Against Prejudice

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ABSTRACT

Contemporary psychology defines prejudice broadly, rejecting traditional views that equate prejudice with hostility and emphasizing the role of unconscious mental processes. A growing number of legal scholars have seized upon this new cognitive account of prejudice as a basis to expand the enforcement of antidiscrimination law's prohibition against status-based disparate treatment. This Article challenges that dominant approach, arguing that rather than expanding legal protections against discrimination, it instead exploits the intuitive appeal of theories that define discrimination by the defendant's invidious intent and overlooks the fact that disparate treatment liability turns on proof of status causation and not necessarily on evidence of motive. This Article presents a normative discussion of the ways in which disparate treatment doctrine is intended to balance equality commitments against a commitment to preserve the legitimate exercise of employer discretion and argues that the cognitive account of prejudice threatens to narrow rather than expand the law's protections. This Article also discusses status-based voluntary compliance measures motivated by the employer's self-interest, or "discrimination as compliance," and argues that such measures may be, and should be, addressed under disparate treatment doctrine and cannot adequately be addressed by relying on the cognitive account of prejudice.

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INTRODUCTION

Contemporary psychology proposes to transform our understanding of prejudice and, as a consequence, has set in motion a debate within legal scholarship concerning what empirical assumptions and normative commitments ought to guide the future development of antidiscrimination law. On one side are legal scholars who believe that the new cognitive account of prejudice provides insight into the nature of discrimination sufficient to dispel false empirical assumptions that have clouded legal doctrine and diminished its effectiveness against subtle forms of discrimination.[1] Some of these scholars also derive

1 *See, e.g.*, Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 753 (2001) ("[A]ntidiscrimination law is inadequate because it targets mainly intentional discrimination, missing the more prevalent contemporary forms of bias that are often nondeliberate or unconscious."); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946

from this research reasons to question the sufficiency of the normative commitments upon which antidiscrimination law is founded.[2] On the other side are some scholars who reject the scientific basis of the new prejudice,[3] and others who caution that to characterize discrimination as behavior motivated by unconscious cognitive processes would undermine regulatory goals of incentivizing compliance and deterring unwanted behavior.[4] In this debate, much turns not only on what psy-

(2006) (cataloging the contributions of implicit social cognition theory in opposing a "'naïve' psychological conception of social behavior"); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1001 (2006) (arguing that implicit bias research should be used to debunk intuitive psychological theories of discrimination); 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 Krieger, *The Content of Our Categories*] (arguing that disparate treatment doctrine "is inadequate to address the subtle, often unconscious forms of bias" illuminated by cognitive psychology); Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 836 (2004) [hereinafter Krieger, *The Intuitive Psychologist*] (arguing that judges often rely on intuitive psychological theories of discrimination "inadequate to address many modern forms of gender bias"); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) ("Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality."); *see also* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479–80 (2007) (defending the science of implicit bias research against the view that it ought not influence antidiscrimination law because it fails to satisfy tests of scientific validity).

2 *See, e.g.*, Bagenstos, *supra* note 1, at 480 (stating that those "who seek to retool the law to address implicit bias . . . must therefore focus their efforts as much on developing the normative case for responding to implicit bias as on developing the scientific case that implicit bias exists"); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 4 (2006) (opining that "today's problems of workplace bias may lie beyond the reach of not just the doctrinal tools but also the normative resources of antidiscrimination law"); Krieger & Fiske, *supra* note 1, at 1061 (admitting that, although the argument for legal reform based on cognitive science "sounds in empiricism, its agenda is ultimately normative").

3 *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1030 (2006) [hereinafter Mitchell & Tetlock, *Perils of Mindreading*] (arguing that implicit bias research is too weak to support or justify a substantial overhaul to antidiscrimination doctrine, because it fails basic challenges to its scientific validity); Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 737 (2009) (defending the conclusions of their previous article).

4 *See, e.g.*, Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1958 (2009) (rejecting unqualified adoption of research findings that would upset the law's normative function to motivate employers to act without bias); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1132–33 (1999) (arguing that liability for unconscious discrimination would fail to fulfill the three "principal goals of a liability scheme—deterrence, compensation, insurance—in a cost effective manner"); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979, 1004–05 (2008) (arguing that the problem with implicit bias research is that the causal connection that it draws between mental states and behavior is typically too weak to eliminate other explanations).

chology reveals about discrimination but also on how one describes the law's normative commitments and their role in shaping legal doctrine.

The problem of determining the proper relationship between psychological studies of prejudice and legal constructions of discrimination has long been a source of intense debate.[5] In the very same year that the Supreme Court cited Professor Kenneth Clark's doll studies in *Brown v. Board of Education*,[6] Professor Gordon Allport launched an ambitious exploration of the psychological dynamics of prejudice in his seminal book, *The Nature of Prejudice*.[7] Then, Allport defined prejudice succinctly as "thinking ill of others without sufficient warrant."[8] Now, after decades of testing and revising Allport's thesis, implicit social cognition theory defines prejudice to include negative—and even ambivalent—group-based attitudes attributable to automatic mental processes capable of influencing cognition and behavior beyond the agent's conscious awareness or control.[9] The definition of

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5 Professor Kenneth Clark's studies of African American children who selected blond-haired, blue-eyed dolls in response to the command "show me the doll that is pretty" famously contributed to the Supreme Court's appreciation of the harms of prejudice and stigma when the Court decided the landmark case of *Brown v. Board of Education*, 347 U.S. 483, 494 & n.11 (1954) (citing Clark's work, among other psychologists' and sociologists', to correct misapprehensions regarding the psychological effects of segregation based on "modern authority"). In the eyes of many legal scholars who were otherwise supportive of *Brown*, the Court's citations to social science undermined its integrity. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (arguing that school segregation is unconstitutional not based on a "metaphysics of sociology" but because "the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority"); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167–68 (1955) (fearing that, if *Brown* indeed turned on social science, the guarantee of equal protection might be "seriously restricted" to those cases in which the plaintiff "offered competent proof" of permanent psychological damage); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 706–07 (1976) (quoting Professor Alexander Bickel's view that footnote 11 of *Brown* "was a mistake" rendering the decision vulnerable to the criticism that it was "unjudicial and illegal").

6 Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

7 GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954).

8 *Id.* at 6 (emphasis omitted).

9 Implicit social cognition theory posits that "traces of past experience affect some performance, even though the influential earlier experience . . . is unavailable to self-report or introspection." Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4–5 (1995). The theory relies on "indirect measures, which neither inform the subject of what is being assessed nor request self-report concerning it," *id.* at 5, and the theory takes implicit attitudes (which include implicit prejudice) and implicit stereotypes as the principal objects of such measurements, *id.* at 7–9, 14–16. *See infra* Part I.C. Although prejudices are distinguished from stereotypes in this literature as beliefs are generally distinguishable from attitudes, this Article uses the term "prejudice" to refer to negative group-based beliefs as well as attitudes, just as the term is commonly used in everyday

prejudice has become at once broader and more elusive: prejudice may be neither overtly hostile nor objectively irrational, and a person motivated by prejudice may otherwise demonstrate strong personal commitments to egalitarian values and prodiversity social outcomes[10]—the very values and goals that antidiscrimination law aims to foster through deterrence and remediation. Thus, contemporary psychology provides the important insight that an individual may embrace the law's commitment to workplace equality even as he violates its commands. In fact, to the extent that it blinds him to his own bias, the defendant's belief in egalitarian values may even be a contributing cause of his discriminatory behavior.[11]

What antidiscrimination law ought to do with this new understanding of prejudice is already a matter of controversy among legal scholars. The doctrine of disparate treatment under federal employment discrimination law[12] is a critical subject of this debate. To sustain a claim of disparate treatment, the plaintiff must prove that the defendant treated her differently than other similarly situated persons "because of" her protected status and that this disparate treatment resulted in an adverse employment action.[13] Disparate treatment involves conduct that may be innocent under one explanation and unlawful under another, and often the cause of the defendant's action may not be ascertainable except by investigating the defendant's motivations.

The cognitive account of prejudice has strong intuitive appeal in this context because the Supreme Court routinely describes disparate treatment as intentional discrimination.[14] The phrase "intentional discrimination" may appear to reflect a *constitutive* view of the relationship between prejudice and discrimination, suggesting that conduct

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speech, except where the Article specifically distinguishes between prejudice and stereotyping to emphasize certain important differences between attitudes and beliefs.

10 *See infra* Part I.B.

11 *See infra* note 100 and accompanying text.

12 Originally developed as an interpretation of section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting employment discrimination "because of [an] individual's race, color, religion, sex, or national origin"), disparate treatment doctrine has also been applied to race discrimination claims brought under 42 U.S.C. § 1981, to claims of discrimination "because of . . . age," 29 U.S.C. § 623(a) (2006), and to claims of discrimination "because of . . . disability," 42 U.S.C. § 12112(a). *But see* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 n.2 (2009) (stating that the Court has not "definitively decided" whether to follow Title VII precedents under the ADEA). For a more detailed discussion of the doctrine, see *infra* Part I.B.

13 *See infra* Part III.A–B.

14 *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

constitutes discrimination only if motivated by the defendant's animus. The cognitive account of prejudice is well positioned to support a broad understanding of the beliefs and attitudes that may provoke discriminatory behavior, particularly where the defendant's motivations could not be perceived by reviewing his proffered reasons.

In fact, the intuitive appeal of defining discrimination in terms of prejudice reaches beyond the cognitive account. As a sociohistorical concept, prejudice provides us with a language with which to contest the purpose, efficacy, and duration of antidiscrimination law.[15] This discourse is not reducible to discussions of motivation, and it may stand in tension with the cognitive account—particularly because the latter seeks to render prejudice measurable, stripping it of its personal and political qualities. By contrast, the sociohistorical account defines prejudice in terms of its social meanings and its practical consequences for society and the victims of discrimination. Thus, to define discrimination in terms of prejudice simply begs the question, *which* prejudice?

Proponents of the cognitive account of prejudice argue that it raises an important empirical challenge to current disparate treatment doctrine by suggesting that the doctrine allows some discrimination to go unchecked because the doctrine overlooks discriminatory motivations that operate beyond the perpetrator's conscious awareness. Reducing disparate treatment to a showing of prejudice, however, risks diminishing the scope of antidiscrimination law by entrenching the constitutive view of the relationship between prejudice and discrimination. This would be so even if the law's empirical assumptions regarding prejudice were fully consistent with the cognitive account.

To rely completely on the cognitive account of prejudice to define discrimination would do more than endorse its empirical observations; it would also endorse a normative framework that would curtail the law's commitment to equality. Antidiscrimination law requires us to make normative choices regarding what sorts of conduct we ought to hold unlawful, what sorts we may excuse, and why. The law aims to disestablish entrenched patterns of segregation and social stratification by enforcing equal access to employment.[16] There can be no doubt that these forms of inequality have their origins in societal prejudices. Their perpetuation, however, is not the result of prejudice alone, and they may be preserved today through practices of disparate treatment that do not involve prejudice. The cognitive turn in antidis-

15 *See infra* Part II.A.

16 *See infra* Part II.A.

crimination law does not repudiate the constitutive view. To the contrary, it presumes this view. Theorizing disparate treatment without prejudice is beyond its purview.

This limitation is significant because it shows the cognitive account to be more restrictive than either the relevant statutory language or Supreme Court precedent—each of which portrays the plaintiff's burden as one of causation without restricting the plaintiff's proof to evidence that the defendant acted with a particular mental state.[17] The plaintiff must show that she suffered an adverse employment action "because of" her status. Proof of prejudice may be instrumental to meet this burden, but it is not necessary. In this sense, the law views prejudice as incidental to discrimination, sustaining disparate treatment liability even where proof of prejudice is absent. Similarly, the doctrine does not excuse disparate treatment just because the defendant acted without prejudice, even if the defendant's motivations were benevolent. Indeed, the Supreme Court recently reaffirmed this principle in *Ricci v. DeStefano*,[18] when it held that the City of New Haven engaged in unlawful disparate treatment by undertaking a race-conscious effort to avoid antidiscrimination liability, notwithstanding whether the city's reasons were "well intentioned or benevolent."[19] The Court thus rejected the view that discriminatory animus is an absolute prerequisite to a finding of disparate treatment liability.

We should not be overly sanguine, however, regarding the Court's reaffirmation of the open structure of existing doctrine. The Court may yet be persuaded to adopt a more restrictive view, for its own rhetoric has long betrayed ambivalence toward animus- and causation-based understandings of disparate treatment.[20] In an era when many perceive a decline in overt discrimination, some will prefer that antidiscrimination law take a less prominent role in the regulation of social relations. One might even be persuaded that the purposes of employment discrimination law would be better served by relaxing the law's scrutiny of certain employment practices. Large business institutions frequently signal their compliance with employment discrimination law by adopting diversity initiatives and other voluntary compliance measures.[21] The Court may seek to encourage such volun-

17 *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1); *see also infra* Part III.A–B.

18 Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

19 *Id.* at 2674.

20 *See infra* Part III.

21 Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and*

tary measures by allowing them to stand as defenses to liability when they fall within a proscribed safe harbor, much as the Court does with voluntary affirmative action programs.[22] Or it may subject employers' voluntary compliance practices to a level of scrutiny more commensurate with that ordinarily imposed upon deliberate, status-based unequal treatment when these practices perpetuate the very patterns of workplace inequality they are generally presumed to address.

The aim of this Article is to show that, though it certainly holds value for antidiscrimination law, the cognitive account of prejudice may cause unforeseen harm if it persuades jurists and scholars to abandon a broad equality-based understanding of the law's normative commitments which may be applied to identify discrimination even in circumstances that do not involve prejudice. This Article demonstrates that Supreme Court doctrine already confers disparate treatment liability upon a defendant who engages in status-based conduct for benign reasons if this conduct produces an adverse employment action against the plaintiff. The Article also raises the question whether the law ought to treat similarly voluntary compliance measures and, in particular, diversity initiatives that harm the women and minorities who are their putative beneficiaries.[23] Employers may perceive diversity policies and other compliance strategies as "adding value" consistent with their business objectives and may choose to pursue such policies whether or not they are calculated to enhance employment opportunity.[24] To shield these measures from effective review would defer to employers' self-interested institutional choices as expressions of legal policy.

Any theory that defines discrimination restrictively by requiring a showing of prejudice will be unable to contribute meaningfully to a conversation about the extent to which antidiscrimination law should provide oversight of such policies. This Article argues that status-

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Integration, 59 EMORY L.J. 585, 595–97 (2010); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1018–19 (2011).

22 *See* United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (finding that an employer may rely on a voluntary affirmative action program if it is responsive to "manifest racial imbalances" in the employer's labor force); *see also* Johnson v. Transp. Agency, 480 U.S. 616 (1987); *infra* notes 365–66 and accompanying text.

23 Disparate treatment doctrine already permits challenges to compliance measures and diversity policies in cases of reverse discrimination. *See Ricci*, 129 S. Ct. at 2681 (sustaining a disparate treatment challenge to the defendant's voluntary compliance effort); *see also infra* notes 387–91 and accompanying text.

24 *See Green*, *supra* note 21, at 587 (according to the "value-added" narrative supporting diversity, "race and sex are relevant as means of serving markets and of signaling a firm's commitment to diversity and its adherence to egalitarian norms"); *see also infra* Part IV.B.

based unequal treatment resulting from such policies, or "discrimination as compliance," represents a core disparate treatment concern. To hold otherwise would place concern with prejudicial motivation before equality and shield a wide range of employment practices from effective legal review.

Part I of this Article introduces the cognitive account of prejudice by surveying the psychological literature and discussing developments in the science of prejudice and stereotyping. Part II examines some of the ways in which prejudice discourse has been used to rationalize antidiscrimination law. From this analysis, prejudice emerges as part of an ongoing and evolving discourse through which legal norms are sometimes justified and other times reevaluated and disestablished. The cognitive account of prejudice is surely part of that discourse, but instead of assuming that its scientific basis will resolve the indeterminacy of past interpretations of antidiscrimination norms, we must appreciate that the cognitive account is itself a potential source of indeterminacy and artificially restrictive legal interpretation. Part III explains why disparate treatment liability does not require a showing of prejudice or conscious intent and shows that the concept of intentional discrimination aims to balance liability for discriminatory conduct against the employer's legitimate exercise of business discretion. Part IV discusses unresolved ambiguities in disparate treatment doctrine concerning the extent of the employer's discretion to engage in voluntary compliance. This Part also discusses the problem of "discrimination as compliance"—that is, discrimination resulting from the employer's intention to achieve legal compliance—to demonstrate certain limitations of the cognitive account of prejudice and to explore the breadth of the law's commitment to workplace equality. Finally, Part V argues against making prejudice a central role in defining disparate treatment discrimination because the concept of prejudice is indeterminate and would result in a restrictive interpretation of antidiscrimination law's equality norms.

I. UNDERSTANDING THE "NEW" PREJUDICE

The new prejudice is known by many names: "automatic prejudice,"[25] "implicit bias,"[26] "modern racism,"[27] "aversive racism,"[28]

25 *See, e.g., infra* note 118.

26 *See, e.g., supra* note 1.

27 *See, e.g., infra* note 68.

28 *See infra* notes 71–77 and accompanying text.

and "ambivalent sexism,"[29] to name but a few. This multitude of names reflects, in part, differences in the experimental methods used to identify prejudice and, in part, different understandings of the scientific description and social meaning of prejudice. Fundamentally, each of these names reflects an understanding that prejudice includes attitudes and beliefs that may not be consciously endorsed by the person who holds them and so cannot be adequately investigated by relying on methods of direct examination or self-reporting.

In this sense, the new prejudice contradicts the "commonsense view" that prejudicial attitudes "imply an evaluative preference that, when brought to people's attention, they endorse and are even prepared to justify under appropriate conditions."[30] Instead, contemporary psychology suggests that prejudice may be a normal, even inevitable, response to cultural norms that associate groups with particular socially salient traits.[31] This new account of prejudice has relevance for antidiscrimination law in part because it appears to offer a relatively fixed and clear view of what discrimination is, simplified in its abstraction from political and social views about the meaning of discrimination. This Part lays a foundation from which to question whether the conclusions of psychological science are indeed fixed and unambiguous. Ultimately, this Part shows that these conclusions are complex and evolving.

A. Origins of Contemporary Psychological Perspectives on Prejudice

Psychological research on prejudice has a long history in the United States. In their infancy, prejudice studies constructed prejudice as "psychopathology" or as a "dangerous aberration from normal thinking," and, responding to the postwar political climate, repudiated prejudice as a symptom of the "authoritarian personality."[32] Allport's early work altered the course of prejudice studies by attributing prejudice to the ordinary operation of mental processes. Allport described persons as having a "propensity to prejudice" arising from a "normal and natural tendency to form generalizations, concepts, [and] categories, whose content represents an oversimplification" of human

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29 *See infra* note 78 and accompanying text.

30 Mitchell & Tetlock, *Perils of Mindreading*, *supra* note 3, at 1080.

31 *See infra* note 50 and accompanying text.

32 *See, e.g.*, John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 830 (2001) ("Hitler [gave] racism a bad name." (alteration in original) (internal quotation marks omitted)). For more detailed discussions of the history of prejudice studies, see JOHN DUCKITT, THE SOCIAL PSYCHOLOGY OF PREJUDICE (1992).

experience.[33] This natural inclination toward prejudice stems from what Allport called the "normality of prejudgment," referring to our ordinary process of making and relying on category-based associations.[34]

Allport defined prejudice as "thinking ill of others without sufficient warrant"[35]—that is, without an adequate basis in fact. This definition has two components: "unfounded judgment" and negative affect, which Allport himself clarified as "refer[ing] only to *negative* prejudice."[36] Both aspects of this definition perform important limiting functions for Allport's theory of prejudice. First, Allport did not intend to condemn all prejudgments. Rather, he elaborated that "[p]rejudgments become prejudices only if they are not reversible when exposed to new knowledge," and that evidence contradicting one's prejudices is often resisted with a certain emotional intensity.[37] Prejudices may also conflict with a person's moral or religious beliefs, causing Allport to conclude that, in the ordinary case, one experiences "prejudice with compunction" (i.e., prejudice accompanied by feelings of guilt, shame, or regret), which may lead to either denial or "inner conflict."[38] Thus, awareness of one's commitment to moral values of tolerance or egalitarianism may not extinguish prejudice; rather, in Allport's elegant phrasing, "[d]efeated intellectually, prejudice lingers emotionally."[39]

Second, the requirement that prejudice be "negative" placed meaningful restrictions on Allport's application of the concept. Not only did Allport strip unwarranted *preferences* from his definition, but the requirement that judgments be unwarranted permitted him to exclude negative views about bona fide social undesirables, such as "Nazis" and "gangsters," because evidence of their despicable and

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33 ALLPORT, *supra* note 7, at 27.

34 *Id.* at 20–24; *see also* Susan T. Fiske, *Social Cognition and the Normality of Prejudgment*, *in* ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 36, 36–37 (John F. Dovidio et al. eds., 2005).

35 ALLPORT, *supra* note 7, at 6.

36 *Id.*

37 *Id.* at 9.

38 *Id.* at 326–29; *see also* Patricia G. Devine, *Breaking the Prejudice Habit: Allport's "Inner Conflict" Revisited*, *in* ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 34, at 327, 328–29. Allport reviewed anecdotal evidence from college essays and a survey of suburban women to record poignant expressions of inner conflict. Devine, *supra*, at 328–29. This material differs notably from experiments informing subsequent generations of research, however, because it relies exclusively on self-reporting. *Cf. id.* at 329–30 (noting the discrepancy between reported prejudice and prejudice observed in behavior).

39 ALLPORT, *supra* note 7, at 328.

antisocial behavior is abundant and conclusive.[40] Allport himself, however, expressed uncertainty regarding whether suspicion of someone with a criminal record constitutes prejudice, calling an employer's rejection of an ex-convict for employment "a true borderline instance."[41] Notwithstanding the appearance that Allport's definition might be congenial to judgments of moral culpability or legal liability, Allport himself admitted that "[w]e can never hope to draw a hard and fast line between 'sufficient' and 'insufficient' warrant" and, therefore, "cannot always be sure whether we are dealing with a case of prejudice or nonprejudice."[42] Thus, by Allport's own admission, prejudice will sometimes be difficult to identify, even considering the limiting characteristics of his definition of prejudice.

B. The Cognitive Turn in the Psychology of Prejudice

1. Automaticity

The next generation of social psychologists adopted cognitive frameworks that enabled them to pursue more thoroughly Allport's thesis that prejudice emanates from the normality of prejudgment.[43] These psychologists advanced dual-process models of social cognition, depicting information processing as occurring along a continuum from automatic, category-based processes that operate without the individual's conscious awareness to controlled processes of effortful deliberation.[44] Category-based processes collect information in "schemas," which are "cognitive structure[s] that contain[ ] units of information and the links among these units"[45] and that assist in the conservation

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40 *Id.* at 8.

