made by judges. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1196 (2003). In the early years of the statute's application, courts tended to operate on the assumption that if an employment decision was unexplained, or the explanation made no sense or lacked support, it was likely that the decision involved discrimination. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). That assumption has shifted, and many judges today instead presume that the employer who is unwilling or unable to explain a decision may have acted with personal animosity—which is not prohibited by law—rather than discriminatory animus. An interesting aspect of this shift is the assumption that personal animosity and racism are distinct problems. Of course, while this is sometimes true, it is also the case that racism—whether conscious or unconscious—can lead to personal animosity. *See* Derum & Engle, *supra*, at 1179; *see also* Selmi, *supra* note 254, at 668 ("[I]t is not the doctrine that has led to conservative judicial interpretations, but instead, that doctrine is the product of a limited vision of the decision makers on matters of discrimination, whether those decision makers are judges or jurors."); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 186 (1997) ("[T]he Court's ready acceptance of a 'personality clash' as a non-discriminatory justification ignores the effects of unconscious bias and stereotyping and opens a gaping loophole in the law."); Schultz & Petterson, *supra* note 258, at 1180 ("After a decade of efforts to enforce Title VII, federal judges apparently began to share the general public's belief that employment discrimination against minorities had been largely eradicated.").

260. *See, e.g.*, Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004).

261. *See* Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 544-46 (2001) ("[C]ourts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits."); 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, 210 (1993); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (showing the lower courts' hostility to employment discrimination cases; in particular noting that plaintiffs are "half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims"); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 63 (2000) (noting "the reluctance and doubt that greet claims asserted by civil rights plaintiffs"); Shultz & Petterson, *supra* note 258, at 1151-52 (describing the shift in judicial attitudes about the significance of plaintiffs' proof after a decade of Title VII enforcement).

this should not prevent the plaintiff from surviving summary judgment. The judicially imposed requirement of employer dishonesty—with its attendant focus on the consciously intentional nature of prohibited discrimination—was never an element of Title VII, and it should be abandoned. The Civil Rights Act of 1991, together with the decision in *Desert Palace v. Costa*, opens up a real opportunity for courts to recognize the complex nature of discrimination—not as either-or, but as part of a decisionmaking process likely to have multiple motivating factors, some of which will be conscious, but many of which the decisionmaker will not truly be aware. Challenges to an employer's excessively subjective decisionmaking processes, which are increasingly common in both individual and class litigation, reveal the practical impossibility of distinguishing conscious from unconscious discrimination and offer real potential for addressing some of the most pervasive and presistent modern discrimination.