41 *Id.*

42 *Id.*

43 Dovidio, *supra* note 32, at 831; *see also* Fiske, *supra* note 34, at 38 (stating that "[c]ognitive information-processing approaches freed social psychology from sovereign motivational theories" and spurred researchers to explore the potential of "cognitive mechanisms . . . for explaining social phenomena").

44 *See, e.g.*, Galen V. Bodenhausen et al., *On the Dialectics of Discrimination: Dual Processes in Social Stereotyping*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 271 (Shelly Chaiken & Yaacov Trope eds., 1999); Marilynn B. Brewer & Amy S. Harasty Feinstein, *Dual Processes in the Cognitive Representation of Persons and Social Categories*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, *supra*, at 255; Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989); Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, 23 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (1990).

45 Susan T. Fiske & Linda M. Dyer, *Structure and Development of Social Schemata: Evidence from Positive and Negative Transfer Effects*, 48 J. PERSONALITY & SOC. PSYCHOL. 839, 839 (1985).

of cognitive resources by passively processing information.[46] As schemas linking social group categories and personal traits, stereotypes are understood to simplify the process of impression formation when individuals encounter or evaluate others during social interaction.[47] The economizing effects of stereotyping are especially insidious in that they "occur[ ] in the absence of perceivers' explicit intention to instigate stereotype-based modes of thought."[48] Moreover, although controlled mental processes provide some opportunity to curb stereotyping and to avert discriminatory behavior, they often do not prevail even when the individual consciously endorses egalitarian values.[49]

By locating automatic processes beyond the individual's direct control as the principal source of prejudice and stereotyping, the cognitive emphasis of social cognition theory may lead some to infer that prejudice is inevitable.[50] Once social categories such as race- and sex-based groups are assigned, individuals may be presumed to rely on group identification as a source of information about individuals,[51] causing the behavior of group members to be perceived in stereotyped terms.[52] Dual-process models generally portray category-based

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46 *See* William F. Brewer & Glenn V. Nakamura, *The Nature and Functions of Schemas*, *in* 1 HANDBOOK OF SOCIAL COGNITION 119, 120 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1st ed. 1984).

47 Steven L. Neuberg & Susan T. Fiske, *Motivational Influences on Impression Formation: Outcome Dependency, Accuracy-Driven Attention, and Individuating Processes*, 53 J. PERSONALITY & SOC. PSYCHOL. 431, 432 (1987) (arguing that category-based processes "simplify the task of understanding others by categorizing them as members of familiar social groups because it generally requires too much mental effort to individuate them"); *see also* C. Neil Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37, 44 (1994) ("Through stereotype application, perceivers can economize cognition by managing the demands imposed on their processing capacity."). By contrast, controlled, attribute-based processes are inefficient in that they involve effortful, "piecemeal" consideration of "isolated pieces of information" abstracted from the relationships on which category-based structures are built. Susan T. Fiske et al., *Category-Based and Attribute-Based Reactions to Others: Some Informational Conditions of Stereotyping and Individuating Processes*, 23 J. EXPERIMENTAL SOC. PSYCHOL. 399, 401 (1987).

48 Macrae et al., *supra* note 47, at 414.

49 *See* Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They?*, 81 J. PERSONALITY & SOC. PSYCHOL. 757, 757 (2001) ("Even those who consciously renounce prejudice have been shown to have implicit or automatic biases that conflict with their nonprejudiced values that may disadvantage the targets of these biases.").

50 *See* Devine, *supra* note 44, at 5 ("[M]any classic and contemporary theorists have suggested that prejudice is an inevitable consequence of ordinary categorization (stereotyping) processes.").

51 Shelley E. Taylor et al., *Categorical and Contextual Bases of Person Memory and Stereotyping*, 36 J. PERSONALITY & SOC. PSYCHOL. 778, 790–91 (1978).

52 *Id.* at 791.

processes to hold a dominant role in impression formation.[53] That dominance may lead information processing to be biased in favor of expectancy confirmation, and it may cause category-based processes to interfere with the recollection, use, and even the gathering of individuating, or stereotype-disconfirming, information by individuals who fail to perceive the diagnostic value of information that contradicts their expectations.[54]

The dominance thesis is not unqualified, however. Social cognition theorists have frequently concluded that controlled mental processes, and internal motivations to engage those processes, are instrumental to the reduction of stereotyping and prejudice.[55] Professor Patricia Devine rejected the "pessimistic" interpretation that "all people [are] prejudiced," stating instead that "all are victims of being limited capacity processors."[56] Devine propounded a "dissociation model of prejudice," through which she observed that prejudice reflects a "struggle between automatic and controlled processes,"[57] and yet indi-

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53 Macrae et al., *supra* note 47, at 41 (noting that "cognitive models of impression formation" suggest that individuals are "at best reluctant, and at worst incapable, of individuating others unless a series of critical cognitive and motivational criteria . . . have been satisfied"); *see also* Bodenhausen et al., *supra* note 44, at 279–82 (discussing the "stereotype dominance" thesis and collecting evidence from supportive studies).

54 *See, e.g.*, Yaacov Trope & Erik P. Thompson, *Looking for Truth in All the Wrong Places? Asymmetric Search of Individuating Information About Stereotyped Group Members*, 73 J. PERSONALITY & SOC. PSYCHOL. 229, 239–40 (1997) (reporting original work on information gathering and citing to additional studies); *see also* Macrae et al., *supra* note 47, at 41 (stating that reliance on stereotyping facilitates retrieval of stereotype-consistent information).

55 *See, e.g.*, Ralph Erber & Susan T. Fiske, *Outcome Dependency and Attention to Inconsistent Information*, 47 J. PERSONALITY & SOC. PSYCHOL. 709 (1984) (arguing that persons may pay greater attention to group-inconsistent information about individuals with whom they have relationships that may affect future outcomes); Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, *in* UNINTENDED THOUGHT 253 (James S. Uleman & John A. Bargh eds., 1989) (stating that a person's intent to respond in a "nonstereotypic" manner may activate controlled processes and maintain attention on individuating information); Anne Locksley et al., *Sex Stereotypes and Social Judgment*, 39 J. PERSONALITY & SOC. PSYCHOL. 821 (1980) (stating that persons are less likely to rely on sex stereotypes if they possess individuating information about the person who is the subject of a social judgment); Neuberg & Fiske, *supra* note 47 (finding that accuracy-driven attention may mediate automatic processes of impression formation); Felicia Pratto & John A. Bargh, *Stereotyping Based on Apparently Individuating Information: Trait and Global Components of Sex Stereotypes Under Attention Overload*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 26 (1991) (stating that possession of individuating information may inhibit stereotyping only where persons have sufficient cognitive resources and time to give adequate attention to such information). The utility of these control-based strategies continues to be a subject of investigation and debate within social and cognitive psychology. *See infra* notes 117–21 and accompanying text.

56 Devine, *supra* note 44, at 15.

57 Devine, *supra* note 38, at 333. *See generally id.* at 329–36 (discussing research, including Devine's own work beginning in the late 1980s).

viduals differ in their ability to control prejudiced responses. These differences do not necessarily reflect an individual's conscious repudiation of prejudiced beliefs or endorsement of egalitarian values.[58] According to Devine's model, "[n]onprejudiced responses are . . . a function of intentional, controlled processes and require a conscious decision to behave in a nonprejudiced fashion."[59] Her studies show that "low-prejudiced individuals" who possessed the internal motivation to make such a decision were less likely to engage in discriminatory behavior than "high-prejudiced individuals," but that such internal motivation alone could not compensate for external forces (e.g., insufficient time or opportunity) that might undermine an individual's efforts to engage her controlled processes.[60]

Like Allport before them, social cognition theorists during this transitional period were not unaware of the role that their work might play in discussions of legal policy, and some voiced concerns regarding psychology's potentially destabilizing impact.[61] For example, dual-process models that emphasize the automaticity of behaviorally salient unconscious bias may not be easily reconciled with common views about antidiscrimination law to the extent that such views presume liability for discrimination to be dependent upon a determination of fault.[62] These concerns appear to be based on exaggerations of both the law and the psychology. As discussed in Part III, disparate treatment doctrine does not require a showing that the employer acted on an illicit, conscious plan to discriminate against members of a particular social status. Rather, evidence of status-based causation will support a finding of liability.[63] In addition, as noted above, the dominance thesis of dual-process theory is mediated by factors such as

58 Devine, *supra* note 44, at 15 ("[A] change in one's beliefs or attitude toward a stereotyped group may or may not be reflected in a change in the corresponding evaluations of or behaviors toward members of that group.").

59 *Id.*

60 *Id.* at 6, 15–16; *see also* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude-Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, *supra* note 44, at 97, 112–13 (affirming Devine's conclusions).

61 *See, e.g.*, *infra* note 62. *See generally* Eugene Borgida et al., *On the Courtroom Use and Misuse of Gender Stereotyping Research*, 51 J. SOC. ISSUES 181 (1995).

62 At least one prominent psychologist opined that discussions of automaticity without appropriate emphasis on the role of controlled processes is "potentially dangerous" because automatic stereotyping "might be used in a discrimination lawsuit, with the defense raised that the defendant did not intend, was not aware of, and could not control his or her discriminatory behavior, and so is not culpable." John A. Bargh, *The Ecology of Automaticity: Toward Establishing the Conditions Needed to Produce Automatic Processing Effects*, 105 AM. J. PSYCHOL. 181, 185 (1992).

63 *See infra* notes 200–02 and accompanying text.

internal motivation and opportunity to engage in controlled processes.[64] Although these factors may support various types of social judgments holding individuals accountable for discriminatory behavior, they are orthogonal to judgments of legal liability which themselves do not turn on whether the defendant's actions were avoidable through additional effort.

By identifying the origins of discriminatory behavior in biased information processing, social cognition theory upsets common assumptions that might lead a factfinder to discount the probative value of evidence of bias not observable at the moment that a challenged decision was made.[65] The guiding normative commitments of disparate treatment doctrine, however, place limitations on the consideration of what a defendant might have done differently to curb the effects of discriminatory bias. As discussed in Part III, disparate treatment doctrine defers to the legitimate exercise of employer discretion with the consequence that employers are not held liable for failing to adopt more prudent personnel policies to guard against discrimination, though they similarly are not excused from liability for disparate treatment just because they also took good faith measures to comply with their legal responsibilities.[66] In sum, although social cognition theory reveals important considerations for making social and possibly also legal judgments, it may at times cloud legal judgments because the law already interposes normative choices that minimize, and in some instances reject, the significance of these considerations.

2. *Ambivalence*

Social cognition theory focused attention on processes of stereotyping and prejudice formation rather than on the content of particular prejudices or stereotypes. Its cognitive approach provoked

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64 *See supra* notes 59–60 and accompanying text; *see also* Fiske & Neuberg, *supra* note 44; Neuberg & Fiske, *supra* note 47.

65 For example, legal scholar Linda Hamilton Krieger has extensively demonstrated that social cognition theory disrupts the common intuition that discrimination occurs at a critical moment of judgment when the agent chooses a particular course of behavior and reveals that discriminatory behavior may originate at perception through passive information processing. *See* Krieger, *The Content of Our Categories*, *supra* note 1, at 1213; *see also* Krieger & Fiske, *supra* note 1, at 1034.

66 In other words, whether the defendant could have avoided subjecting the plaintiff to status-based unequal treatment may contribute little to the central question whether the defendant did in fact subject the plaintiff to such treatment. *See infra* Part III. However, a defendant's good faith compliance efforts represent an effective defense against an award of punitive damages where discriminatory conduct by the employer's managerial agents contradicted those good faith efforts. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–45 (1999).

a simplification of the definition of prejudice, which nevertheless remains complex in its application. First, the new definition jettisoned the requirement of inaccuracy, which had been a limiting feature of Allport's definition, in favor of a minimalist approach equating prejudice with *negative* group-based associations.[67] Second, Allport's equation of prejudice with hostility had also become too narrow a formulation to be consistent with the developing understanding of how prejudices are formed and how they relate to social behavior. Third, his "inner conflict" thesis had relied on self-reporting, a method on which dual-process models of social cognition cast doubt, as individuals relying on controlled processes may be unwilling or unable to describe their true beliefs or attitudes. Some researchers responded to the limitations of self-reporting methods by devising a system of indirect questioning, which was intended to discover racial attitudes based on the subject's answers to questions regarding matters of public policy.[68] Others investigated the automaticity of prejudice and stereotyping through the use of priming techniques that exposed test subjects to environmental cues in order to provoke automatic associations of beliefs or attitudes with the priming event and to determine whether those associations bias judgments.[69] Moving beyond self-reporting opened substantial new possibilities for the investigation of prejudice. However, it also radically simplified and generalized the definition of prejudice by effectively closing a key window into the content of prejudice and stereotypes.[70]

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67 *See* Alice H. Eagly, *Prejudice: Toward a More Inclusive Understanding*, *in* THE SOCIAL PSYCHOLOGY OF GROUP IDENTITY AND SOCIAL CONFLICT: THEORY, APPLICATION, AND PRACTICE 45, 46 (Alice H. Eagly et al. eds., 2004).

68 *See, e.g.*, John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 91, 92–93 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (describing a "Modern Racism Scale" intended to measure covert racial prejudice by assessing the subject's attitudes toward political ideologies assumed to reflect support or hostility toward a progressive, egalitarian racial agenda).

69 Icek Ajzen & James Sexton, *Depth of Processing, Belief Congruence, and Attitude-Behavior Correspondence*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY, *supra* note 44, at 117, 125 ("The possibility of priming effects suggests that when people construct an attitude or try to reach a decision, immediately preceding events can direct their thinking in either a positive or a negative direction."); *see also, e.g.*, Mahzarin R. Banaji & Curtis D. Hardin, *Automatic Stereotyping*, 7 PSYCHOL. SCI. 136, 136 (1996); Russell H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229, 230 (1986). *See generally* DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING 132–36 (2004).

70 *See* Charles Stangor, *The Study of Stereotyping, Prejudice, and Discrimination Within Social Psychology: A Quick History of Theory and Research*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 1, 12 (Todd D. Nelson ed., 2009) (arguing that focus on "basic cognitive and affective processes" has led psychologists to "ignore content" with the result that "we know little about the truly prejudiced and bigoted").

One of the earliest and most influential depictions of prejudice as attitudinal ambivalence is the theory of "aversive racism," understood as "a particular type of ambivalence in which the conflict is between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about blacks."[71] Professors Samuel Gaertner and John Dovidio hypothesized that the "negative affect" felt by aversive racists "is not hostility or hate" but may include "discomfort, uneasiness, disgust, and sometimes fear, which tend to motivate avoidance rather than intentionally destructive behaviors."[72] These authors published empirical studies demonstrating that "ambiguous or conflicting" feelings facilitate discriminatory behavior. Even clear norms against discrimination will not necessarily deter whites from discriminating when they are presented with "ostensibly nonracial factors . . . that can substitute for the issue of race in justifying negative behavior."[73] The authors concluded that an "indirect attitudinal process" intervenes to "increase the salience and potency" of such nonracial factors,[74] thereby allowing whites to express their prejudice through negative behavior while preserving a "nonprejudiced, nondiscriminating self-image."[75]

The aversive racism model disrupts many common assumptions about the relationship between prejudice and discrimination. Specifically, aversive racists are not motivated by hostility, and an aversive racist's endorsement of egalitarian values may contribute to feelings of discomfort that bias his behavior while also occluding such feelings from his own awareness.[76] Moreover, the aversive racism model reveals the individual to be an incompetent witness to the truth of his own motivations, incapable of escaping his own best-case explanations of his behavior as he struggles to maintain an egalitarian self-image.[77]

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71 Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM, *supra* note 68, at 61, 62.

72 *Id.* at 63.

73 *Id.* at 85. For example, one study demonstrated that participants assisted black accident victims slightly more frequently than white victims when they believed there were no other bystanders to the accident; however, they assisted blacks substantially less frequently than whites when other bystanders were present. *See id.* at 76–77. The authors concluded that "the opportunity to diffuse responsibility for intervening, an apparently nonracial factor" had a greater impact on behavior when the victim was black, and that this was true regardless whether the participant had previously been identified as a high- or low-prejudiced individual. *Id.* at 77.

74 *Id.* at 85.

75 *Id.* at 84.

76 *Id.* at 62.

77 Dovidio and Gaertner repeated and expanded their research in 1998 and 1999, concluding ultimately that, although overt racism may have decreased over the prior decade, aversive racism remained "more persistent." Dovidio, *supra* note 32, at 837.

In this respect, the model's elements of ambivalence and automaticity are intertwined.

Like aversive racism, ambivalent sexism reflects the agent's uncertainty and attitudinal ambivalence regarding attitudes toward the target group. As Professors Susan Fiske and Peter Glick have observed, automatic sex stereotypes may be either hostile or benevolent in nature, but paternalistic stereotyping with benevolent motivations is no less pernicious than hostile stereotyping because each may result in the discriminatory treatment of women.[78] Stereotypes may be descriptive (e.g., beliefs "that women are nurturing and soft-spoken" and so could not be effective managers) or prescriptive (e.g., beliefs that women should not be managers and should instead adhere to established gender roles).[79] Descriptive stereotypes may bias the evaluation process when women are considered for traditionally male-dominated occupations and disadvantaged by a perceived "lack of fit," meaning that sex stereotypes bias the decisionmaker's performance expectations of women based on their stereotypical association with certain traits.[80] This problem is particularly acute when the criteria associated with qualification for an employment position are stereotypically male-associated traits (e.g., aggressiveness or independence as criteria associated with managerial positions).[81]

Like the social cognition theories discussed above, Professor Madeline Heilman's "lack of fit" model posits that individuating information may moderate the influence of sex stereotypes on perceptions of women's performance.[82] To ameliorate sex bias, however, the information must have clear diagnostic value; ambiguous information (e.g., successful past performance of a job with low relevance to the current evaluation) may even increase negative bias against women.[83]

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78 Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 J. PERSONALITY & SOC. PSYCHOL. 491 (1996).

79 Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 666–67 (1999); *see also* Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 658 (2001) (describing sex stereotypes as "pervasive," "very resistant to change," and "predominat[ing] in work settings as well as nonwork settings").

80 *See* Burgess & Borgida, *supra* note 79, at 666. *See generally* Madeline E. Heilman, *Sex Bias in Work Settings: The Lack of Fit Model*, 5 RES. ORGANIZATIONAL BEHAV. 269 (1983).

81 *See* Burgess & Borgida, *supra* note 79, at 666.

82 Madeline E. Heilman, *Information as a Deterrent Against Sex Discrimination: The Effects of Applicant Sex and Information Type on Preliminary Employment Decisions*, 33 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 174, 183 (1984).

83 *Id.* at 183–84.

As Professors Diana Burgess and Eugene Borgida have observed, discrimination motivated by descriptive sex stereotypes "does not require any prejudicial intent to discriminate, nor does it require the decision maker to harbor any hostility toward women,"[84] and this stereotyping may occur outside of conscious awareness.[85]

Prescriptive stereotyping may result in discrimination against women who have violated stereotypical beliefs about how women should behave.[86] As Professor Alice Eagly's work on role congruity bias shows, prejudice is often triggered by the perception that an individual has transgressed a prescribed social role.[87] Like "lack of fit" bias, role congruity bias has profoundly disadvantaging consequences for women who seek leadership positions in business.[88] For example, a man may feel warmly toward a woman when she holds an assistant's position and rate her highly in her work, but turn hostile toward her when she seeks a managerial position and rate her below her comparably qualified male peers. Similarly, a man may feel warmly toward mothers but believe that, in the workplace, motherhood—but not fatherhood—is an impediment to quality performance or would otherwise be incompatible with the demands of the job. In either example, whether one's views reflect gender prejudice is not a function of animus or hostility, and the hypothetical male supervisor's actions are viewed as sexist not because his associations were irrational, but because they caused him to overlook the actual traits and capabilities of the female worker.

Theories of ambivalent sexism demonstrate that positive and negative motivations cannot be easily disentangled,[89] and that egalitarian values may mask or even contribute to discriminatory behavior.[90] Thus, it is disingenuous to presume that just because unconscious motivations end in discriminatory behavior, those motivations must have been hostile. Ambivalence is not only a function of the tension between positive and negative attitudes; it is also a function of the

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84 *See* Burgess & Borgida, *supra* note 79, at 667.

85 *Id.* at 683.

86 *Id.* at 667.

87 Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 573–74 (2002) (describing hybrid "role congruity theory of prejudice" whereby women may face prejudice due to the perceived transgression of actual or ideal gendered behavioral expectations).

88 *See* Alice H. Eagly, *Female Leadership Advantage and Disadvantage: Resolving the Contradictions*, 31 PSYCHOL. WOMEN Q. 1, 7 (2007).

89 *See* Glick & Fiske, *supra* note 78, at 510.

90 *See supra* notes 67–69 and accompanying text.

difficulty an individual may have perceiving whether he has acted for legitimate or illegitimate reasons.

As previously discussed, the ability to interpose nonracial for racial motivations is crucial to the phenomenon of aversive racism. Since Gaertner and Dovidio produced their watershed work, numerous studies have demonstrated that subjects adjust their decisionmaking criteria to justify status-based discrimination, often without conscious awareness that they have deployed such ostensibly legitimate criteria differently for members of one status group than for members of another.[91] This problem is particularly salient where persons are asked to select between candidates who not only differ by social status, but also by their qualifications.[92] That is, an actual difference in qualifications enables discrimination, as an individual's status motivates the decisionmaker to inflate the significance of that difference.[93] Professors Michael Norton, Joseph Vandello, and John Darley have hypothesized that the presence of differing job qualifications provided subjects with a basis to engage in casuistry[94] by exploiting the attributional ambiguity, or elasticity, of the information provided to them.[95] They also found that experimental conditions intended to enhance the subject's accountability increased, rather than deterred,

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91 *See, e.g.*, Monica Biernat & Diane Kobrynowicz, *Gender- and Race-Based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 554 (1997); Monica Biernat et al., *Race-Based Shifting Standards and Racial Discrimination*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 16, 24 (2009); Monica Biernat & Kathleen Fuegen, *Shifting Standards and the Evaluation of Competence: Complexity in Gender-Based Judgment and Decision Making*, 57 J. SOC. ISSUES 707, 708–09 (2001); Monica Biernat et al., *Shifting Standards and the Inference of Incompetence: Effects of Formal and Informal Evaluation Tools*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 855, 858–59 (2010).

92 Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 821 (2004) [hereinafter Norton et al., *Casuistry and Social Category Bias*]; Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 476–77 (2005) [hereinafter Uhlmann & Cohen, *Constructed Criteria*]; Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 213–14 (2007) [hereinafter Uhlmann & Cohen, *Self-Perceived Objectivity*].

93 *See* Norton et al., *Casuistry and Social Category Bias*, *supra* note 92, at 820–21 (finding that male subjects asked to select between fictitious male and female job applicants consistently chose male over female candidates by adjusting their preference for different types of job qualifications based on the sex of the applicant).

94 The authors define "casuistry" as "specious reasoning in the service of justifying questionable behavior." *Id.* at 817. They hypothesize that casuistry is a cognitive strategy, or behavior, that aids individuals both to make difficult choices and to conceal the "private rationalization of their questionable behavior." *Id.*

95 *See id.* at 819.

bias, and that efforts to commit subjects to a particular prioritization of criteria prior to making their decisions failed to curb bias as "one kind of inconsistency (changing the rankings from pre to post [selection]) was used to justify another (selecting candidates who violate prerankings)."[96] In fact, subjects' inconsistent application of selection criteria did not undermine their confidence in the validity of their judgments.[97]

Similarly, Professors Eric Uhlmann and Geoffrey Cohen have found that the likelihood of discrimination may be increased by ambiguity in the "appropriate criteria of judgment."[98] Their studies showed that subjects viewed positive qualifications for a traditionally male occupation more favorably when possessed by men and less favorably when possessed by women, with male subjects engaging in more discriminatory decisionmaking consistent with their bias favoring men.[99] In separate studies, Uhlmann and Cohen have found that the more convinced the individual is of his objectivity, the less likely he will be to moderate the effect of implicit bias on his reasoning.[100] Other researchers have reinforced the conclusion that ambiguous differences between candidates present opportunities for selection discrimination[101] and have shown that the more subjective decisionmaking criteria are, the more vulnerable the decisionmaking process is to influence by stereotyping.[102]

In sum, notwithstanding the "minimal" nature of the cognitive definition of prejudice, social cognition theory reveals prejudice to be

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96 *Id.* at 828.

97 *See id.* at 827. *But see* Uhlmann & Cohen, *Constructed Criteria*, *supra* note 92, at 478 (in similar experiments, finding that precommitment to evaluative priorities did mitigate discrimination).

98 Uhlmann & Cohen, *Constructed Criteria*, *supra* note 92, at 474.

99 *Id.* at 475. Both male and female subjects showed such bias, although bias was less pronounced in female subjects. Female subjects also moderated the effect of this bias by evaluating male and female subjects relatively equally, though they otherwise ranked the traits that they possessed more favorably when they favored men and less favorably when they favored women. *Id.* at 475–76.

100 *See id.* at 477; Uhlmann & Cohen, *Self-Perceived Objectivity*, *supra* note 92, at 221.

101 *See, e.g.*, John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 318 (2000) (finding that "when given latitude for interpretation . . . moderate qualifications are responded to as if they were strong qualifications when the candidate is white, but as if they were weak qualifications when the candidate is black").

102 *See* Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579, 580–81 (1997); *see also* Biernat & Fuegen, *supra* note 91, at 708–09 (providing a summary discussion and citing several other studies).

complex both in its influence on social judgments and in terms of the means by which that influence is expressed. Defining prejudice broadly allows its effects to be observed across a broad range of social interactions. Certainly the attributional ambiguity literature shows that the use of legitimate criteria to justify social judgments may mask the presence of illicit bias, and this insight may assist in rendering certain forms of discrimination more visible. However, the minimalist definition of prejudice seems inadequate in other ways. For example, in what sense does "negativity" unify the contemporary understanding of prejudice? Following the example of benevolent sexism, are we just as concerned with all benevolent attitudes that motivate discriminatory behavior, or only those attitudes so paternalistic as to appear "benevolent" only in some formal and inauthentic sense?[103] In short, does the concept of negativity perform a meaningful and legitimate limiting function?

Professor Christian Crandall and his colleagues have pursued the hypothesis that, following the minimalist definition of prejudice, the negative group-based associations that most people have of socially disfavored groups (e.g., white supremacists, pedophiles, and drug users) are prejudices in the same way as prejudices against groups that we understand to be unfair victims of prejudice (e.g., racial minorities and women).[104] Advocating a new examination of the role that social norms play in promoting the expression or suppression of prejudice,[105] these authors conclude that people with an aptitude for attitude suppression are constrained by social norms to express prejudice more liberally when socially acceptable and to restrain their behavior when unacceptable.[106] The study helps us to appreciate that social norms cannot be disentangled from notions of prejudice. This is true not only in terms of suppression, but also in terms of the very definition itself—as the authors recognize, one may protest that groups deserving of hostility are not victims of prejudice, but the very notion of "deservingness" is itself "under social normative control."[107] Indeed, by attempting to abstract itself from social and political conversations about prejudice and discrimination to embrace a more clinical, cogni-

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103 *See* Eagly, *supra* note 67, at 50 ("Given the lack of evidence that evaluations of women are predominantly negative, it might be tempting to conclude that women are not targets of prejudice" but that "would be inconsistent with evidence of discrimination against women.").

104 Christian S. Crandall et al., *Social Norms and the Expression and Suppression of Prejudice: The Struggle for Internalization*, 82 J. PERSONALITY & SOC. PSYCHOL. 359, 359 (2002).

105 *Id.* at 374.

106 *Id.* at 372, 374–75.

107 *Id.* at 374–75.

tive approach, contemporary psychology may have at least partially undermined the social significance of its contributions.[108] Regardless, it has continued to pursue its cognitive approach and to refine its methods.

C. *Implicit Social Cognition Theory*

The current generation of social and cognitive psychologists developed new methods of implicit measurement to assess the influence of implicit biases on cognition without relying on self-reporting, building upon the use of priming by early social cognition theorists.[109] These methods rely on indirect, nontestimonial measures such as computerized experiments recording reaction times in response to priming procedures or in the performance of categorization tasks.[110] Implicit measures, such as the Implicit Association Test ("IAT"), are designed to observe unconscious attitudinal and stereotypic associations manifested by response latency or other automatic nonverbal cues "in a manner that is not discerned by respondents."[111] As Professors Anthony Greenwald and Mahzarin Banaji have described, "[i]mplicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects,"[112] and implicit stereotypes are defined similarly except that they "mediate attributions of qualities to members of a social category."[113] Although their experiments are generally limited to nonverbal, automatic behaviors, implicit social cognition theorists have provided a concrete measure by which to assess the influence of implicit biases on behavior.[114] A recent meta-analysis has shown that, although the joint use of the IAT and self-reporting measures holds higher predictive validity than using

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108 *See* Eagly, *supra* note 67, at 59–60 (concluding that psychology's definition of "prejudice" is inadequate without attention to social context).

109 *See* Greenwald & Banaji, *supra* note 9, at 5 ("[I]nvestigations of implicit cognition require indirect measures, which neither inform the subject of what is being assessed nor request self-report concerning it."); *see also infra* notes 111–15 and accompanying text.

110 *See, e.g.*, Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 J. PERSONALITY & SOC. PSYCHOL. 1013, 1013–15 (1995); Greenwald & Banaji, *supra* note 9, at 19–20.

111 Greenwald & Krieger, *supra* note 1, at 952. *See generally* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

112 Greenwald & Banaji, *supra* note 9, at 8.

113 *Id.* at 15.

114 *See generally* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 428–39 (2007).

either measure alone, the IAT is superior to self-reporting measures on socially sensitive topics such as "racial and other intergroup behavior."[115]

The refinement of implicit measures substantiates the theory that implicit biases evade direct control, and some research during this period suggests that early social cognition theorists were indeed too optimistic about the prospect that automatic biases may be moderated by controlled processes.[116] A variety of research indicates, however, that implicit biases are indeed "malleable" and may "shift in response to various contextual and psychological factors."[117] Some research shows that unconscious prejudices and stereotypes may be addressed most effectively by accessing an individual's unconscious processes through the use of environmental cues that disrupt or reverse stereotypic associations and negative group-based attitudes.[118] As Professor Nilanjani Dasgupta summarizes, "attitudes measured by seemingly implicit tasks are not 'process pure'; rather, they are guided by a blend of automatic and controlled processes."[119] The agent is not faced with a simple choice between automatic prejudice and effortful control. In fact, if one pursues effortful control, he may trade the application of prejudice in one context for its application in another; effort directed at suppression may lead to a "rebound effect," in which stereotyping returns with greater influence over cognition than if no effort at suppression had been made at all.[120] This problem is particularly acute

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115 Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 32 (2009).

116 *See, e.g.*, Duane T. Wegener et al., *Not All Stereotyping Is Created Equal: Differential Consequences of Thoughtful Versus Nonthoughtful Stereotyping*, 90 J. PERSONALITY & SOC. PSYCHOL. 42 (2006) (discussing how engagement with thoughtful processes, under certain conditions, contributes to the creation and maintenance of stereotypes).

117 Nilanjana Dasgupta, *Mechanisms Underlying the Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity and Cognitive Control*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION, *supra* note 70, at 267, 268.

118 *See* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 244–46 (2002) (collecting results from multiple studies); *see also, e.g.*, Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001); Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 642 (2004). The subject's motivation, whether passively or actively derived, may also play an important role in the mediation of automatic stereotyping. *See* Ziva Kunda & Lisa Sinclair, *Motivated Reasoning with Stereotypes: Activation, Application, and Inhibition*, 10 PSYCHOL. INQUIRY 12, 12 (1999).

119 Dasgupta, *supra* note 117, at 269.

120 *See, e.g.*, Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC.

where the agent acts in an environment leaving him few cognitive resources for self-regulation.[121]

In sum, implicit social cognition research has significantly refined the means by which implicit biases may be examined in relation to social behavior. However, the utility of this research may be somewhat narrowed by its methods, which purposefully eschew self-reporting and deliberative laboratory tasks in favor of methods that measure automatic, nonverbal responses to implicit cues. These methods further abstract the conclusions of psychological research from the practical situations of deliberative decisionmaking and resource allocation in which discrimination is understood to have social and legal significance. In addition, implicit social cognition theory has cast further doubt on the extent to which implicit biases are subject to conscious control—a significant contribution if indeed susceptibility to conscious control were a prerequisite of accountability.[122]

D. *Imaging Implicit Bias: The Role of Neuroscience in Achieving New Discoveries*

Even before we fully know what role implicit social cognition research may play in antidiscrimination law, a new phase of prejudice studies is already upon us. Cognitive neuroscience promises a future in which researchers will be able to image the brain's activity as it engages in automatic processes, thereby promising to provide "documentary" proof of those processes.[123] This burgeoning interdisciplinary field gives new urgency to the familiar criticism that the psychology of prejudice advances "mindreading" over credible investigation of discrimination.[124]

Neuroscientists have already reaffirmed implicit social cognition theory's rejection of self-reporting as an unreliable measure of our

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PSYCHOL. 871 (2000); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994); *see also* Sei Jin Ko et al., *Sneaking in Through the Back Door: How Category-Based Stereotype Suppression Leads to Rebound in Feature-Based Effects*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 833 (2008) (arguing that efforts at suppression may alter rather than eradicate the stereotype).

121 *See* Kawakami et al., *supra* note 120, at 871.

122 *See supra* Part I.B.

123 *See generally* Matthew D. Lieberman, *Social Cognitive Neuroscience: A Review of Core Processes*, 58 ANN. REV. PSYCHOL. 259 (2007) (discussing research tools such as neuropsychology and neuroimaging).

124 *Cf.* Mitchell & Tetlock, *Perils of Mindreading*, *supra* note 3, at 1097–1100 (arguing that psychologists' claims to have "mindreading tools" capable of identifying hidden prejudice are undermined by "recurring flaws" in the psychological research).

most deeply held attitudes and beliefs.[125] Imaging techniques such as functional magnetic resonance imaging have been used to show that amygdala activity in white Americans correlates with implicit but not explicit measures of racial attitudes.[126] These techniques also show that the location and degree of amygdala activity varies as subjects are asked to perform different types of tasks (i.e., nonsocial visual tasks, social categorization tasks, and social individuation tasks), suggesting that subjects may inhibit negative automatic evaluations of outgroup members by adjusting the social context in which they view the targets of evaluation.[127] These techniques allow scientists to image not only the activation of implicit biases but also the mind's efforts to correct or otherwise control such biases.[128]

The full impact of this research upon legal policy cannot yet be known. It may ultimately cause us to think of prejudice as a pattern of neurological activity in the brain just as concrete as any cancer that spreads and imposes its pathology upon the body. However, just as it may render prejudice more concrete, it may do so in a way that requires further adjustments to our understanding of prejudice. For example, in her current work with coauthors Professors David Amodio and Eddie Harmon-Jones, Patricia Devine purports to show (by direct measurement of electroencephalographic signals associated with conflict-monitoring brain function) that persons who are better able to curb prejudiced responses to stimuli exhibited enhanced neurological activity relative to those who had less control over their responses, even where both groups shared similar motivation to respond without prejudice.[129] This suggests that, contrary to the rejection of dispositional accounts of prejudice in studies performed after Allport, the ability to control prejudiced responses may rely on measurable, innate

125 *See* Lieberman, *supra* note 123, at 272–73.

126 *See generally* Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000). The amygdala is "a subcortical structure" within the brain that has been linked to "numerous forms of emotional learning and evaluation," including "the expression of learned emotional responses that have been acquired without direct aversive experience." *Id.* at 729–30.

127 Mary E. Wheeler & Susan T. Fiske, *Controlling Racial Prejudice: Social-Cognitive Goals Affect Amygdala and Stereotype Activation*, 16 PSYCHOL. SCI. 56, 57–61 (2005). *See generally* Lieberman, *supra* note 123, at 272–73 (collecting research).

128 *See, e.g.*, David M. Amodio et al., *Neural Signals for the Detection of Unintentional Race Bias*, 15 PSYCHOL. SCI. 88, 92–93 (2004).

129 David M. Amodio et al., *Individual Differences in the Regulation of Intergroup Bias: The Role of Conflict Monitoring and Neural Signals for Control*, 94 J. PERSONALITY & SOC. PSYCHOL. 60, 60–62 (2008); *see also* Patricia G. Devine & Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, *in* HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION, *supra* note 70, at 61, 77–80.

brain function specific to some individuals. To date, social cognitive neuroscience has also failed to provide imaging of brain activity that confirms the picture of mental compartmentalization presented by dual-process theory. To the contrary, the neuroscience suggests more unity than disunity within brain activity between attitudinal and cognitive processes.[130]

In sum, neuroscience holds out the possibility that psychologists will be able to paint an increasingly concrete picture of implicit biases and the mental processes by which they influence behavior. Cognitive neuroscience may, however, destabilize in some areas and reinforce in others prior understandings of the role of prejudice. This Article argues that it is the responsibility of legal actors to determine in what manner and under what circumstances prejudice is germane to a finding of unlawful discrimination. To admit such a limitation on psychology's contributions is to recognize also that questions of motive—to which psychology's contribution may be truly significant—should be limited to those cases where they are appropriate (i.e., cases in which proof of motive is necessary to determine that discrimination was caused by the plaintiff's social status) and leave plaintiffs otherwise free to identify and to challenge acts of discrimination that occur without prejudice. Part III shows that existing doctrine authorizes this distinction between prejudice-salient and -nonsalient cases. First, however, this Article discusses the significance that other accounts of prejudice have had to antidiscrimination law in order to place the cognitive account of prejudice into context.

II. PREJUDICE AND THE NORMATIVE COMMITMENTS OF ANTIDISCRIMINATION LAW

A. *How Prejudice Has Influenced Our Understanding of Antidiscrimination Law*

The need for antidiscrimination law is explained in no small measure by the existence of prejudice. What could be more ordinary than thinking of antidiscrimination law as a legal response to societal prejudices? At that level of generality, the relationship between the two seems both unassailable and unremarkable. To say that prejudice is a fundamental concern of antidiscrimination law is to say nothing in particular about the nature of that concern. How we position prejudice in relation to antidiscrimination law may yield very different

130 *See* Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 124–25 (2004) ("The brain does not distinguish affective and cognitive processes as neatly as our theories do.").

interpretive outcomes and, for that reason, we should be careful about leaving common assumptions untested.

Following the Civil Rights Era, we now stand in a period when the relationship between prejudice and antidiscrimination law appears seamless and fundamental. President John F. Kennedy called upon Congress to pass the 1964 Civil Rights Act, including Title VII's prohibition against private employment discrimination, expressly in order to combat the unjust effects of persistent societal prejudices.[131] In 1991, following several Supreme Court decisions that sought to roll back established protections against employment discrimination, Congress passed an amendment to Title VII preserving and even expanding upon its original scope, expressly to "reaffirm[ ] that any reliance on prejudice in making employment decisions is illegal."[132] But things were not always this way.

As Professor Reva Siegel reminds us, judicial assumptions regarding the intransigence of societal prejudices were presented throughout the latter half of the nineteenth century as a rationale for restrictive interpretations of Reconstruction Era civil rights laws.[133] At that time, courts assessed the constitutionality of antidiscrimination laws by determining whether such laws conferred civil, political, and social rights.[134] In the Reconstruction Era's social rights discourse, prejudices were treated like tastes and personal convictions that were not proper subjects for legal intervention because they were merely the private concerns of the persons who held them and were not susceptible to the influence of legal rules.[135] Statutes, such as the 1866 Civil Rights Act,[136] were understood to confer certain *civil* rights upon African Americans (e.g., the right to make and enforce contracts, to sue, and to give testimony). Thus, the purpose of the 1866 Act was to provide the freed slave population with civil rights sufficient to protect them from continued oppression by those who sought "to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social

131 President John F. Kennedy, Civil Rights Address (June 11, 1963), *available at* http://www.jfklibrary.org/research/ready-reference/jfk-speeches/radio-and-television-report-to-the-american-people-on-civil-rights-june-11-1963.aspx.

132 H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695.

133 *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1122–24 (1997).

134 *See id.* at 1124–25.

135 *See id.*

136 42 U.S.C. § 1981 (2006).

prejudices."[137] However, these laws were not understood to confer *social* rights to freed slaves and their descendants that would place them at the level of social parity with whites.[138]

Similarly, when interpreting the Civil Rights Act of 1875,[139] courts held the statute to grant blacks access to public transportation but not "integrated access"[140] in cabins cohabitated by white patrons, based on the view that comingling between the races as social equals was degrading to whites and that such "social prejudices . . . are too deeply implanted to be eradicated by any legislation."[141] Under this view, the law was compelled to honor those "long established prejudices"[142] that it was powerless to disturb. Siegel demonstrates that the Supreme Court joined in this discourse and placed societal prejudices beyond the limits of permissible lawmaking when it invalidated the 1875 Act,[143] and again, in *Plessy v. Ferguson*,[144] when it rejected the view that segregation connoted inferiority because, in the Court's view, it mistakenly "assumes that social prejudices may be overcome by legislation."[145]

These nineteenth-century assumptions about the limits of lawmaking are, on the one hand, very much in the rear-view mirror of history, as we now understand the civil rights legislation of the twentieth century to be directly and permissibly aimed at deterring and providing remediation for acts of societal prejudice. On the other hand, the current era has its own conceptual challenges. Some of these concern the role of prejudice and its kindred concepts of discriminatory animus, motive, and intent.

Normatively, prejudice offers a reason to hold defendants morally culpable for discriminatory acts—suggesting it is the defendant's illicit motivations that make some forms of unequal treatment subject to legal remedies. This view makes the cognitive account of prejudice

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137 CONG. GLOBE, 39th Cong., 1st Sess. 1839 (1866) (remarks of Rep. Sidney Clarke); *see also* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383–91 (1982) (discussing legislative history).

138 Siegel, *supra* note 133, at 1119–20 (articulating this history and defining "social rights" as "those forms of association that, white Americans feared, would obliterate status distinctions and result in the 'amalgamation' of the races").

139 Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

140 *Id.* at 1124.

141 Charge to Grand Jury—The Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (No. 18,258).

142 *Id.*

143 *See* The Civil Rights Cases, 109 U.S. 3 (1883).

144 Plessy v. Ferguson, 163 U.S. 537 (1896).

145 *Id.* at 551; *see also* Siegel, *supra* note 133, at 1125–26.

salient because it offers the prospect of identifying hidden, illicit motivations and reveals them to be an important source of discriminatory behavior. However, prejudice also situates antidiscrimination law sociohistorically, permitting us to explain the law as a response to historical forms of status hierarchy and social disadvantage actively perpetuated by discriminatory practices.

Professor Robert Post describes the "dominant conception" of antidiscrimination law, stating that "[a]ntidiscrimination law seeks to neutralize widespread forms of prejudice that pervasively disadvantage persons based upon inaccurate judgments about their worth or capacities."[146] The notion that antidiscrimination law prohibits unequal treatment because of prejudice crystallizes one of the founding accounts of antidiscrimination law, but this account hardly provides us with a complete picture. The "forms of prejudice" referenced by Post transcend purely psychological understandings of prejudice. His description emphasizes both a cognitive element (i.e., inaccurate judgments of individual worth and capacities) and a sociohistorical one (i.e., pervasive disadvantage).[147]

Post contrasts the dominant view of antidiscrimination law with his own sociological account. According to the latter, "law is itself a social practice, which regulates other social practices, because the latter have become for one reason or another controversial."[148] In his

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146 Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 8, 16 (2000).

147 Psychologists generally agree that stereotypes—especially pervasive stereotypes—typically originate in a cultural foundation. *See, e.g.*, Devine, *supra* note 44, at 6–7; John T. Jost & David L. Hamilton, *Stereotypes in Our Culture*, *in* ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT, *supra* note 34, at 208, 210. Of course, there are cultural stereotypes that do not result in pervasive disadvantage for any particular group and stereotypes that we do not consider prejudice because we consider them in some sense to be justified. *See* Crandall et al., *supra* note 104, at 361.

148 Post, *supra* note 146, at 17. Post introduces his sociological account of legal order by describing a failed attempt by residents of Santa Cruz, California, to pass an ordinance prohibiting appearance-based discrimination (nicknamed the "purple hair ordinance"), a result that he demonstrates to be consistent with the dominant view of antidiscrimination law. *Id.* at 2–8. In support of protection against appearance-based discrimination, Professor Deborah Rhode reports extensively on the social science describing its social impact. In doing so she relies on the language of prejudice, explaining that the "costs associated with appearance are the product of widespread prejudice." Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1049 (2009). As Professor Rhode argues, stereotypes based on appearance factors such as obesity "give rise to the same forms of bias that prompted passage of disability statutes." *Id.* at 1080–81. Thus, she understands the prejudice basis for extending appearance-based protection to reflect the mode of discrimination (i.e., discrimination based on stereotyping), arguing that it is similar to the basis applied to the passage of other civil rights laws. Rhode's argument illustrates how forms of prejudice might be easily analogized by appealing to their psychological,

description of the dominant view, antidiscrimination law does not eliminate or eradicate prejudice, but instead "neutralize[s]" it.[149] The central trope for neutralization is "blindness."[150] Post echoes Professor Owen Fiss to acknowledge that "the important trope of 'blindness' . . . 'has played a dominant role in the interpretation of antidiscrimination prohibitions,'" and that it does so by "render[ing] forbidden characteristics invisible" to encourage employers to make personnel decisions on the basis of individual merit.[151] Post raises the concern that the blindness trope "points unmistakably toward the instrumentalization of persons" by devaluing the sense in which persons view their social status as a source of identity and personal expression in order to protect those same persons from discrimination based on their status.[152] Post thus uses the sociological account of antidiscrimination law to demonstrate that the law's practice of "colorblindness," or status-blindness, is incomplete. By this account, one "does not ask whether 'stereotypic impressions' can be eliminated *tout court*, but rather how the law alters and modifies such impressions."[153]

For example, employment discrimination law rejects the notion that traditional gender roles should be salient in assigning work opportunities[154] but permits employers to affirm gender roles and to reiterate stereotypic gendered assumptions by enforcing dress codes that differentiate between men's and women's dress.[155] Granting employers latitude to enforce sex-based grooming codes is inconsistent with the norm of equal treatment, though it may reflect an assumption that grooming codes are not the type of social practice that perpetuates social subordination but instead are practices that permit businesses to signal conformity with social norms. This example illustrates that the manner in which the law promises to neutralize prejudice is marked by inconsistencies reflecting social norms that even a sociological account of prejudice must struggle to rationalize.

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process-based similarities, though we may otherwise struggle to analogize them from a sociohistorical perspective. *Cf. supra* notes 104–08 and accompanying text (discussing the role of social norms in attributing social salience to prejudice).

149 Post, *supra* note 146, at 8.

150 *Id.* at 11.

151 *Id.* (quoting Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971)).

152 *Id.* at 15.

153 *Id.* at 31.

154 *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (plurality opinion), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1074, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

155 *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).

Commenting on Post's work, Siegel argues that, since the Civil Rights Era, antidiscrimination law has served an antisubordination principle, with the purpose of "ameliorat[ing] certain forms of racial group stratification."[156] Under Siegel's view, prejudicial ideologies perform a structural role in maintaining social status hierarchies. Antidiscrimination law is concerned with forms of inequality that are socially pervasive and the social practices that maintain such inequality, including prejudicial ideologies that dehumanize particular groups and rationalize their subordinate social status.[157] Siegel reminds us that "antidiscrimination law can become a powerful tool for rationalizing social inequality" when it posits that practices associated with a particular group's social status are distributively salient and therefore justify discrimination.[158] Which qualities may fairly be associated with an individual on the basis of group identity and which qualities truly contradict meritocratic norms are again matters of profound social contestation that cannot be resolved by simple recourse to claims about which associations are or are not expressions of irrational prejudice. Put another way, that antidiscrimination law's antisubordination principle aims to ameliorate social stratification does not tell us which forms of social stratification are illegitimate and therefore deserving of legal sanction. This insight applies equally to disparate treatment theory: that disparate treatment theory imposes a norm of equal treatment on employer practices does not tell us what forms of unequal treatment are legally salient.

Post's and Siegel's observations demonstrate that the law takes a selective approach toward addressing prejudice, one that reflects choices about what types of discrimination are sufficiently offensive and consequential to be subject to punishment and remediation. Indeed, our reliance on prejudice discourse hardly determines where we might stand on matters of legal policy. For example, in explaining antidiscrimination law, we may point to societal prejudices and say that they are the target of legal regulation and that eradicating such prejudices is the law's ultimate goal. Alternatively, we may say that certain prejudices are, as cultural norms, so ingrained or, as cognitive biases, so intransigent, that they are beyond the law's power to mold or to deter. Or we may admit that antidiscrimination laws were enacted in response to specific societal prejudices but counter that, as a

156 Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 112 (2000).

157 *Id.* at 81–83.

158 *Id.* at 105.

historical matter, these prejudices have largely dissipated in response to evolving social norms and the enforcement of antidiscrimination law should contract in concert with the law's declining social relevance. Or we may admit that antidiscrimination laws were enacted largely in response to overt forms of discrimination but also recognize that over time our society has witnessed more subtle forms of discrimination, and we may conclude therefore that the law should now target these more subtle practices in order to fulfill its original purpose. The latter position is taken by those scholars who propose that antidiscrimination law reorient its understanding of discrimination to conform to the cognitive account of prejudice. As is clear from the preceding discussion, however, the concept of prejudice does not commit us to any particular set of normative choices; it merely provides us with a language with which to explain our choices.

Prejudice discourse has provided a rich, complex, and grounding language from which to interpret the normative commitments of antidiscrimination law. Although a sociohistorical approach may bring to this language a particular set of normative restrictions, the cognitive account implies a different set of restrictions that may be more acute despite contemporary psychology's broadening of its own definition of prejudice. What is at stake in legal discussions of the relationship between prejudice and discrimination is not simply a set of empirical claims about the nature of discrimination but more centrally a set of normative claims about the fundamental commitments of the law, the duration and intensity of those commitments, and the types of situations to which the law may apply. The following Section argues that to reorient antidiscrimination law around the cognitive account of prejudice would actually limit the terms by which we may articulate antidiscrimination law's fundamental commitments and undermine robust interpretation of the law's equality norms.

B. What the New Prejudice Contributes to This Understanding, and What It Does Not

Over a decade ago, Professor Linda Hamilton Krieger introduced legal scholars to social cognition theory, using it to explain why disparate treatment jurisprudence, "while sufficient to address deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy."[159] Krieger's work has made significant contribu-

159 Krieger, *The Content of Our Categories*, *supra* note 1, at 1164.

tions to antidiscrimination law by showing that social and cognitive psychology can demonstrate how false empirical assumptions about the cognitive mechanics of discrimination may upset the just adjudication of particular cases.[160] She has described her contributions as primarily empirical.[161] She has inspired numerous other scholars in a school of legal thought called "behavioral realism," which seeks to enforce the principle that behavioral theories in law, whether stated or unstated, "should remain consistent with advances in relevant fields of empirical inquiry" and, in the case of antidiscrimination law, "should be periodically revisited and adjusted so as to remain continuous with progress in psychological science."[162] Krieger fully recognizes that "[l]aw, at its root, is normative,"[163] but she also posits that "a normative theory of nondiscrimination based on faulty premises about how and why decision makers treat people differently because of their social group status cannot realistically perform much normative work."[164] Her project, and the project of behavioral realism generally, stands as an empirical correction aimed to remove artificial doctrinal impediments to the fulfillment of the law's normative commitments.

Behavioral realists have demonstrated the significance of new psychological understandings in relation to a paradigm case of implicit discrimination. The type of case frequently chosen by behavioral realists to explain the significance of contemporary psychology's contribution both enables and restricts legal interpretation. This paradigm case involves a situation in which the reason proffered by the defendant to justify his discriminatory action is both legitimate and genuine from the defendant's point of view; yet it is not the true *cause* of his

160 *Id.*

161 *See, e.g.*, Krieger & Fiske, *supra* note 1, at 1034 ("The enormous body of research examining the influence of implicit stereotypes on social judgment yields a set of key empirical findings that challenge the conception of discrimination embedded in disparate treatment doctrine."); Krieger, *The Content of Our Categories*, *supra* note 1, at 1211 (using psychology to show that an "enormous quantity of empirical evidence suggests that Title VII's assumption of a blank slate from which employers make decisions is wholly unsupportable"); Krieger, *The Intuitive Psychologist*, *supra* note 1, at 842 (stating that psychological theories expressed in judicial opinions, "at least in the context of antidiscrimination doctrine . . . have in various respects fallen behind advances in the empirical social sciences").

162 Krieger & Fiske, *supra* note 1, at 1001; *see also* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 972 (2006) (explaining behavioral realism to be aimed to guide lawmakers to conform legal policy to the "best available evidence about people's actual behavior"); Krieger & Fiske, *supra* note 1, at 1006 (criticizing "intuitive" judicial assumptions and arguing that "[a] psychologically trained eye can spot these intuitive psychological theories all across Title VII's doctrinal landscape").

163 Krieger & Fiske, *supra* note 1, at 1007.

164 *Id.* at 1001.

action. The true cause is the defendant's implicit bias of which the defendant himself is unaware, and if antidiscrimination law does not consider this bias to be salient, it will not consider the defendant's action to be discrimination. To illustrate this point, Professors Christine Jolls and Cass Sunstein propose a hypothetical case in which the employer must decide whether to promote a white employee, Jones, or a black employee, Smith.[165] The employer "thinks that both employees are excellent, but [he] chooses Jones on the basis of a 'gut feeling' that Jones would be better for the job," explaining that he "thinks that 'Jones is a better fit.'"[166] Otherwise stated, the employer did not consciously think of race in making his decision, but "Smith would have been chosen if both candidates had been white."[167]

This hypothetical case assumes that Smith would be unable to prove intentional discrimination on these facts, because he would have difficulty rebutting the employer's contention that race did not enter into his decisionmaking process when Jones was assessed as a superior "fit."[168] This example illustrates the concern that an employer may rely on automatic, status-based assumptions regarding whether an individual possesses traits predictive of successful job performance, and those assumptions may go undiagnosed—even by the employer's own honest self-examination.[169] Smith's "fit" is a non–status-based reason to deny him employment, and although it may mask or even provoke the activation of prejudicial motivations,[170] it is not presumptively illegitimate.

Similarly, Krieger has long cautioned that disparate treatment doctrine generally presumes "decisionmaker self-awareness,"[171]

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165 Jolls & Sunstein, *supra* note 162, at 970.

166 *Id.*

167 *Id.*

168 *Id.*

169 *See supra* notes 79–85 and accompanying text (discussing descriptive stereotyping based on "lack of fit").

170 *See, e.g.*, *supra* notes 73–75, 91–102 and accompanying text (discussing how the availability of nondiscriminatory justifications for adverse treatment may provoke and enable discrimination).

171 In fact, Krieger identifies several false assumptions within disparate treatment doctrine. *See* Krieger, *The Content of Our Categories*, *supra* note 1, at 1168–86 (discussing assumptions of rational decisionmaking, bifurcation of perception and judgment, and the equation of causation and intentionality). Decisionmaker self-awareness is highlighted here because, according to Krieger, it is the law's "most obvious" lay psychological assumption, *id.* at 1185, and because it continues to have prominence in her work as an assumption fundamentally at odds with the science of implicit prejudice and stereotyping, *see, e.g.*, Krieger & Fiske, *supra* note 1, at 1030–38 (finding this assumption present in both Supreme Court rhetoric and the "honest belief rule" observed by many federal circuit courts).

thereby falsely assuming that "well-intentioned decisionmakers are able to comply with Title VII's injunction 'not to discriminate'" and that "[i]ll-intentioned decisionmakers know when they are taking an employee's group status into account."[172] This assumption underscores antidiscrimination law's aspiration of status-blindness. Krieger, however, uses social and cognitive psychology to demonstrate that this aspiration is impracticable and that the "self-professed 'colorblind' decisionmaker" is probably unaware of the influence of cognitive bias on his perceptions and judgments.[173] Krieger has continued to argue, in a recent article coauthored with social psychologist Susan Fiske, that the "thoughtless" or "unwitting application" of social stereotypes may give rise to a defendant's discriminatory conduct and should be understood to form a proper basis for disparate treatment liability.[174] Krieger and Fiske prophesy a day when the Supreme Court "will be confronted with a disparate treatment case in which the fact finder has concluded that implicit stereotypes, operating outside of the decision maker's conscious awareness, caused that decision maker" to discriminate even though "the decision maker was not aware that implicit bias had influenced his judgment."[175] According to the authors, the Court will then confront "a normative choice," which it should resolve by consulting psychological science.[176]

Krieger and Fiske rightly perceive the value of psychological science in addressing such cases of implicit discrimination, where the professed good intentions of the decisionmaker provide an incomplete and misleading account of his true motivations. They do not adequately explain, however, why science's contribution to the law's normative outlook would be limited to such cases. Should psychological science not also frame the law's definition of discrimination, for example, in cases where the factfinder concludes that the defendant's treatment of the plaintiff, while status-based, was well intentioned and not otherwise tainted by implicit bias? This hypothetical case also presents a normative choice, but of a very different kind. The notion that psychological science should determine the legal definition of discrimination in disparate treatment cases generally may not be troubling if one deduces from the science that "even the well-intentioned will inexorably categorize along racial, gender, and ethnic lines."[177]

172 Krieger, *The Content of Our Categories*, *supra* note 1, at 1185.

173 *Id.* at 1217.

174 Krieger & Fiske, *supra* note 1, at 1058–61.

175 *Id.* at 1062.

176 *Id.*

177 Krieger, *The Content of Our Categories*, *supra* note 1, at 1217.

Whatever impact this empirical claim might have on the weighing of evidence in particular cases, it provides an inadequate basis for revising antidiscrimination law's normative outlook because the law must be prepared to resolve cases in which the plaintiff cannot disprove the defendant's good intentions even though she otherwise proves that the defendant subjected her to disadvantaging unequal treatment because of her status.

Ultimately, Krieger's work and the work of other behavioral realists does much more than simply expose empirical assumptions about discrimination. These scholars are actually engaged in *two* important descriptive projects. One presents psychological science to legal audiences as a set of tested empirical propositions. The other purports to describe empirical assumptions embodied in existing doctrine that conflict with psychological science. For Krieger and others, the description of legal doctrine is necessary to show the conflict between doctrine and science. However, the description of legal doctrine *is* legal interpretation, and therefore is also at least partially a normative enterprise. In connection with disparate treatment theory, Krieger and Fiske state that "antidiscrimination law reflects and reifies a common-sense theory of social perception and judgment that attributes disparate treatment discrimination to the deliberate, conscious, and intentional actions of invidiously motivated actors."[178] However, the judicial construction of disparate treatment as intentional discrimination reflects not only empirical assumptions but also normative commitments, and these too deserve our attention. To interpret this construction is inevitably to say something about its normative foundations.

Krieger resists this view, representing the behavioral realists' critique of law as addressing a question ancillary to the exposition of legal norms—that is, whether the law's false empirical assumptions will render it "normatively ineffectual."[179] Similarly, Krieger has written that the aspiration of status blindness is destined to fail because it is empirically unrealistic.[180] This may be true. Equally important, however, is the fact that the law applies this trope of blindness to

178 Krieger & Fiske, *supra* note 1, at 1028; *see also* Krieger, *The Content of Our Categories*, *supra* note 1, at 1216 (stating that "current disparate treatment jurisprudence construes the role of motivation in intergroup discrimination precisely backwards" because discrimination "does not result from a motive or intent to discriminate; it is an unwelcome byproduct of otherwise adaptive cognitive processes").

179 Krieger, *The Content of Our Categories*, *supra* note 1, at 1239.

180 *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1276–93 (1998) (arguing that colorblindness will fail as

some contexts and not others, not because of the operational failure of legal norms that cannot overcome empirical fallacy, but because the law is a social practice through which we choose to enforce norms of equality in some contexts and not others.[181] In effect, legal practice includes the choice to regulate some social practices and not others, a choice made by consulting social norms. The failure of legal norms to address specific empirical realities may reflect a normative choice. Certainly some versions of behavioral realism overlook this fact, and in so doing absent themselves from the conversation about such choices.

Subtle discrimination has always been a part of the American workplace, and addressing it has always been a key concern of disparate treatment doctrine. As the Supreme Court announced early in its development of the doctrine, "Title VII tolerates no racial discrimination, subtle or otherwise."[182] Krieger admits that the letter of the law communicates an open structure for disparate treatment liability.[183] Her concern, however, is that, through judicial interpretation, the law has become burdened by certain empirical assumptions that cabin and undermine its broader normative commitments. This may be a fair criticism of certain lower court doctrines,[184] but it mischaracterizes and diminishes the Supreme Court's settled articulation of the doctrine.[185] Moreover, using a new set of empirical claims to counter the law's false empiricism may free the law merely to embrace an alternative empiricism that again restricts the law's normative commitments, albeit in new ways.

Reliance on psychological science as a means to expand our understanding of antidiscrimination liability inevitably promotes a particular normative outlook. It affirms the constitutive view of the relationship between prejudice and discrimination by holding that be-

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a goal of antidiscrimination law because it relies on an empirically inaccurate model of intergroup relations). *See also supra* note 173 and accompanying text.

181 *See supra* notes 153–155 and accompanying text.

182 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

183 *See, e.g.*, Krieger & Fiske, *supra* note 1, at 1054 ("There is nothing in either the text of Title VII nor the dictionary definition of the verb 'discriminate' that limits the statutory text to differences in treatment resulting from an employer's conscious intention to subordinate (or favor) an individual because of his or her protected-group membership."); Krieger, *The Content of Our Categories*, *supra* note 1, at 1168 ("It would be reasonable to interpret [section 703 of Title VII] as simply requiring proof of causation without proof of intent. . . . This is not, however, how section 703 has been construed.").

184 Krieger and Fiske provide extended discussions of two lower court doctrines: the honest belief rule and same actor inference. *See* Krieger & Fiske, *supra* note 1, at 1034–52.

185 *See infra* Part III.

havior motivated by the perpetrator's bias is discriminatory, and its proffered "expansion" consists of focusing the law's evidentiary inquiry to identify bias as science defines it. In the end, to make a claim about prejudice is to make a claim about discrimination and about the proper practice, scope, and legitimate duration of antidiscrimination law. The cognitive account of discrimination threatens to crowd out a vision of equality already embraced by the law that is more expansive and more flexible in identifying discrimination than its own view. To restrict judgments of disparate treatment liability to proof of prejudice—however broadly defined—denies plaintiffs the opportunity to challenge all forms of status-based conduct that restrict their employment opportunities.

Consider the following hypothetical. A major U.S. corporation employs an African American attorney as a contract analyst. Before her maternity leave, she had been one of the company's highest-ranked analysts. After she returns to work, her immediate supervisor complains to her about her productivity and blames social visits from her black coworkers during work hours. She reports the conversation to her department manager, who sides with her supervisor and warns her that she has become a "black matriarch," and this has negatively impacted her performance. The department manager memorializes this conversation in a memorandum inserted in her personnel file. The attorney complains to the company's legal department. Concerned that she might take legal action, the department manager instructs her supervisor not to confront her again about her job performance and to take no action regarding any dissatisfaction that he might have with her performance. Thereafter, her department manager ensures that she receives only "satisfactory" performance ratings. The corporation terminates the attorney during a subsequent reduction in force because she is one of the department's two lowest-ranked contract analysts. She files a disparate treatment claim against the company.

The cognizable harm experienced by our hypothetical plaintiff is that she was denied fair and accurate performance evaluations, resulting in her termination.[186] To resolve this case as an example of im-

186 Employment actions that do not in themselves affect the terms and conditions of the plaintiff's employment, but that result in downstream tangible employment actions, are cognizable under Title VII. *See, e.g.*, Lewis v. City of Chi., 496 F.3d 645, 654 (7th Cir. 2007) (finding that the denial of work assignment may constitute adverse action where the plaintiff contended that, as a result, she was denied overtime pay and experience that might have led to more desirable positions); *see also* Judie v. Hamilton, 872 F.2d 919, 921 (9th Cir. 1989) (finding that the denial of supervisory responsibilities constitutes race discrimination if it impairs the plaintiff's prospects

plicit discrimination, the plaintiff would need to show that she suffered this harm because of racial bias. The racial comment made by the department manager is not directly linked to her supervisor's decision to rate her performance poorly, and its relationship to her satisfactory evaluations is also uncertain. The manager's expressed motivation to inflate her evaluations is compliance oriented; it reflects a self-interest—that is, the manager's personal interest and the company's business interest—in avoiding litigation.

What determination of the defendant's motivation is necessary to sustain the plaintiff's claim? That her satisfactory evaluations were a mere pretext for animus-based discrimination? That the plaintiff was denied fair evaluation because of a condescending racial stereotype that she would likely not succeed were she not shielded from frank criticism of her performance? Could the plaintiff prevail if the defendant were motivated by a benevolent but paternalistic concern that, as a black woman and mother of a newborn infant, she may already have been the victim of discrimination and that the satisfactory evaluations were necessary for her own protection? Determining the defendant's true motivation may be difficult, and the probative value of the motivation may be uncertain if truly benevolent motivations can form no basis for liability. Fortunately, these questions are superfluous.

The actual plaintiff whose claim inspired this hypothetical, Emma Vaughn, prevailed on her disparate treatment claim.[187] The Fifth Circuit held that her employer, Texaco, Inc., had engaged in unlawful race discrimination by denying her truthful and material information about her performance because of her race.[188] Knowing that her employer was Texaco, which settled a separate landmark class action race discrimination case several years after the Fifth Circuit published its decision in *Vaughn v. Edel*,[189] one may be tempted to infer that Vaughn's claim truly involved conscious animus or that it sprang from a workplace culture permeated by racial stereotyping. In accordance with this view, one may also believe that Vaughn failed to prove her

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for advancement); Yee v. Dep't of Envtl. Servs., 826 F.2d 877, 882 (9th Cir. 1987) (finding that restriction of supervisory responsibilities to white employees constitutes discrimination); Lowery v. WMC-TV, 658 F. Supp. 1240, 1250 (W.D. Tenn.), *order vacated*, 661 F. Supp. 65 (W.D. Tenn. 1987) (black newscaster established discrimination in promotion and assignments based on evidence that black reporters were given "garbage stories" and that the weekend anchor position was considered "black news").

187 Vaughn v. Edel, 918 F.2d 517, 523 (5th Cir. 1990).

188 *Id.*

189 Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990); *see also* Thomas S. Mulligan & Chris Kraul, *Texaco Settles Race Suit for $176 Million*, L.A. TIMES, Nov. 16, 1996, at A1.

claim because she failed to introduce convincing evidence of racial prejudice. However, to determine the company's disparate treatment liability, one need not determine that the company acted out of racial animosity or stereotyping. All that matters is that the company decided to treat Vaughn differently from her coworkers because of her race.

The Fifth Circuit was not convinced by the employer's argument that the desire to avoid litigation meant that its decision to pad her performance evaluations was race neutral. Rather, her department manager feared litigation because of Vaughn's race.[190] The court was satisfied by the magistrate judge's finding (on which the district court had not relied when it entered judgment for Texaco) that "had Vaughn been white, Texaco would have both criticized and counseled her."[191] Despite the "black matriarch" comment, the magistrate judge found no racist motivation behind the employer's actions, and the Fifth Circuit did not dispute this finding, agreeing that "self-interest rather than racial hostility motivated Texaco."[192] Theories of cognitive bias may indeed be valuable to support an inference of status-based discrimination in appropriate cases.[193] *Vaughn*, however, illustrates that the cognitive account will not always provide the most efficient means to identify discrimination. In that case, an inquiry into the defendant's bias would have unnecessarily complicated the factual inquiry. To sustain a discrimination claim, the plaintiff need only show that she was subjected to disparate treatment because of her status.

This still may not satisfy some proponents of the constitutive view who would say that prejudice still sits at the center of disparate treatment discrimination, and that all the *Vaughn* case proves is that sometimes evidence of discriminatory animus is difficult to obtain and so, to fulfill the remedial purposes of the statute, Title VII permits the plaintiff to proceed on circumstantial evidence. Rather than viewing *Vaughn*, as the Fifth Circuit did, as a direct-evidence case in which the defendant's admission of its business interest was also evidence of race discrimination, some may object that admission of the business interest is significant, but in combination with the other evidence in the case and only as indirect evidence of a racial motive. I offer the counterexample of "discrimination as compliance" to illustrate the

190 *Vaughn*, 918 F.2d at 522.

191 *Id.*

192 *Id.* at 523.

193 *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999) (recognizing the probative value of evidence of unconscious bias, and citing authorities in support).

very real prospect that plaintiffs may be subjected to disparate treatment without prejudice but as a result of the defendant's benign, or even benevolent, motivations.

Consider once more the original hypothetical. Should it alter the outcome if the plaintiff and her department manager had never had a conversation in which her performance or her race were discussed? What if instead the department manager testified without contradiction that, upon the plaintiff's return from maternity leave, he attempted to insulate the plaintiff from complaints by others who may be insensitive about her new childcare responsibilities? Perhaps he even believed that, because the organization employed few women at the plaintiff's level, the organizational culture was insensitive to those responsibilities[194] and that it was therefore prudent to shield the plaintiff from the harsh consequences of that insensitivity by sanitizing her performance evaluations so that they provided no basis for reproach while she adjusted to balancing her professional and caregiving responsibilities. Here, rather than self-interest or status-based animus, the employer's stated reason for subjecting the plaintiff to disparate treatment was that he intended to provide the plaintiff with special protection during her readjustment period. If the plaintiff is terminated based on her evaluations, she should prevail on her disparate treatment claim because the department manager has admitted to the sex-based nature of his decision. The employer's benevolent motivation makes no legal difference, as Part III shows.

The cognitive account of prejudice provides no help in resolving such a case. Though particularly well suited to uncover implicit discrimination, it is unable to accommodate discrimination clothed in the good intentions of compliance. Moreover, it provides no basis to differentiate between practices that perpetuate patterns of social subor-

194 Claims based on similarly paternalistic notions about the impact of parenting on job performance have begun to surface with increasing frequency in the form of caregiver, or family responsibilities, discrimination. *See, e.g.*, Lettieri v. Equant Inc., 478 F.3d 640, 649 (4th Cir. 2007) (finding that a sex discrimination claim may be sustained on evidence that the employer believed that women with children should not work away from home); Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (same); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 57 (1st Cir. 2000) (finding that sex discrimination may be sustained on evidence of the employer's anxiety that plaintiff may not be able to balance work and caregiving commitments following the birth of her second child). *See generally* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008). Although evidence of implicit bias may be critical in resolving such cases, any framework for caregiver protection that relies on proof of such bias will ultimately be underinclusive because it will excuse other incentives such as self-interest and well-intentioned paternalism that may be just as costly to women workers.

dination through unconscious bias and well-intentioned practices that also perpetuate such subordination on the basis of the plaintiff's protected status. The purpose and efficacy of antidiscrimination law are undermined by denying individuals the opportunity to challenge practices that perpetuate status disadvantage and harm them personally just because those practices are motivated by benevolent reasons. Part of what it means to require the law to remain capable of enforcing its norms in the context of evolving employer practices is that antidiscrimination law must hold employers accountable for status-based unequal treatment that occurs beyond the influence of prejudice, where employers act on self-interest or based on their own interpretations of legal compliance in ways that perpetuate status-based disadvantage. The cognitive account of prejudice gives us no way to theorize liability for this type of discrimination, and in fact it reinforces a normative outlook that would not permit us to do so. Examining the set of norms that rests at the foundation of disparate treatment doctrine reveals that the law's commitment to workplace equality—not prejudice—should be our touchstone.

Part III shows that disparate treatment theory reflects the law's commitment to workplace equality balanced against its commitment to avoid encroachment upon the legitimate exercise of employer discretion. This precarious balance shapes the interpretive pathways into which we must submit our aspirations and concerns regarding the role of prejudice in antidiscrimination law. Workplace equality, here, reflects a commitment both to equal treatment and equal employment opportunity; although disparate treatment assesses liability for status-based unequal treatment, it has historically done so in the service of antisubordination goals,[195] and it continues to have a role to play in promoting those goals. As a result, disparate treatment theory provides us with more inclusive protection against workplace discrimination than it would if it depended on a showing of prejudice, no matter how broadly the latter were defined.

III. UNDERSTANDING DISPARATE TREATMENT THEORY

The cognitive account of prejudice holds strong intuitive appeal as a means to explain disparate treatment because the latter is also known as "intentional discrimination"[196] and the defendant's motivation is a central focus of disparate treatment litigation. This does not mean that proof of prejudice is a requirement of disparate treatment

195 *See* Siegel, *supra* note 156, at 111–12.

196 *See infra* note 204 and accompanying text.

liability, or that any psychological account of prejudice defines the universe of cases in which disparate treatment liability may lie. To understand why, we must look to disparate treatment doctrine.

A. *What Is Meant by "Intentional Discrimination"?*

Disparate treatment doctrine originated as an interpretation of section 703(a)(1) of Title VII of the 1964 Civil Rights Act, which provides in relevant part that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[197] The provision does not require proof of the defendant's mental state,[198] nor does it define what it means "to discriminate."[199] It simply describes a causal relationship between the plaintiff's status and the challenged employment practice. The view that disparate treatment liability requires proof of status-based causation and is not strictly contingent upon proof of illicit motivation is widely held among legal scholars,[200] and it has sometimes been explicitly stated by

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197 42 U.S.C. § 2000e-2(a)(1) (2006); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973).

198 As enacted, Title VII refers to "intentional discrimination" to address the availability of particular types of remedies and defenses. Section 706(g) provides that injunctive and equitable relief are available upon the court's finding that the defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." 42 U.S.C. § 2000e-5(g)(1). Senator Hubert Humphrey, one of the bill's floor managers, explained that this provision was intended to exclude only "inadvertent or accidental discrimination[ ]." 110 CONG. REC. 12,723–23 (1964); *see also* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1302 n.23 (1987) (acknowledging that courts have followed this liberal construction of section 706(g)). Postenactment, Congress further amended the remedial provisions of 42 U.S.C. § 1981a to include compensatory and punitive damages for violations of Title VII against defendants "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)," thereby adopting the Supreme Court's convention without elaboration. 42 U.S.C. § 1981a.

199 Notably, Congress considered and refused to adopt an amendment to section 703(a) that would restrict discrimination to conduct committed "solely" because of the plaintiff's status. *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, 1198–99 (2003) (discussing the process by which the amendment was offered and defeated).

200 *See, e.g.*, Bartlett, *supra* note 4, at 1922 (explaining that, as used in disparate treatment caselaw, "the language of intention means that a causal link must be found between an employment action and the plaintiff's race, sex, or other protected characteristic—not that a deliberately or consciously discriminatory purpose is required"); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997) (arguing that the "key question" in a disparate treatment case is whether the plaintiff's protected status "made a difference in the decisionmaking process, a question that targets causation, rather than subjective mental states"); *see also* Martin J. Katz, *The Fundamental Incoherence of Title VII:*

the Supreme Court. For example, a footnote in the majority's opinion in *International Brotherhood of Teamsters v. United States*[201] describes disparate treatment as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[202]

However, the Court's rhetoric has been inconsistent. For example, in the same footnote, the Court states that "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[203] Motive is, of course, salient in disparate treatment cases as a means to demonstrate causation. It is not critical, as this Part discusses, when causation can be proved otherwise. Nor is it necessary for the defendant's motive to include prejudice for it to prove discrimination.

The Supreme Court would eventually use the phrase "intentional discrimination" to distinguish disparate treatment from disparate impact, just as it had used "motive" in *Teamsters*.[204] What the phrase "intentional discrimination" is meant to contribute to our understanding of disparate treatment is not entirely clear. Professor Richard Primus has described it as a "terminological oddity" that "is a product of the way the Supreme Court organized antidiscrimination law in the 1970s,"[205] suggesting a certain futility in trying to probe its meaning too deeply. Professor George Rutherglen has remarked that "'[i]ntentional discrimination' has an irreducible element of redundancy about it" because discrimination is generally understood as an intentional act.[206] To describe some discrimination as intentional "presupposes the possibility of 'unintentional discrimination,'" leav-

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Making Sense of Causation in Disparate Treatment Law, 94 GEO. L.J. 489, 495–500 (2006); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 498 (2001).

201 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

202 *Id.* at 335 n.15.

203 *Id.*

204 *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986–87 (1988) (distinguishing between disparate treatment and disparate impact as "intentional" and "unintentional" discrimination, respectively); *see also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) (explaining that the plaintiff bears the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated").

205 Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1351 n.56 (2010).

206 George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 96; *see also* George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 128 (1995) ("The phrase 'intentional discrimination' is a redundancy according to the ordinary sense of 'discrimination.' All discrimination is intentional in the sense that anyone who discriminates acts on the ground for the discrimination.").

ing antidiscrimination law with a false contrast that is "part of the problem, not part of the solution."[207] The distinction fails, as Rutherglen points out, because it does not tell us in what sense intentional discrimination is intentional.[208]

The cognitive account of discrimination suggests an answer to this question, but it is the wrong answer. This account suggests that illicit motivation must be the defining feature of intentional discrimination. The cognitive account is, in a sense, more sophisticated than a lay psychological account might be, because the latter tends to assume that discrimination can be intentional only if it is undertaken for a conscious reason. According to the cognitive account, discrimination may consist of deliberate behavior[209] triggered by unconscious motivations. Reaffirming Primus's and Rutherglen's concerns about indeterminacy, we have already discovered two senses in which discrimination may be intentional, both of which may be traced to a psychological account of discriminatory behavior though each is quite different from the other. Although either account might serve to explain the meaning of "intentional discrimination," neither should be accepted.

Both accounts place limitations on the statute's causation requirement that exceed the statute's terms. On its face, section 703(a)(1) requires a compound showing of causation—that is, causation in three parts. The plaintiff must show that her protected status caused her to suffer unequal treatment (*status* causation), that the unequal treatment was performed by the defendant (*control* causation), and that the unequal treatment caused her injury (*injury* causation).[210] The statute does not specify a particular manner of influence (e.g., that the plaintiff's sex was consciously considered by the defendant or that the defendant, consciously or not, was moti-

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207 George Rutherglen, *Reconsidering Burdens of Proof: Ideology, Evidence, and Intent in Individual Claims of Employment Discrimination*, 1 VA. J. SOC. POL'Y & L. 43, 48 (1993).

208 *Id.* at 49.

209 The typical adverse employment action (e.g., refusal to hire, failure to promote, or termination) is certainly an "intentional" action in terms of the manner in which it is performed, regardless whether the decisionmaker is conscious of his motivations in committing that action.

210 Of course, the factual inquiry into two or more of these elements may be collapsed when each may be inferred from the same evidence. This may be a common occurrence, as when, for example, the defendant's discriminatory intent demonstrates both status causation and control causation, though it is sometimes necessary to consider each separately. *See supra* note 186. For an interpretation of the statute supporting a more circumspect relationship between the plaintiff's status and the defendant's conduct, see Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1357 (2009) (arguing that disparate treatment liability requires a showing of "membership causation" and "employer responsibility").

vated by an animus against members of the plaintiff's sex). Thus, disparate treatment liability should require neither conscious consideration of, nor negative affect toward, the plaintiff's status.

More important, "intentional discrimination" is not merely a description of the type of conduct prohibited as disparate treatment; it also reflects a set of normative commitments fundamental to the law's approach to disparate treatment. As originally formulated, disparate treatment doctrine did not include any references to discriminatory intent, animus, or any other proxy for prejudice. Rather, it was concerned with balancing two fundamental commitments: to enforce the norm of equal treatment and to avoid encroachment upon legitimate employer discretion. The phrase "intentional discrimination" reasonably reflects these commitments because the classic disparate treatment case requires the court to determine whether the defendant was motivated by the plaintiff's status or by some other legitimate concern. Of course, the phrase itself is incomplete. For example, as the Supreme Court has recognized since the doctrine's earliest articulation, an employer discriminates when it relies on legitimate business criteria differently in the decisions that it makes about members of the plaintiff's status from decisions about members of other statuses.[211] It should therefore not be surprising that even after the Court began to describe disparate treatment as intentional discrimination, no specific account of discriminatory intent could explain the development of the Court's doctrine or the resolution of particular cases as well as they are explained by the relationship between these normative commitments.

B. *From* Griggs *to* McDonnell Douglas*: The Law's Commitment to Equal Treatment*

The Supreme Court began its development of disparate treatment doctrine in the 1973 decision *McDonnell Douglas Corp. v. Green*.[212] Two years prior, the Court had issued the landmark decision *Griggs v. Duke Power Co.*,[213] in which it held that a facially neutral employment practice may violate Title VII if it results in a racially disparate impact and the employer fails to show that the practice is job-related and consistent with business necessity.[214] The Court recognized that such practices may give effect to and compound social dis-

211 *See infra* note 232 and accompanying text.

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

213 Griggs v. Duke Power Co., 401 U.S. 424 (1971).

214 *Id.* at 431.

advantages that burden minority workers and, therefore, frustrate Congress's objective "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[215] Although *Griggs* involved a systemic challenge on behalf of all African American employees impacted by policies that were uniformly applied to all workers, *McDonnell Douglas* involved an individual challenge to an employment decision that was specific to the plaintiff.

Percy Green, an African American civil rights activist and mechanic, had been laid off from his position at a McDonnell Douglas plant coincident to a reduction in force. Green protested the company's action through a "stall-in," which was organized to block other workers from entering the plant, and he was also involved in one other demonstration at the plant—a "lock-in"—during which some of the defendant's employees were prevented from exiting the plant.[216] Roughly a year after Green's layoff, McDonnell Douglas advertised for mechanics, but denied Green's application to be rehired on the basis of his involvement in the "stall-in" and "lock-in."[217] Green brought suit for race discrimination under Title VII and 42 U.S.C. § 1981[218] and for retaliation under Title VII.[219] He had no direct evidence that the company had been motivated to deny him rehire because of his race.[220]

The absence of direct evidence was significant to the district court. It had dismissed Green's section 703(a) claim based on an erroneous ground: that the Equal Employment Opportunity Commission had failed to determine reasonable cause that a violation of that provision had occurred. The court had reached the merits of Green's § 1981 race discrimination claim, however, dismissing it for lack of evidence of "racial prejudice."[221] On appeal, McDonnell Douglas argued that, even if the Commission's determination of reasonable cause was not a prerequisite for suit, this finding also defeated Green's Title VII race discrimination claim. The court of appeals disagreed, relying on *Griggs* to conclude that an employer making a decision that adversely affects the rights of an African American worker may avoid liability

215 *Id.* at 429–30.

216 *McDonnell Douglas*, 411 U.S. at 794–95.

217 *Id.* at 796.

218 *See* 42 U.S.C. § 1981 (2006) (prohibiting intentional race discrimination in contracts).

219 *McDonnell Douglas*, 411 U.S. at 796–97; *see* 42 U.S.C. §§ 2000e-2(a), -3.

220 *See McDonnell Douglas*, 411 U.S. at 804.

221 *See* Green v. McDonnell-Douglas Corp., 318 F. Supp. 846, 850–51 (E.D. Mo. 1970), *rev'd*, 463 F.2d 337 (8th Cir. 1972), *vacated*, 411 U.S. 792.

only if the decision can be shown to be "related to job performance."[222]

The Supreme Court held that this was in error, but in doing so it did not adopt the district court's view that the plaintiff must demonstrate racial prejudice, nor did it distinguish *Griggs* by appealing to the now familiar distinction between intentional and nonintentional discrimination. Instead, the Court admonished that the instant case differed from *Griggs* "in important respects," emphasizing first that *Griggs* dealt with facially neutral testing practices that "operated to exclude many blacks who were capable of performing effectively in the desired positions."[223] *Griggs* thus presented a situation in which all workers were subjected to the same treatment regardless of race, but a facially neutral practice produced a discriminatory outcome because of externalities concerning the historically subordinated social position of African Americans for which the plaintiff workers were not themselves responsible.[224] The Court concluded that Green "appear[ed] in different clothing," having "engaged in a seriously disruptive act against the very one from whom he now seeks employment."[225] There was no dispute that McDonnell Douglas's decision had directly caused Green's injury; rather, the dispute concerned whether Green was treated differently because of his race, or simply subjected to the same treatment that any former employee would have received who had participated in similar activities. Thus, the *McDonnell Douglas* Court made clear that the critical question in a disparate treatment case is whether the plaintiff was treated differently because of her status or for some other, permissible reason.[226]

The Supreme Court addressed this question by developing a burden-shifting framework to facilitate resolution of disparate treatment claims based on circumstantial evidence. Under this framework, the plaintiff bears the initial burden of demonstrating a prima facie case of

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222 *See McDonnell Douglas*, 463 F.2d at 343 (internal quotation marks omitted); *see also McDonnell Douglas*, 411 U.S. at 805–06 (criticizing the circuit court's use of *Griggs*).

223 *McDonnell Douglas*, 411 U.S. at 806.

224 *See id.* ("*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, [should] not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.").

225 *Id.*

226 By contrast, in a disparate impact case, the plaintiff must show that all persons were subjected to the same treatment but that this treatment had disproportionately harmful consequences for members of her status group. Viewed in this way, it is the difference in treatment that is the distinguishing feature between cases of disparate impact and disparate treatment.

discrimination.[227] Green satisfied this burden by showing that he was black, that McDonnell Douglas did not dispute his qualification for the position he had formerly held, and that, despite his qualifications and McDonnell Douglas's active solicitation of applicants, Green was denied rehire even though the position remained open.[228] Once a prima facie case of discrimination is established, the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the adverse employment action.[229] The Court found that McDonnell Douglas satisfied this burden by providing evidence that it refused to rehire Green because of his participation in allegedly unlawful protests, rather than because of his race.[230] As a result, the Court determined that the burden shifted back to the plaintiff to show that the defendant's proffered reason was a "pretext" for discrimination.[231] The Court thus concluded by instructing the district court that, on retrial, Green "must be afforded a fair opportunity to demonstrate that [the company's] assigned reason for refusing to re-employ was a pretext *or discriminatory in its application*."[232] The final clause of this sentence makes clear that the Court held status-based differences in treatment to be discrimination even when the trier of fact could not otherwise conclude that the defendant's purported reliance on legitimate reasons constituted a knowing cover-up.

The Supreme Court later explained that the "prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."[233] The defendant may rebut this presumption by proffering a legitimate, nondiscriminatory reason for its action.[234] The defendant's burden is merely one of production, not persuasion, and "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[235] In *St. Mary's Honor Center v.*

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227 *McDonnell Douglas*, 411 U.S. at 802.

228 *Id.* (setting forth the elements of a prima facie case of disparate treatment). These elements are intended to remain flexible so that they can be adapted to a variety of adverse employment actions and factual contexts. *Id.* at 802 n.13.

229 *Id.* at 802.

230 *Id.* at 803–04.

231 *Id.*

232 *Id.* at 807 (emphasis added).

233 Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) (explaining that the prima facie case allows the plaintiff to proceed without "direct proof of discrimination" by "creat[ing] an inference that the decision was a discriminatory one").

234 *Burdine*, 450 U.S. at 249.

235 *Id.* at 253.

Hicks,[236] the Court further held that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination," but the rejection of those reasons does not compel judgment for the plaintiff.[237] Over a vigorous dissent by Justice Souter, the *Hicks* Court concluded that disproof of the employer's proffered reason did not automatically entitle the plaintiff to a finding of liability.[238] Rather, the presumption of discrimination established by the prima facie showing "drops from the case"[239] once the defendant produces admissible evidence of a legitimate, nondiscriminatory reason and is not resurrected by disproof of that reason.[240] Instead, the plaintiff must prove that the proffered "reason was false, *and* that discrimination was the real reason."[241]

The *McDonnell Douglas* framework is designed to permit the plaintiff to proceed on circumstantial evidence and to prove even "subtle" forms of discrimination.[242] Overall, the framework grants plaintiffs significant latitude in terms of the evidence that may be offered in support of a claim of discrimination, and the Supreme Court has generally avoided articulating the plaintiff's ultimate showing in a restrictive manner. For example, the Court refers to a presumption of *discrimination* and a "real reason" that is *discrimination* without specifying a showing of a particular state of mind and without distinguishing between reason as an explanation and reason as a cause of behavior.[243] Moreover, the Court has instructed that the *McDonnell Douglas* analysis "was never intended to be rigid, mechanized, or ritualistic," but rather provides a means to draw an inference of discrimination "in light of common experience as it bears on the critical question of discrimination."[244] The reference to "common experience" makes room for the consideration of evolving understandings of discrimination[245] and should not exclude the advances in our under-

236 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

237 *Id.* at 511; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (clarifying that disproving the defendant's proffered reason is sufficient to sustain a claim of disparate treatment).

238 *Hicks*, 509 U.S. at 535.

239 *Burdine*, 450 U.S. at 255 n.10.

240 *See id.* at 255–56.

241 *Hicks*, 509 U.S. at 515.

242 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise.").

243 *Id.*

244 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

245 *See infra* note 259 and accompanying text.

standing provided by psychological science. To conclude otherwise would be to contradict both the statute's commitment to equality of opportunity and disparate treatment's obvious design to enforce a norm of equal treatment. Indeed, the Court's recent rulings on the use of evidence in discrimination cases demonstrate its aversion to rules that, as a matter of law, proscribe particular types of evidence plaintiffs may use in employment discrimination cases, except as supported by the rules of evidence,[246] or the inferences that may reasonably be drawn from evidence.[247]

The vision of equal treatment articulated in *McDonnell Douglas* and its progeny is also substantively broad, protecting men as well as women and whites as well as minorities from status-based discrimination. In *McDonald v. Santa Fe Trail Transportation Co.*,[248] the Supreme Court reversed dismissal of a race discrimination claim brought by white employees discharged for misappropriating company property. The plaintiff alleged that a black employee similarly charged with misappropriation had not been terminated, and the Court agreed that these allegations were sufficient to permit the claim to go forward. Writing for the majority, Justice Marshall observed that the terms of section 703(a) "are not limited to discrimination against members of any particular race."[249] The Court also cited the "uncontradicted legislative history" demonstrating that Title VII was intended to cover "all Americans" regardless of race or sex.[250] The employer had contended that discrimination against whites, although it could not be permitted "across the board," may be condoned where it does not "burden whites as a class unduly."[251] Reiterating Title VII's commitment to "tolerate[ ] *no* racial discrimination, subtle or

246 *See* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008).

247 *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (per curiam).

248 McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

249 *Id.* at 278–79. The Court determined that the same is also true for race discrimination claims brought under 42 U.S.C. § 1981 (2006) (granting "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens"), and found that the statutory language was intended to "emphasize the racial character of the rights being protected," *McDonald*, 427 U.S. at 293 (internal quotation marks omitted), and not as a limitation on who had the right to sue, *id.* at 295–96.

250 *McDonald*, 427 U.S. at 280 (internal quotation marks omitted).

251 *Id.* at 280 n.8. The employer did not contend that it had acted pursuant to an affirmative action program, and the Court expressly reserved judgment regarding the proper standard for consideration of voluntary affirmative programs under Title VII. *Id.*; *see also* United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding the defendant's race-based affirmative action plan constructed to address a "manifest imbalance" in the racial composition of the defendant's workforce).

otherwise,"[252] Justice Marshall found the case "indistinguishable from *McDonnell Douglas*."[253] There, too, the defendant claimed to have denied the plaintiff reemployment because the plaintiff had engaged in illegal activity. As in *McDonnell Douglas*, the employer would be permitted to take adverse action against the plaintiff based on such activity but this criterion "must be 'applied alike to members of all races.'"[254]

In holding that Title VII "prohibits *all* racial discrimination in employment without exception,"[255] the *McDonald* Court might be viewed as overlooking the fundamental purpose of the Act. As the Court had previously recognized in *Griggs*, Congress's purpose was to promote equal employment opportunity by "remov[ing] barriers that have operated in the past to favor an identifiable group of white employees."[256] Senator Hubert Humphrey had proclaimed that "the crux of the problem" Congress sought to address was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[257] In this light, the *Griggs* Court's focus on removing barriers to nontraditional employment makes perfect sense: openly segregationist workplace practices constituted the principal evil that had motivated passage of Title VII, and the defendant in *Griggs* had maintained racially segregationist policies until the effective date of Title VII.[258] However, by holding that Title VII targeted subtle as well as overt discrimination, the Court recognized in *McDonnell Douglas* and *McDonald* what it would later make explicit: that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils," and forms of discrimination discussed during legislative debates should not be construed to void the statute's

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252 *McDonald*, 427 U.S. at 281 n.8 (internal quotation marks omitted).

253 *Id.* at 282.

254 *Id.* at 274 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

255 *Id.* at 283 (emphasis added).

256 Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

257 110 CONG. REC. 6548 (1964) (statement of Sen. Hubert Humphrey). The Court reviewed the legislative record extensively in *Weber* and concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII . . . was with 'the plight of the Negro in our economy.'" United Steelworkers v. Weber, 443 U.S. 193, 202 (1979) (quoting 110 CONG. REC. 6548 (statement of Sen. Hubert Humphrey)) (finding support in Senator Clark's statement that high and rising black unemployment was "one of the principal reasons" in passing Title VII (internal quotation marks omitted)); *id.* at 203 (citing President Kennedy's June 1963 address introducing the Civil Rights Act where he supported equal employment because the right to public accommodations would otherwise be undermined).

258 *Griggs*, 401 U.S. at 426–27.

enacted provisions.[259] By taking this position, the Court has ensured the law's evolution in response to changes in the types of disputes plaintiffs elect to litigate, as such adaptations would have been suppressed by a vision of Title VII that limited its enforcement to "traditional" forms of discrimination contemplated when Title VII was enacted.

Quite by design, Title VII's right to equal employment opportunity does not stop with the formal integration of nontraditional occupations, but includes the right to obtain the benefits and to enjoy the opportunities ordinarily associated with such jobs. For this reason, the protections of section 703(a) address not only hiring, but also promotion, termination, and all adverse employment actions that affect the "compensation, terms, conditions, or privileges of employment."[260] The Supreme Court has further honored this vision by expressly holding that Title VII protects the employee's right to equal consideration for all benefits and opportunities associated with her position.[261]

The Court has always found a reciprocal relationship between the antisubordination and equal-treatment commitments of the statute and has typically shied from drawing a rigid distinction between them. The *McDonnell Douglas* Court believed that it was fulfilling the purpose of equal opportunity by enforcing the mandate of equal treatment.[262] The *Griggs* Court believed that it was fulfilling the promise of equal treatment by removing artificial barriers to fair and equal evaluation.[263] Nevertheless, the availability of disparate impact theory

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259 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (upholding a same-sex harassment claim).

260 42 U.S.C. § 2000e-2(a)(2) (2006).

261 *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 75 (1984) (finding that Title VII protects a female associate's right to equal consideration for partnership because "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion").

262 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (stating Congress's purpose "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens" and establishing pretext analysis to aid that purpose).

263 *Griggs*, 401 U.S. at 431 (stating that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed" and suggesting that Congress intended to fulfill that mandate through "the removal of artificial, arbitrary, and unnecessary barriers to employment"). Only recently has the Court indicated that there might be tension between those commitments. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009) (referring to a "statutory conflict" between disparate treatment and disparate impact theories of liability). *But see id.* at 2699 (Ginsburg, J., dissenting) ("Neither Congress' enactments nor this Court's precedents . . . offer even a hint of 'conflict' between an employer's obligations under the statute's disparate-treatment and disparate-impact provisions.").

as a discursive space in which to formulate an understanding of discrimination without intent or prejudice seems to have isolated disparate treatment from robust normative theorization.[264] Disparate treatment doctrine punishes defendants for the harm they intentionally commit because of the plaintiff's protected status. Once we establish that the status (e.g., race or sex) is an inappropriate basis on which to base the regulated behavior (e.g., an employer's personnel decision), what further normative work is there to do? This account is overly simplistic. In a sense, it is disparate impact that relies on prejudice in order to explain its theory that social disadvantage renders certain forms of employment evaluation discriminatory for the groups that have suffered such disadvantage. This is the sociohistorical account of prejudice discussed in Part II.[265] But it is generally disparate treatment that is often thought to be hobbled by a fixation on discriminatory animus.[266] I have shown that disparate treatment's commitments lie with enforcing equal treatment in the service of the statute's overarching vision of equal employment opportunity rather than purging employment decisions of invidious mental states. The latter is certainly a part of the work performed by disparate treatment doctrine, but it is not the full account, as the remainder of this Part shows.

C. *Balancing Equal Treatment with Employer Discretion*

The term "intentional discrimination" balances the two guiding normative commitments of disparate treatment theory—equal treatment and the preservation of legitimate employer discretion. Employers are to be held liable for conduct caused by the plaintiff's status, not conduct caused by other factors, such as differences in the plaintiff's performance or qualifications. Disparate treatment doctrine's guiding commitment to equal treatment is therefore balanced against the concern that the prohibition against discrimination may be used by plaintiffs or the government as a justification for encroaching upon the legitimate business decisions of private employers. As the Court has stated, "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion,

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264 For an in-depth examination of this view, see Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006).

265 *See supra* Part II.A.

266 *See supra* note 178.

nationality, and sex become irrelevant."[267] Moreover, the Court presumes that, once the employer eliminates the influence of illicit, status-based factors on its decisionmaking, it will "naturally . . . focus on the qualifications of the applicant or employee."[268] Employers remain free to define legitimate criteria of employability, even if their choices prove inefficient, and they remain free to choose legitimate means to sort between candidates for employment on the basis of those criteria, even if other sorting methods would yield more accurate results.

Title VII does not authorize courts to substitute their judgment for the employer's about what would constitute the "'best' hiring procedures" to hasten the fulfillment of the statute's policy objectives.[269] As the Supreme Court admonished in *Texas Department of Community Affairs v. Burdine*,[270] Title VII "was not intended to 'diminish traditional management prerogatives,'"[271] and it does not strip employers of the "discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[272] This includes the latitude to "misjudge[ ] the qualifications of the applicants," provided such an error in judgment does not disguise a discriminatory purpose or otherwise occur because of the plaintiff's protected class status.[273] The Court has made similar pronouncements when deciding workplace disparate treatment cases outside of the Title VII context.[274] It has expressed this point using a variety of

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267 *Griggs*, 401 U.S. at 436; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 243–44 (1989) (plurality opinion) (explaining that, besides the status-based factors protected by the statute, no other qualification is affected by Title VII), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1074, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

268 *Price Waterhouse*, 490 U.S. at 243.

269 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

270 Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

271 *Id.* at 259 (quoting United Steelworkers v. Weber, 443 U.S. 193, 207 (1979)).

272 *Id.* An employer may render a decision based on the plaintiff's status (except for the status of race or color), if reliance on status is justified as a bona fide occupational qualification ("BFOQ"). *See* 42 U.S.C. § 2000e-2(e) (2006) (providing an affirmative defense to liability for disparate treatment "on the basis [that the plaintiff's] religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). The BFOQ defense is appropriate only in "very narrow circumstances" that are beyond the scope of this Article, *Price Waterhouse*, 490 U.S. at 244; *see also* UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) ("The BFOQ defense is written narrowly, and this Court has read it narrowly."), and, in those circumstances where it applies, it expands employer discretion beyond the default restrictions on that discretion discussed here.

273 *Burdine*, 450 U.S. at 259.

274 *See, e.g.*, McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361 (1995) ("The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits

phrases, including that employment discrimination statutes do not permit "a general regulation of the workplace,"[275] that they are not "for cause" legislation,[276] and that they are not workplace "civility code[s]."[277] Professor Charles Sullivan has observed that the preservation-of-employer-discretion norm of disparate treatment doctrine is so prevalent in employment discrimination law that "literally hundreds of cases recite some version of the slogan that courts do not sit as 'super-personnel departments.'"[278] Thus, disparate treatment doctrine is constructed to permit the factfinder to differentiate between unequal treatment because of the plaintiff's status and legitimate exercises of business discretion concerning the employer's methods of employee evaluation, reward, and discipline.

When divorced from this framework, the phrase "intentional discrimination" may mislead one to conclude that it turns solely on evidence of the defendant's motive and that it even precludes the use of evidence of unconscious bias.[279] However, we need not look beyond Supreme Court doctrine to disprove these conclusions.

D. Discrimination Caused by Status-Based Stereotyping

In *Price Waterhouse v. Hopkins*,[280] the Supreme Court held that comments regarding an employee's failure to conform to stereotypical views of appropriate feminine behavior in connection with the employee's consideration for promotion constituted evidence of sex discrimination sufficient to shift the burden of persuasion to the employer to prove that the same decision would have been made absent consideration of the employee's sex.[281] In establishing a cause of action for mixed-motive discrimination as a species of disparate treatment under section 703(a)(1), the Supreme Court demonstrated that it understood discrimination "to be a complex phenomenon, and not always the result of a conscious or single-minded effort to treat racial

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discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees.").

275 *Id.*

276 *Price Waterhouse*, 490 U.S. at 239.

277 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

278 Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 (2004).

279 *See supra* Part II.B.

280 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1074, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

281 *Id.* at 258 (plurality opinion).

minorities or women worse than others."[282] The Court's reasoning, therefore, deserves greater attention here.

Ann Hopkins brought a claim of disparate treatment against the accounting firm Price Waterhouse in connection with the firm's refusal to admit her to partnership.[283] Hopkins had been a distinguished senior manager at the firm, praised by some of her superiors for performing "virtually at the partner level."[284] Following its usual practice, Price Waterhouse had invited all partners in the firm, regardless whether they worked in Hopkins's office or had substantial experience with her, to submit comments regarding Hopkins's candidacy that were then considered by a reviewing board, which made the determination to place her candidacy on hold.[285] Hopkins provided evidence, based on the comments submitted by partners and other informal statements made directly to her, that she was denied partnership because she refused to conform to stereotypical gender norms of femininity (e.g., by wearing makeup and feminine attire) and passivity (e.g., by avoiding aggressive or assertive behavior).[286] Significantly, some of the most damning evidence came from persons who were supporters of Hopkins's candidacy.[287] Price Waterhouse asserted that it made its decision on the basis of Hopkins's performance and poor interpersonal skills.[288]

The trial court determined that interpersonal skills were a valid consideration for partnership, and that Hopkins had not disproved the firm's reliance on them.[289] Nevertheless, the district court found Price Waterhouse liable for sex discrimination, concluding that the firm had "consciously giv[en] credence and effect" to evaluations of Hopkins

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282 Bartlett, *supra* note 4, at 1924–25.

283 *Price Waterhouse*, 490 U.S. at 232.

284 *Id.* at 233 (internal quotation marks omitted). Comparing Hopkins's performance record to the records of male candidates, the district court concluded that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership." Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228.

285 *Price Waterhouse*, 490 U.S. at 232–33 (plurality opinion).

286 *Id.* at 235.

287 For example, one such partner wrote that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." *Id.* (first alteration in original) (internal quotation marks omitted). Another supporter advised Hopkins that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted).

288 *Id.* at 236.

289 *Id.*

that "resulted from sex stereotyping," although it found at least some of the stereotyping to have been unconscious.[290] The D.C. Circuit affirmed, rejecting the firm's argument that it could not be held liable for "unconscious sexual stereotyping"[291] and concluding that "the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it."[292] The Supreme Court agreed that Hopkins could rely on the evidence of sex stereotyping to sustain her claim of discrimination.[293]

The critical question before the Court concerned what test for liability to apply to Hopkins's case because, although she possessed compelling evidence of the defendant's discriminatory bias, she could not prove that the defendant's proffered nondiscriminatory reason was a pretext.[294] Disagreeing with the tests applied by the lower courts, the Supreme Court established its own mixed-motive approach affording the employer an affirmative defense subject to a preponderance of the evidence test.[295] The substance of this approach is spread over a plurality opinion by Justice Brennan and separate concurrences by Justices White and O'Connor.

The plurality opinion rejected what it called a "but-for causation" standard because that standard "is a hypothetical construct," requiring the court to consider whether, in the absence of a factor shown to have been present, an event "would have transpired in the same way."[296] Here, this would have meant that Hopkins could prove liability only if she could show that Price Waterhouse would not have denied her partnership had the sex stereotypes reflected in comments submitted by the partnership not been considered. Justice Brennan instead concluded that Hopkins met her burden to establish liability when she demonstrated that her sex "played a motivating part" in the defendant's decision to deny her partnership, thereby "plac[ing] upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive."[297] Both concurrences

290 *Id.* at 237; *see also* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1118 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228.

291 *Hopkins*, 825 F.2d at 464.

292 *Id.* at 469.

293 *Price Waterhouse*, 490 U.S. at 250–52 (plurality opinion); *id.* at 272 (O'Connor, J., concurring in the judgment) (describing evidence of sex stereotyping in support of the plaintiff's claim).

294 *Id.* at 236–37 (plurality opinion).

295 *Id.* at 252–53.

296 *Id.* at 240.

297 *Id.* at 250.

agreed that the proper standard should be that the plaintiff must demonstrate "that the unlawful motive was a *substantial* factor in the adverse employment action."[298] Justice O'Connor also advocated that mixed-motive analysis should apply only in cases where the plaintiff put forward direct evidence of discrimination.[299]

Both the plurality opinion and Justice O'Connor's concurrence emphasized the compelling nature of Hopkins's evidence. Justice Brennan described the evidence as providing "clear signs . . . that some of the partners reacted negatively to Hopkins's personality because she was a woman."[300] He declared for the plurality that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[301] Responding to the defendant's protest that the testimony of Susan Fiske as an expert witness for the plaintiff was an inappropriate basis on which to establish its liability, Justice Brennan wrote that "[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[302] Justice Brennan echoed the role-congruity theory of sex stereotyping[303] when he admonished employers who "place[ ] women in an intolerable and impermissible catch 22" by "object[ing] to aggressiveness in women" while simultaneously offering positions that "require this trait."[304] Justice Brennan concluded that "Title VII lifts women out of this bind."[305] The Court did not disturb the district court's finding that the employer's reliance on interpersonal skills was a legitimate basis to deny Hopkins partnership, and so it did not raise the issue whether individual partners might have construed her demeanor as "abrasive[ ]" rather than confident, in contrast to how a man who behaved similarly might have been evaluated.[306]

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298 *Id.* at 259 (White, J., concurring in the judgment); *id.* at 261–62 (O'Connor, J., concurring in the judgment) (agreeing that the mixed-motive framework should apply in cases "where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion").

299 *Id.* at 276 (O'Connor, J., concurring in the judgment).

300 *Id.* at 235 (plurality opinion).

301 *Id.* at 251; *see also id.* at 272–73 (O'Connor, J., concurring in the judgment) (stating that "Hopkins had taken her proof as far as it could go" and likening her case to one in which the plaintiff overhears sex stereotypes being used by those discussing her candidacy).

302 *Id.* at 256 (plurality opinion).

303 *See supra* notes 87–88 and accompanying text.

304 *Price Waterhouse*, 490 U.S. at 251.

305 *Id.*

306 *Id.* at 234–36.

Lower federal courts have since held that Title VII equally prohibits such descriptive stereotyping.[307]

Some scholars have argued that the *Price Waterhouse* decision betrays psychologically false empirical assumptions that the employer will have conscious awareness of its true motivations and that the employer's decisionmaking process can be, and ought to be, divorced from instances of information gathering and evaluation that may have occurred prior to the moment of decision.[308] These conclusions are not consistent with the facts of the case, which included evidence of unconscious stereotyping,[309] and mistake the plurality's explanatory heuristic for an empirical flight of fancy when it in fact seeks to make a normative point about the statute's proper interpretation.[310] Moreo-

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307 *See, e.g.*, Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004) (finding that the employer's assumption that the plaintiff would not wish to relocate because she had children is a discriminatory basis to deny her a promotion); *id.* at 586 (finding that the employer's assumption that the plaintiff would be unable or unwilling to work with openly sexist clientele in her sought position was a discriminatory basis to deny her a promotion).

308 Professors Krieger and Fiske reach this conclusion by analyzing the following portion of Justice Brennan's plurality opinion:

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

Price Waterhouse, 490 U.S. at 250; *see also* Krieger & Fiske, *supra* note 1, at 1010. According to Krieger and Fiske, this passage "reflects two 'common sense' theories about the nature of discriminatory motivation": (1) that the discriminator is "consciously aware, 'at the moment of decision,' that he or she is discriminating" (also referenced as "transparent mental processing"), and that (2) perception may be divorced from decisionmaking, such that when the agent undertakes to render an "employment decision," he or she is capable of setting aside whatever defects or biases of perception preceded that decision. *Id.* at 1010 (quoting *Price Waterhouse*, 490 U.S. at 250). Whether these assumptions are false is of no moment for this Article—in fact, I share Krieger and Fiske's view that they are—because the more pressing matter is whether they are in fact empirical assumptions that may be properly ascribed to Justice Brennan's statements. They are not. *See infra* note 310.

309 *See supra* notes 290–92 and accompanying text.

310 Rather than introducing false empirical assumptions, *see supra* note 308, Justice Brennan's depiction of a successful cross-examination of the employer "at the moment of the decision," *Price Waterhouse*, 490 U.S. at 250, is read more fairly as a metaphor—it otherwise suffers from the practical impossibility of returning to "the moment of decision" to engage in this colloquy—used to explain his rejection of the but-for causation standard proposed by the dissent., *id.* at 240–41 (arguing that consideration of the question "whether gender was a factor in the employment decision *at the moment it was made*" is compelled by the statute's use of the present tense "to fail or refuse" and otherwise avoids the "hypothetical construct" of but-for causation, which requires the plaintiff to prove no adverse action would have been taken had the factor not been considered (internal quotation marks omitted)); *see also id.* at 250 n.13 (describing the plurality's motivating factor test as "distinctly non-hypothetical" because "[i]t seeks to determine the content of *the entire set of reasons* for a decision" (emphasis added)). Justice Brennan's contention is normative in that it seeks to have the factfinder take account of all factors leading

ver, the Court required no showing, and indeed none seems to have been possible, that the partners themselves viewed their statements as biased or that they were consciously concealing their bias by purporting to rely on Hopkins's interpersonal skills. In fact, the plurality takes the more psychologically sophisticated view that sex may have made Hopkins's interpersonal skills salient.[311]

It also seems false to suggest that the Court's descriptions of mixed-motive analysis reflect empirical assumptions about cognition and not normative commitments to a particular standard of liability. Indeed, Justice Brennan's plurality opinion is explicit in reaffirming the twin normative commitments of disparate treatment doctrine: equal treatment and preservation of legitimate employer discretion. The opinion states that, although the section 703(a)(1) prohibition against discrimination reflects "the simple but momentous announcement" by Congress that the plaintiff's protected status is "not relevant to the selection, evaluation, or compensation of employees," the statute otherwise "does not purport to limit other qualities and characteristics that employers *may* take into account in making employment decisions," thereby "preserving employers' freedom of choice."[312]

In the Civil Rights Act of 1991, Congress codified an amended version of the mixed-motive framework, one that is in fact more favorable to plaintiffs. Rejecting the precise liability standards proposed by the *Price Waterhouse* plurality and concurring opinions, Congress provided that if the plaintiff demonstrates that her protected status "was a motivating factor for any employment practice," she has established the defendant's liability for an unlawful employment practice "even though other factors also motivated the practice."[313] The 1991 Act permits an affirmative defense whereby the defendant may avoid damages and certain injunctive relief (such as reinstatement, hiring, or promotion) on a showing that the defendant "would have taken the same action in the absence of the impermissible motivating factor."[314] For a time, many circuits continued to follow Justice O'Connor's instruction that the motivating-factor test may apply only

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to the employer's decision rather than limiting the inquiry to consider only the hypothetical effect of eliminating the plaintiff's status as a factor.

311 *See id.* at 256 (stating that it does not "require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism").

312 *Id.* at 239.

313 42 U.S.C. § 2000e-2(m) (2006).

314 *Id.* § 2000e-5(g)(2)(B).

where the plaintiff makes her required showing by direct evidence.[315] In *Desert Palace, Inc. v. Costa*,[316] however, the Supreme Court unanimously held that the plaintiff may sustain her burden based on either direct or circumstantial evidence.[317] This means that plaintiffs may obtain access to the motivating-factor test, and as a consequence may pursue theories of disparate treatment liability based on stereotyping and other forms of cognitive bias without explicit evidence of such bias and without having evidence sufficient to disprove the defendant's proffered reason.

The doctrinal resources developed in *Price Waterhouse* and in the 1991 Act have expanded the scope of Title VII's enforcement by responding to the evidentiary challenges posed by stereotype-based discrimination. Yet we should not assume that attention to stereotypes must always have such an expansive effect. For example, relying on evidence from congressional hearings and the report of the Secretary of Labor provided at Congress's direction,[318] the Supreme Court determined that Congress intended the Age Discrimination in Employment Act ("ADEA") to prohibit age discrimination based on "inaccurate and stigmatizing stereotypes."[319] Congress did not, however, extend the motivating-factor test to claims under the ADEA.[320] In fact, the Supreme Court concluded that, despite obvious parallels in the language of the two statutes, ADEA claimants cannot benefit even from the mixed-motive test established by *Price Waterhouse*.[321] The Court also concluded that otherwise covered persons under the ADEA may not bring "reverse discrimination" claims based on allegations that older workers were provided benefits withheld from younger workers.[322] In so doing, the Court looked to both the legislative history and "social history" of the statute, declining to interpret

315 Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (noting that the courts of appeals for the First, Fourth, Eighth, and Eleventh Circuits followed the direct evidence requirement).

316 Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

317 *Id.* at 101–02.

318 EEOC v. Wyoming, 460 U.S. 226, 230–31 (1983).

319 Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."); *see also EEOC v. Wyoming*, 460 U.S. at 231 (summarizing the Secretary of Labor's report that age discrimination "rarely was based on the sort of animus motivating some other forms of discrimination" but typically arose from "stereotypes unsupported by objective fact").

320 *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349–50 (2009).

321 *Id.* at 2349. *Compare* 29 U.S.C. § 623(a)(1) (2006) (prohibiting employment discrimination "because of . . . age"), *with* 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting employment discrimination "because of . . . race").

322 *See* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 584 (2004) (holding that plain-

the ADEA to reach beyond the principal evil for which Congress enacted the statute—that is, discrimination arising from the stereotype that age begets a decline in performance, which benefits the younger over the older.[323]

Contemporary psychology may be able to assist the judiciary to appreciate more fully how cognitive processes contribute to age discrimination.[324] However, having seized upon a particular form of age-based stereotyping made salient by a consideration of the social circumstances under which the Court understood age discrimination to be meaningful, the Supreme Court has foreclosed other considerations that might have broadened the law's conception of this form of discrimination. The Court's ADEA decisions thus demonstrate that defining discrimination in terms of stereotyping may place significant limitations on the enforcement of antidiscrimination law and that the kinds of stereotyping we take to indicate discrimination are inextricably linked to a set of social norms that otherwise inform our understanding of discrimination.

E. Discrimination Without Prejudice

If one doubted that the *McDonnell Douglas–Burdine-Hicks* line of cases permitted a finding of disparate treatment liability without a showing of conscious intent to discriminate, the mixed-motive framework must bring that doubt to rest. For it makes clear that evidence of a conscious motive is not required to prove disparate treatment and that liability does not turn on disproving the defendant's proffered reasons. Yet, based on the facts of *Price Waterhouse*, one may wonder whether some type of prejudice, conscious or unconscious, is necessary to sustain a claim of disparate treatment. After all, Justice Brennan's plurality opinion reacts with disgust to the statements made by Price Waterhouse partners concerning Hopkins's perceived transgression of gender norms.[325] Those statements quite understandably may

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tiffs at least forty years of age, and therefore covered by the ADEA, may not sustain a claim of discrimination based on the employer's favoring of older workers).

323 *Id.* at 591–96; *see also id.* at 607–08 (Thomas, J., dissenting) (criticizing the Court for restricting application of the statute to its "principal evil" and thereby violating established norms by which it typically interpreted antidiscrimination statutes). The issue here is not whether *Cline* was rightly decided, but whether defining discrimination in terms of stereotyping led to a restrictive interpretation of the statute's protections.

324 *See generally* AGEISM: STEREOTYPING AND PREJUDICE AGAINST OLDER PERSONS (Todd D. Nelson ed., 2002).

325 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (plurality opinion), *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1074, 1075, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

be interpreted to reveal sexist prejudice, whether or not individual partners felt hostility toward Hopkins.[326]

We need not reach these conclusions, however, because the holdings of several of the Supreme Court's disparate treatment cases make clear that proof of intentional discrimination does not require prejudice or animosity. The Supreme Court has repeatedly held that, where the plaintiff provides direct evidence that her protected status caused the challenged adverse employment decision, she need not also prove animus. For example, in *City of Los Angeles Department of Water and Power v. Manhart*,[327] the Court held that a policy requiring women to fund their pension plans at a disproportionately higher rate than men based on assumptions concerning life expectancy violated Title VII because it did not pass the "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'"[328] Whether the defendant's true reasons for requiring women to pay a premium for pension coverage were economically rational or prejudicial made no difference to the Court's decision. Similarly, in *Goodman v. Lukens Steel Co.*,[329] the Court held that a union's refusal to prosecute grievances of race discrimination asserted by its African American members, though it prosecuted other grievances against the company, constituted intentional discrimination notwithstanding the absence of evidence of discriminatory animus.[330] In *UAW v. Johnson Controls, Inc.*,[331] the Court

326 Siegel has suggested that the Supreme Court's acknowledgement of the pernicious consequences of sex stereotyping seems to embrace a "sociohistorical and narratological view of discrimination" that recognizes the harm of "morally suspect prescriptions and cognitively suspect rationalizations that together justify keeping certain groups 'in their proper place.'" Siegel, *supra* note 156, at 97 n.81. Through this framework, Siegel observes, the law may recognize "as suspect the claim that particular blacks are lazy—or that particular women are too aggressive." *Id.* Of course, the very sociohistorical perspective that may aid courts to identify certain stereotypes as impermissible, because they have been deployed during various periods in our history in order to maintain women or minorities in an oppressed position, is also a perspective that may limit courts' abilities to recognize other types of evidence of status-based motivation. *See supra* notes 322–23 and accompanying text; *see also* Siegel, *supra* note 156, at 97 n.81 (questioning the plurality's confidence in prohibiting sex stereotyping because of its failure to examine the legitimacy of the defendant's assertion that Hopkins's "aggressiveness" meant she lacked interpersonal skills (internal quotation marks omitted)).

327 City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

328 *Id.* at 711 (quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971)).

329 Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).

330 *Id.* at 668–69. In so holding, the Court decided that the plaintiffs' section 703 rights against the union exceeded their NLRA rights to fair representation, which would have permitted the union to avoid liability if it could show that its reasons were not arbitrary but based on legitimate self-interest of the union membership. *Id.* The *Goodman* ruling precludes self-inter-

held that a policy prohibiting fertile women, but not fertile men, from occupying certain hazardous positions violated Title VII, regardless of "[t]he beneficence of [the] employer's purpose."[332] The company's policy failed *Manhart*'s "simple test" of disparate treatment because of sex.[333] The courts of appeals have followed suit, frequently holding that disparate treatment requires no showing of animus or conscious intent where other evidence of status causation is present.[334]

As a final example, the Supreme Court reaffirmed this idea recently in *Ricci v. DeStefano*.[335] In that case, the district court decided that the City of New Haven's refusal to certify the results of a test for promotion within its fire department because the results demonstrated a "racially disparate impact" did not constitute intentional discrimination against the predominantly white firefighters who were slated to be promoted based on their test performance.[336] The court denied the plaintiffs' motion for summary judgment and granted the defendant's because it concluded that the record showed "a total absence of any evidence of discriminatory animus towards [the] plaintiffs."[337] The Supreme Court reversed and awarded the plaintiffs summary judgment without any finding that the board had acted with discriminatory animus. The animus inquiry pursued by the district court, as it turns out, had been a sideshow.

In explaining its rationale, the Supreme Court stated that "[w]hatever the City's ultimate aim—however *well intentioned or benevolent* it might have seemed—the City made its employment deci-

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est from serving as a basis for the union to avoid Title VII liability, even in the absence of evidence of animus, provided that the plaintiffs otherwise prove that the union refused to prosecute their claims because of race. *Id.*

331 UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

332 *Id.* at 200.

333 *Id.* (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

334 *See, e.g.*, EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1283–84 (11th Cir. 2000) ("To prove the discriminatory intent necessary for a disparate treatment or pattern or practice claim, a plaintiff need not prove that a defendant harbored some special 'animus' or 'malice' towards the protected group to which she belongs."); Ferrill v. Parker Grp., Inc., 168 F.3d 468, 471, 473 n.7 (11th Cir. 1999) ("[I]ll will, enmity, or hostility are not prerequisites of intentional discrimination."); *accord* EEOC v. Jefferson Cnty. Sherriff's Dep't, 467 F.3d 571, 581 (6th Cir. 2006), *rev'd sub nom.* Ky. Ret. Sys. v. EEOC, 554 U.S. 135 (2008); Johnson v. New York, 49 F.3d 75, 78 (2d Cir. 1995); *see also* Massarsky v. Gen. Motors Corp., 706 F.2d 111, 119 (3d Cir. 1983) ("[W]here an employer's policy or practice is discriminatory on its face, it is unnecessary for the plaintiff to make a separate showing of intent to discriminate.").

335 Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

336 *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 160–61 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658.

337 *Id.* at 158.

sion because of race."[338] The Court's equation of a decision undertaken in light of a perceived racial disparity with a decision undertaken because of the race of those predominantly advantaged by the disparity is curious and unprecedented. Nevertheless, the significance of *Ricci* for purposes of this Article is clear.[339] The *Ricci* Court rejects the assumption that failure to find discriminatory animus against the white firefighters barred judgment in their favor, concluding that the City of New Haven could not prevail "[w]hatever [its] ultimate aim."[340] Instead, the Court held that the city could justify its decision not to certify the test results because of their racial stratification only if it had a "strong basis in evidence" that certification of the test results would mean that it had violated the disparate impact provisions of Title VII.[341] Of principal significance here, the Court concluded that unequal treatment because of race does not cease to be disparate treatment just because the defendant held no prejudicial motive against the plaintiffs.

In sum, the intentionality requirement is *not* a two-stage requirement—that the plaintiff prove causation (i.e., that the employer took adverse action against her because of her protected class characteristic) and then prove prejudice (i.e., that the employer acted due to negative beliefs about or attitudes toward members of the plaintiff's class, or positive beliefs about or attitudes toward members of a class that benefited from the plaintiff's adverse treatment). Nor is it a requirement that the evidence of causation presented by the plaintiff be limited to proof of prejudice (i.e., that prejudice serve as the causal mechanism). Rather, evidence that an adverse action was undertaken because of the plaintiff's protected status may include evidence of rational, benign, or even benevolent motivations. Although prejudice may be instrumental in proving causation in particular cases, proof of prejudice is not required where causation may be established by other means. The doctrine simply does not compound the plaintiff's burden

338 *Ricci*, 129 S. Ct. at 2674 (emphasis added). The Court, in fact, completely neutralizes the question of the city's intent. *See id.* at 2677 (holding the defendants liable for discrimination even if they "*were motivated as a subjective matter* by a desire to avoid committing disparate-impact discrimination" (emphasis added)).

339 Whether the plaintiffs suffered disparate treatment should of course turn on whether the test results were not certified because of their racial status (i.e., that the city would have certified the results had they advantaged black applicants). *See* 42 U.S.C. § 2000e-2(a)(1) (2006) (providing that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin." (emphasis added)).

340 *Ricci*, 129 S. Ct. at 2674.

341 *Id.* at 2677.

by requiring proof of an invidious motive to supplement proof of causation.

IV. The Future of Disparate Treatment

A. *Confronting Uncertainty Within Existing Doctrine*

Part III demonstrates that disparate treatment doctrine requires neither a showing of conscious discriminatory intent nor a showing that the defendant is motivated by conscious or unconscious prejudice. Nevertheless, the fractured nature of the Supreme Court's rhetoric[342] may detract from the doctrine's stability. Citing to one portion of the doctrine and not the other can foreclose an entire world of evaluative possibilities to a court or litigant in a particular case. There is perhaps no better example of this instability than the Court's recent decision in *Ricci*, and so this Section returns to it.

The *Ricci* case is already famous for many things, among them Justice Scalia's prediction in his concurrence of an inevitable "war between disparate impact and equal protection."[343] It is less known for Justice Alito's lengthy concurrence in which he argues that, notwithstanding the majority's granting of summary judgment for the plaintiffs, the Court was obligated at the very least to reverse the district court's order of summary judgment for the defendants because the plaintiffs' evidence was sufficient to raise a genuine issue of material fact regarding the defendants' "subjective" intent to discriminate.[344] In other words, whereas the majority disclaimed the need to inquire into the defendants' intent and assumed, without consequence, that it may have been benevolent, Justice Alito argued that the plaintiffs raised a triable issue regarding the city's invidious intent because the city had, under political pressure, adopted the position of a local reverend and community activist whom Justice Alito described as having racial motives and close political ties to the city's mayor.[345] According to Justice Alito, the reverend opposed certification of the test results for racial reasons and transferred his discriminatory intent to the city through the exercise of political pressure.[346] What is significant here about Justice Alito's opinion is not only his interpretation of discriminatory intent as elastic and transferrable, relying on a "cat's paw" the-

342 *See supra* Part III.A.

343 *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

344 *See id.* at 2683–84 (Alito, J., concurring).

345 *See id.* at 2685.

346 *See id.* at 2685–87.

ory,[347] but also that he felt the need to argue the case that the city acted with discriminatory intent.

Justice Alito's opinion is a defense of what he described as a "subjective question" of "the employer's intent."[348] The opinion is calculated to reassure the reader that disparate treatment theory does indeed require the plaintiff to prove the employer's subjective intent. Justices Scalia and Thomas signed Justice Alito's concurrence. Therefore, at least three members of the Court may seek a future opportunity to articulate a more restrictive account of disparate treatment, one in which proof of intent or prejudicial motive is central, and one in which the Court does what to date it has not done: restrict disparate treatment liability to a particular showing of the defendant's state of mind. This uncertainty alone justifies further attention to the normative commitments reflected within the judicial construction of disparate treatment as intentional discrimination.

Yet *Ricci* raises further ambiguities that weigh upon those commitments. For example, it is difficult to reconcile *Ricci* with the Court's longstanding recognition of the high regard Congress placed on voluntary compliance when it enacted Title VII. Justice Ginsburg, in dissent, herself remarked on "the discordance of the Court's opinion with the voluntary compliance ideal."[349] The majority purported to fulfill this ideal, acknowledging "Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII.'"[350] The majority expressly rejected the plaintiffs' argument that the city should be prohibited from defending itself from disparate treatment liability on the ground that it sought compliance with the disparate impact provision of the statute, unless the city could show *that it had violated that provision*.[351] The Court called this argument "overly simplistic and too restrictive of Title VII's purpose" because it would effectively "bring compliance efforts to a near standstill."[352] The Court also rejected the city's argument that it should be relieved

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347 *See id.* at 2688–89.

348 *Id.* at 2683. The description of the plaintiff's showing as "subjective intent" occurs in dictum in the Court's now-discredited decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003), to explain the difference between disparate impact and disparate treatment, *see id.* at 645–46, but the Court has never relied on it to resolve a disparate treatment claim.

349 *Ricci*, 129 S. Ct. at 2702 (Ginsburg, J., dissenting).

350 *Id.* at 2674 (majority opinion) (quoting Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986)).

351 *Id.*

352 *Id.*

of disparate treatment liability based on its "good faith belief" that its actions were required to maintain compliance with the statute, and the Court selected the "strong basis in evidence" defense as a compromise between the two positions.[353]

In reaching its decision, the district court had relied on the Second Circuit's decision in *Hayden v. County of Nassau*.[354] There, the court held that the county's police department, operating under consent decrees prohibiting it from engaging in discrimination, did not violate Title VII when it designed an employment test to "minimize[ ] the adverse impact on minority applicants."[355] The test was scored and applied to all applicants identically regardless of race. The court concluded that "the intent to remedy the disparate impact of the prior exams is not equivalent to an intent to discriminate against non-minority applicants."[356] The district court in *Ricci* considered the case to be parallel to *Hayden* and relied heavily on this passage because, as in *Hayden*, evidence in the record suggested that New Haven had been interested in promoting racial diversity when it commissioned the test,[357] and the plaintiffs argued that even after the test was conducted the city remained interested in diversity.[358] In fact, the court stated, the "real crux of [the] plaintiffs' argument" was that the city's "'diversity' rationale is prohibited as reverse discrimination under Title VII."[359] The district court concluded that, like the compliance rationale in *Hayden*, a "diversity rationale" is not the equivalent of a discriminatory purpose.[360] To have concluded otherwise would have been to tempt the fate feared by the *Hayden* panel, that if all considerations of race are "automatically suspect" then "[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race" and so would be in jeopardy.[361] The Second Circuit viewed this as a *reductio ad absurdum* to be strictly avoided. The Supreme Court, however, embraced this position in *Ricci*, establishing a conflict between disparate treatment theory and voluntary compliance with

353 *Id.* at 2674–76.

354 Hayden v. Cnty. of Nassau, 180 F.3d 42 (2d Cir. 1999); *see also* Ricci v. DeStefano, 554 F. Supp. 2d 142, 157 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd*, 129 S. Ct. 2658.

355 *Hayden*, 180 F.3d at 47, 54–55.

356 *Id.* at 51.

357 *Ricci*, 554 F. Supp. 2d at 146–47.

358 *Id.* at 156–57.

359 *Id.*

360 *Id.* at 160.

361 *Hayden*, 180 F.3d at 49 (internal quotation marks omitted).

potentially catastrophic consequences for the perpetuation of antidiscrimination law as we now know it.

Regardless whether the Court's compromise in practice will afford employers sufficient breathing room to make robust use of voluntary compliance measures to avoid litigation, it certainly limits the discretion that employers have to undertake such measures.[362] This is an odd outcome because the jurisprudence of employer discretion is often invoked to curb employer liability, even where the exercise of discretion does not implicate the public value of promoting compliance and workplace integration.[363] Here, the doctrine seems to have reached an unforeseen limit: an employer's discretion is more limited when it relates to the employer's efforts to comply with the statute than when the employer is motivated by business objectives independent of any concern for workplace equality. Had deference to the employer's discretion prevailed in *Ricci*, the Court would have affirmed, notwithstanding the majority's confidence in the test results,[364] and held that Title VII granted the city latitude to undertake voluntary compliance measures and to design—or if necessary to redesign—the means by which appropriate job qualifications would be identified.

A similar point might also be made about the relationship between *Ricci* and the Court's prior voluntary compliance decisions. The *Ricci* Court never directly addressed the apparent conflict between that decision and prior decisions permitting the use of race- and sex-conscious voluntary affirmative action policies under Title VII. The Court has upheld voluntary affirmative action policies without a showing of prior or present violation of the statute or a strong basis in evidence to believe that one may exist. In *United Steelworkers v. Weber*,[365] the Court held that Title VII did not preclude the employer's grant of a preference to black employees for admission to an on-the-job training program, where the employer instituted the policy in order to eliminate a manifest racial imbalance in a traditionally segregated job category and the policy did not "unnecessarily trammel the interests of white employees."[366] In *Johnson v. Transportation*

362 *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2676 (2009).

363 *See supra* Part III.C.

364 *Ricci*, 129 S. Ct. at 2678–79 (finding that the test was job-related and consistent with business necessity, and that the city lacked a strong basis in evidence of "an equally valid, less discriminatory testing alternative").

365 United Steelworkers v. Weber, 443 U.S. 193 (1979).

366 *See id.* at 208–09. In *Weber*, the jobs in question had historically been available only to

Agency,[367] the Court extended this rationale, upholding sex-based preferences for promotion to traditionally sex-segregated positions.[368] The Court clarified in *Johnson* that the showing of manifest imbalance announced in *Weber* did not equate to a showing of prima facie discrimination.[369] Under the rationale of *Weber* and *Johnson*, where the employer acts pursuant to a valid voluntary affirmative action program, the program constitutes a legitimate nondiscriminatory reason sufficient to rebut a presumption of discrimination.[370]

Ricci calls the *Weber-Johnson* rationale into question, interpreting the city's latitude to consider race for compliance-related purposes more restrictively than the Court had previously considered employers' discretion to institute voluntary affirmative action programs. As discussed above, the "race-based decision" in *Ricci* is abstract when compared to the ordinary disparate treatment case and fails to track the precise language of Title VII. The City of New Haven chose not to certify its test results because of a racial disparity, and the Court ruled that consideration of that disparity rendered the city's decision "race-based." As a result, the decision could only be justified if the city had a strong basis in evidence to believe that its test violated Title VII. The *Weber-Johnson* rationale requires no showing of past violation or no arguable basis in evidence that such a violation has taken place to justify the use of race- and sex-based preferences.[371] The validity of an employer's affirmative action plan turns on whether it responds to a manifest imbalance in the employer's workforce and considers neither the employer's probable culpability for past violations nor its present motive. The only salient motive, according to *Johnson*, is the employer's "purpose of remedying underrepresenta-

union workers, and union membership was overwhelming white. The on-the-job training was necessary to promote African American workers to craft status. *Id.* at 198–99.

367 Johnson v. Transp. Agency, 480 U.S. 616 (1987).

368 *See id.* at 640–42.

369 *See id.* at 633 n.10. In *Weber*, the Court permitted the employer to make its showing of manifest imbalance based on a comparison between the percentage of black skilled craft workers currently in its employment and the percentage of African Americans in the surrounding labor force regardless of skill level. *Id.* (citing *Weber*, 443 U.S. at 198–99). To establish a prima facie case of systemic disparate treatment under *International Brotherhood of Teamsters*, the employer would have been required to show a racial disparity between "the percentage of black skilled workers in the [defendant's] work force with the percentage of black skilled craft workers in the area labor market." *Johnson*, 480 U.S. at 633 n.10.

370 *See Johnson*, 480 U.S. at 626 (explaining that an affirmative action plan constitutes a "nondiscriminatory rationale" for an employment decision, shifting to the plaintiff the burden "to prove that the employer's justification is pretextual and the plan is invalid").

371 *See Weber*, 443 U.S. at 211 (Blackmun, J., concurring) (advocating for adoption of an arguable basis test).

tion."[372] Why the employer undertakes that purpose is of no moment (i.e., whether for compliance reasons, business reasons, or to promote integration),[373] though it cannot be overlooked that remedying underrepresentation aligns with the statutory purpose to promote equal employment opportunity by disestablishing historical patterns of workplace inequality.

By establishing the "strong basis in evidence" test to sustain race-conscious compliance measures in *Ricci*, the Court applies a higher level of scrutiny to practices that are frankly less overt and less direct in their consideration of protected statuses. In *Ricci*, the city did not designate members of particular social statuses to receive preferences, and indeed did not award preferences. Furthermore, the Court agreed that the test results were sufficiently severe to demonstrate a prima facie case of disparate impact discrimination.[374] The New Haven fire department also had a history of race discrimination against African Americans, with significant racial disparities remaining in the supervisory job classifications to which the plaintiffs sought promotion.[375] Whether *Weber* and *Johnson* can stand after *Ricci* therefore remains an open question.

The *Ricci* decision may also affect so-called "diversity initiatives"—that is, voluntary compliance programs designed to promote workplace diversity which may or may not utilize status-based preferences. Diversity initiatives are used widely across the American workplace;[376] the uncertainty caused by *Ricci* is therefore serious. Unless those initiatives are bona fide affirmative action plans—that is, court-ordered remedial plans or those plans that satisfy the requirements of *Weber-Johnson*—such initiatives have an ambiguous legal status. Diversity initiatives may be relied on by employers to rebut proof of pretext by undermining evidence of discriminatory motive,[377] or to avoid an award of punitive damages,[378] or they may be relied on in

372 *Johnson*, 480 U.S. at 634.

373 *Accord* Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 11 (2005) ("The employer's *reason* or *motive* for [its plan]—whether to redress past wrongs or to gain the benefit of diverse perspectives—appears to be irrelevant.").

374 *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2677–78 (2009).

375 *Id.* at 2691 (Ginsburg, J., dissenting).

376 *See* Shin & Gulati, *supra* note 21, at 1018; *see also supra* note 21 and accompanying text.

377 Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978) (finding that evidence of the diversity composition of the employer's labor force may be used to rebut the plaintiff's evidence of pretext).

378 Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544–46 (1999) (finding that the defendant's "good faith efforts at Title VII compliance" constitute a defense to punitive damages because

reverse discrimination cases as evidence of discrimination.[379] The question that remains, however, is to what extent may an employer defend itself against a disparate treatment claim by demonstrating that its actions were committed as part of a policy to promote diversity.[380]

With *Ricci*, the Court appears to have cleaved employer discretion into two different types: one affords employers broad discretion to determine the qualifications of work and the means by which those qualifications are assessed; the other concerns the employer's license to develop voluntary compliance measures that either have exculpatory value (e.g., in rebutting proof of pretext, providing a defense to harassment liability, or avoiding punitive damages) or are excused from legal liability because they are properly remedial and therefore are not discrimination (e.g., properly formulated voluntary affirmative plans). If the Court now means to distinguish between these forms of discretion, it is unclear precisely where it will draw this distinction in practice. For example, if the city exercises legitimate discretion when it authorizes use of an imperfect test, why does the city not exercise legitimate discretion when it decides, based on actual test results, that the test is flawed and its results should be voided? Why did the city's belief that certification of the test results would lead to disparate impact not enhance rather than diminish its discretion? There are at least three different ways to interpret the relationship between *Ricci* and the doctrine of legitimate employer discretion.

First, the *Ricci* Court may have concluded that the city's decision not to certify the test results was not a *nondiscriminatory* exercise of employer discretion, because this decision turned on the racial stratification of the results. It is in this sense that the *Ricci* Court identifies the refusal to certify the results as a "race-based" decision.[381] The notion that the city's action was akin to a racial classification is not altogether convincing, because the city was not shown to have treated the

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such efforts tend to disprove recklessness); *see also* Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 548–49 (4th Cir. 2003) (denying punitive damages and counting diversity training program among defendant's good faith compliance efforts).

379 *See infra* notes 388–91 and accompanying text.

380 After all, the district court in *Ricci* believed that the city acted lawfully because its pursuit of diversity interests was distinguishable from any discriminatory motive. *See supra* notes 357–60 and accompanying text.

381 The Court's opinion in fact states as its "premise" that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense"; in other words, that "[w]ithout some other justification, this *express, race-based decisionmaking* violates Title VII's command that employers cannot take adverse employment actions because of an individual's race." Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (emphasis added).

plaintiffs differently because of their race—that is, there was no evidence that the city would have certified the results if it had overwhelmingly favored black applicants rather than white applicants. By this interpretation, the *Ricci* decision poses a significant challenge to the law's ordinary deference to employer discretion, because it suggests that the employer cannot take an egalitarian approach to issues of racial justice in constructing the qualifications for work. If this is the Court's position, it affirms the "real crux" of the plaintiffs' argument before the district court,[382] namely, that the city's concern for racial diversity is evidence of its discriminatory intent. It would also mean that, rather than reaching beyond the principal evil that Title VII was enacted to address—the continuation of practices that entrench the social subordination of African Americans by excluding them from nontraditional high-status work[383]—the Court has now decided that the statute prohibits employers from responding proactively to its call to address that evil. This position obviously undermines the value of voluntary compliance under the statute, contradicts the voluntary affirmative action doctrine, and threatens the continued validity of Title VII as an instrument to combat race discrimination.

Second, the Court may have concluded that the city's decision not to certify the test results was not a *legitimate* exercise of employer discretion, because it turned on an interpretation of legal liability that only the courts are authorized to make. The city had given an expansive, if prophylactic, interpretation of the scope of disparate impact liability. By permitting the city to defend itself from disparate treatment liability only if it could show that it had a strong basis in evidence to believe that certification would have resulted in disparate impact liability, the Court forces future employers to make more conservative assessments of their own liability risk. This is an interesting position because it curtails the employer's ordinary prerogative to make liability assessments and to choose its preferred strategy for maintaining compliance without sacrificing business interests, and instead discourages employers from taking measures to improve their personnel procedures or otherwise to cure the problem of status-based disparate impact. Moreover, it curtails the employer's discretion precisely by judging it inferior to the courts' when the employer takes on a quasi-judicial role by acting as an interpreter of the law.

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382 *See infra* note 437.

383 *See supra* notes 255–59 and accompanying text.

Third, the Court may be signaling that the *timing* of the employer's decision is salient, because judicial deference to employer discretion is limited to certain activities leading up to an employment decision in order to balance this discretion against employees' legitimate expectations. The majority opinion gives special consideration to the plaintiffs' reliance on the employer's established merit-based system.[384] In one sense, the Court treats the promotion decision as if, based on the city's regimented procedures, it had effectively already been made. Therefore, the city's attempt to strike the test results was simply too late.

Of course it is possible that under this third interpretation, *merit* and not timing controls. *Ricci* raises the question of whether there are other circumstances in which courts may be authorized to find that an employer violated Title VII because it deviated from a purportedly objective, merit-based process. The timing of the employer's decision to abort its meritocratic employee evaluation process may be a factor in such cases, but not a dispositive one. Alternatively, the merit-based features of the employer's selection system and the fact that success under that system appears to guarantee a particular outcome may be precisely what makes timing salient. Had the city's selection system permitted greater discretion in awarding promotions once the results of the test were certified, performance on the test could not have generated the kind of expectation among the plaintiffs to which the Court shows such sensitivity. The ambiguity described here is significant because generally the employer's latitude to define the qualifications for work trumps either external or internal theories of merit; in other words, the employer may choose selection criteria that are foolish or inefficient and may apply its own internal rules inconsistently without running afoul of Title VII so long as it does so for reasons unrelated to the plaintiff's protected status.[385]

Whatever the Court's intention, those who wish to remodel disparate treatment doctrine based on psychological research have some reason to celebrate *Ricci*. The norm of deference to employer discre-

384 *See, e.g.*, *Ricci*, 129 S. Ct. at 2664 (describing the special importance of promotions to firefighters); *id.* at 2665 (describing the city's process as a "merit system"); *id.* at 2667 (recounting certain plaintiffs' testimony regarding the costs and other inconveniences they had incurred as a consequence of relying on the city's established and publicized system for awarding promotions).

385 Although procedural irregularities in the employer's business practices may support a finding of discrimination, *see, e.g.*, Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1219–20 (10th Cir. 2002), they do not constitute a per se violation and do not ordinarily shift the burden to the employer.

tion is a significant impediment to the robust reformulation of disparate treatment doctrine using psychological research because it permits employers to defend themselves by proffering a broad range of reasons and to prevail even if the proffered reasons were poorly considered. This norm grants employers tremendous latitude to select from a menu of permissible considerations with no secondary check on the appropriateness of those considerations to a particular employment context and ordinarily no opportunity to deduce that the employer's decision is status-based from the fact that its decisionmaking criteria are merely imperfect. *Ricci* may undermine the employer's protection from inquiries into whether its procedures permit or facilitate decisionmaking tainted by implicit bias. To the extent that this is true, it comes at a price. For *Ricci* also may undermine the employer's ability to justify the design of human resources policies, employee evaluation procedures, and other institutional arrangements by stating that they are intended to promote diversity.

The *Ricci* Court never uses the word "diversity"[386] and does not decide whether an employer's motivation to promote diversity may serve as evidence of disparate treatment. Lower federal courts generally follow the rule that evidence showing that an employer took action against the plaintiff pursuant to an affirmative action plan may serve as direct evidence of disparate treatment, forcing liability to turn on whether the plan itself was valid.[387] Some circuits have interpreted evidence that the defendant's actions were taken to promote diversity similarly,[388] and courts sometimes apply the direct evidence rule re-

386 The plaintiffs appear to have abandoned their "diversity rationale" before the Supreme Court. Although they continued to state that the city had offered as one of its reasons for refusing to certify the test results that it sought to promote diversity, the plaintiffs elected to emphasize before the Supreme Court that the city had "disclaimed" diversity as a basis for its decision in order to prevent the city from defending itself against the equal protection claim by contending that its decision served the compelling interest of diversity. *See* Petitioner's Brief on the Merits at 27, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328); *see also* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (upholding the University of Michigan Law School's affirmative action admissions policy against an equal protection challenge because it was narrowly tailored to promote the compelling interest of diversity).

387 *See, e.g.*, Frank v. Xerox Corp., 347 F.3d 130, 137 (5th Cir. 2003); Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095, 1109 (11th Cir. 2001); Cerrato v. S.F. Cmty. Coll. Dist., 26 F.3d 968, 876 (9th Cir. 1994).

388 *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 721–22 (7th Cir. 2005) (finding that insertion of a minority applicant into a hiring pool, thereby bypassing the first round of eliminations to promote educational diversity, constituted circumstantial evidence of discrimination precluding summary judgment); Iadimarco v. Runyon, 190 F.3d 151, 155, 164 (3d Cir. 1999) (stating that an internal memo instruction that "serious consideration" be "given to the issue of diversity," although insufficient to constitute a prima facie case, could support a claim of disparate treatment); *see also* Harel v. Rutgers, The State Univ., 5 F. Supp. 2d 246, 265 (D.N.J. 1998)

garding affirmative action policies to practices that do not establish actual racial preferences but merely reflect a purpose to promote workplace diversity. For example, following *Ricci*, the Eighth Circuit concluded that evidence that a defendant school district followed a policy of pairing assistant principals with principals of different races to promote "racial equality" constituted direct evidence of discrimination sufficient to sustain a claim of disparate treatment because the school district failed to defend its policy by demonstrating that it was part of a court-ordered desegregation plan.[389] Prior to *Ricci*, in *Bass v. Board of County Commissioners*,[390] the Eleventh Circuit held that because the defendant had an affirmative action plan in effect during the relevant time period, the plan constituted direct evidence of disparate treatment sufficient to survive summary judgment even though the defendant contended that (1) no evidence showed any affirmative action plan had been applied to the plaintiff, (2) the plaintiff was denied a position due to poorly ranked performance on a job interview, and (3) the circumstantial evidence linking affirmative action to the defendant's decision included evidence merely that two of the three interviewers "support[ed] affirmative action" generally and that decisionmakers were directed to consider "diversity" in addition to interview performance in making their decisions.[391]

The ability of plaintiffs to bring reverse discrimination challenges against workplace affirmative action and diversity programs is thus

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(finding that at the prima facie stage of a reverse discrimination case, evidence of pressure to increase diversity may constitute "background circumstances" supporting an inference that the defendant is an unusual employer that may discriminate against a nonminority worker). *But see* Reed v. Agilent Techs., Inc., 174 F. Supp. 2d 176, 185–86 (D. Del. 2001) (stating that the mere existence of diversity policy is insufficient to support a claim of discrimination without a nexus between the policy and an adverse employment action); Blanke v. Rochester Tel. Corp., 36 F. Supp. 2d 589, 597–98 (W.D.N.Y. 1999) (stating that evidence of a corporate objective to increase diversity is not race discrimination absent evidence that white employees would be or were actually terminated to vacate positions for minority employees).

389 *See* Humphries v. Pulaski Cnty. Special Sch. Dist., 580 F.3d 688, 694–96 (8th Cir. 2009); *see also Bass*, 256 F.3d at 1112–13 (counting among the features of the defendant's "affirmative action plan" that it "set percentage hiring goals in positions that were found to have few minorities or women" and that it required suspension of the hiring process when no women or minority candidates were available and a written justification for a particular department or division's failure to "obtain diversity" through the regular hiring process).

390 Bass v. Bd. of Cnty. Comm'rs, 256 F.3d 1095 (11th Cir. 2001).

391 *Id.* at 1099–1100. The court of appeals struck a definitive tone in explaining its application of the direct evidence rule, stating that the only thing to distinguish an affirmative action plan from any other discriminatory statement (other than the degree of formality involved) is that the discrimination it prescribes is permissible if the plan is valid under Title VII and the Equal Protection Clause. The court concluded that if it is not valid, an affirmative action plan amounts to nothing more than a formal policy of unlawful discrimination. *Id.* at 1111 n.7.

well established, both before and after *Ricci*. The following Section addresses some undertheorized but important questions regarding the amenability of diversity initiatives to disparate treatment challenge—these are, under what circumstances should workers who are the purported beneficiaries of diversity initiatives be permitted to challenge these initiatives as disparate treatment, and why should they be permitted to do so? To address these questions, we must confront some of the most fundamental reasons why prejudice ought not to define the limits of legally wrongful discrimination.

B. *An Alternative Account of Disparate Treatment: Present and Future*

For almost half a century, employers have responded to employment discrimination statutes (and other workplace regulations) by adapting their practices in several ways, seeking to avoid legal liability with minimal disruption of their business interests. These adaptations have had consequences for the development of legal doctrine and legal norms. As Professors Devon Carbado, Catherine Fisk, and Mitu Gulati have stated, the critical difference between past workplace discrimination and present and future discrimination is that the latter is dominated by forms of discrimination that women and minorities face "after inclusion" within the workplace, where they are confronted by institutional practices that in many ways are responses to their presence.[392] In a separate article coauthored with Professor Patrick Shin, Gulati has further emphasized the signaling function that often motivates companies to adopt diversity initiatives in order to advertise their prodiversity commitment to markets (particularly their own customers) as well as courts, regulators, and the plaintiffs' bar.[393] This Section focuses on voluntary employment practices intended to limit the employer's liability or, through the management of diversity as a resource, to serve the employer's business interests which nevertheless have the pernicious effect of perpetuating workplace inequality. The question posed here is how should antidiscrimination law address these practices in circumstances where they are found to perpetuate and legitimate historical patterns of workplace inequality? The cognitive account of prejudice can contribute little to the resolution of this question because, except perhaps in special cases involving "sham" compliance strategies, these acts of "discrimination as compliance"

392 Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83 (2008).

393 Shin & Gulati, *supra* note 21.

are typically not motivated by negative attitudes or beliefs concerning the persons who are their intended beneficiaries.

Sociological studies of workforce integration following the passage of Title VII demonstrate that integration slowed dramatically; first, after the initial round of Supreme Court decisions interpreting the statute in the 1970s, and then again during the Reagan Administration, which rejected affirmative action as a means to accomplish statutory goals and emphasized parity between the rights of minority and nonminority workers under the statute.[394] These studies demonstrate that judicial and administrative interpretations of employment discrimination law have permitted employers to develop strategies of compliance to avoid liability and to maintain commitment to business objectives without fully embracing the law's normative commitment to workplace equality.

Sociologists Donald Tomaskovic-Devey and Kevin Stainback describe how, as employers settled into an understanding of their compliance responsibilities and the limits of those responsibilities, organizational inertia has played a significant role in maintaining patterns of workplace segregation.[395] During the period between Title VII's enactment and the *Griggs* decision, uncertainty about regulatory goals appears to have led to greater institutional experimentation directed toward fulfilling what employers presumed those goals to be.[396] Conversely, greater certainty about legal norms and expectations may enable employers to develop compliance strategies that have a minimal impact on business operations.[397] In addition, "[a]s behaviors become legitimate" due to favorable legal interpretation and also by their proliferation within particular industries, "institutionalized variance drops."[398] The consequence of these trends for employment discrimination law and "black-white segregation" patterns is that "racial EEO [(equal employment opportunity)] practice has become institutionalized" through the use of voluntary compliance measures and formalized personnel structures "even as EEO progress has

394 *See, e.g.*, Kevin Stainback et al., *Race and Workplace Integration: A Politically Mediated Process?*, 48 AM. BEHAV. SCIENTIST 1200, 1209–11 (2005) (citing additional studies).

395 *See generally* Donald Tomaskovic-Devey & Kevin Stainback, *Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces Since the Civil Rights Act*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 49 (2007).

396 *Id.* at 63–64 (describing the "early period preced[ing] most enforcement efforts" as "the period of maximum regulatory uncertainty in which organizations experimented with demonstrating compliance with the new law in the absence of clear regulatory expectations").

397 *Id.* at 59.

398 *Id.*

stalled."[399] Prompted in large part by administrative and judicial rejections of affirmative action policies, particularly among public actors, the move to embrace formalized personnel policies and diversity initiatives has had important and largely unforeseen consequences.

Employers have instituted formalized personnel practices (including performance reviews, structured interviews, pay-for-performance and promotion standards, and standardized testing) and diversity policies (sometimes loosely described as affirmative action policies) as part of an overall rearticulation of human resources management.[400] Antidiscrimination law and affirmative action policies have been instrumental in the development of "internal labor markets that govern job assignments and promotions."[401] Employers have increasingly formalized workplace procedures as a means to increase managerial efficiency and avoid personnel-related litigation, including litigation related to status-based discrimination. The sincerity and successfulness of these measures has become a frequent topic of social science research.[402] As sociologist Lauren Edelman observes, employers re-

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399 *Id.*

400 *See id.* at 61 ("EEO law has encouraged the adoption of formalized human resource practices to demonstrate compliance with those laws.").

401 BARBARA F. RESKIN, THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT 61 (1998).

402 *See, e.g.*, Tomaskovic-Devey & Stainback, *supra* note 395, at 61 (stating that the adoption of formalized personnel practices "has been primarily interpreted as a legitimating device [that] is merely symbolic adoption to forestall regulatory or legal action"). Formalized employment procedures are widely promoted as having the capacity to curb the influence and application of cognitive bias. *See, e.g.*, William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120 (2000); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319 (2000); Barbara F. Reskin & Debra Branch McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 214 (2000). A growing literature, however, has observed that careful attention must be paid to the extent to which the gains of formalization are undermined when managers are given broad discretion to determine how to use information gathered through formalized personnel evaluation procedures, *see* Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479 (2008) (arguing that formalization of employee evaluation procedures alone is insufficient to guard against discrimination when the standards by which decisionmakers use such information are not also formalized), or to manipulate the procedures themselves in order to accomplish other business ends, such as providing incentives to highly valued workers, *see* Erin L. Kelly & Alexandra Kalev, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or "a Right to Ask,"* 4 SOCIO-ECON. REV. 379 (2006). The Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), suggests that an additional concern for plaintiffs wishing to challenge policies of formalized discretion as systemic disparate treatment is that situating discretionary decisionmaking within an otherwise structured framework may be insufficient to identify the employment practice as a discrete and coherent discriminatory policy. *Id.* at 2553 (finding no company-wide policy amenable to class action challenge in employer's practice of granting broad discretion regarding pro-

spond to antidiscrimination law by instituting formal personnel structures "designed to create a visible commitment to law" and they "do not necessarily[ ] reduce employment discrimination."[403] Employers have also attempted to demonstrate compliance with antidiscrimination laws by adopting antiharassment and antidiscrimination policies, internal grievance procedures, diversity training, race- and sex-based mentoring, race- and sex-based recruiting, hiring equal employment opportunity personnel, and instituting diversity management as a core function of human resources.[404] Estimates regarding the prevalence of affirmative action and diversity policies among private sector employers vary, but the consensus is that such policies are widespread and have been for decades.[405] Despite their broad utilization, however, such policies do not appear to have hastened labor-force integration.[406] Indeed, over time, employers have turned from affirmative action policies utilizing status-based preferences and concrete benchmarks to "diversity initiatives," many of which target workplace culture and intergroup bias without relying on numerical goals or accountability measures.[407]

Nevertheless, the broad utilization of diversity initiatives and the normative entrenchment of diversity as a legal and business objective may give the impression that employers are assiduously and sincerely pursuing workplace equality through these compliance measures, and that therefore the persistence of inequality must be a product of externalities beyond the employer's control. These new institutional practices are presumed to reflect employers' good intentions and not to

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motions to individual supervisors because "[t]he whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard").

403 Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1542 (1992).

404 *Id.*; *see also* Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Officers' Dilemma*, 13 LAW & POL'Y 73 (1991).

405 *See, e.g.*, RESKIN, *supra* note 401, at 16 (citing "mixed" evidence that, in the late 1980s, seventy-one percent of employers had affirmative action plans but that surveys conducted in the 1990s showed that roughly forty percent of employers had such plans); Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1590 (2001) (discussing several studies finding diversity initiatives to be utilized widely by U.S. organizations); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 598 (2006) (reporting that sixty-three percent of employers surveyed were using affirmative action plans by 2002).

406 *See, e.g.*, Tomaskovic-Devey & Stainback, *supra* note 395, at 63–64 (2007) (showing that labor-force–integration measures have remained relatively flat since the 1980s).

407 *See* Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 974–76 (1998); *see also* Kalev et al., *supra* note 405, at 611 (discussing a variety of diversity measures and concluding that successful initiatives typically include accountability measures).

play a role in perpetuating workplace inequality. By designing their own compliance measures and signaling what business practices constitute compliance, employers become important interpreters of law, and their self-governance strategies may not only displace law but also acquire the force of law.[408]

Edelman refers to this phenomenon as "legal endogeneity," or the "managerialization of law,"[409] which has two components. First, Edelman posits that employers "actively participate in constructing the meaning of compliance,"[410] including by deploying compliance strategies within their own workplaces and rationalizing them as methods of litigation avoidance, and by improving organizational efficiency in the guise of promoting diversity.[411] That is, the employer's business interests come to influence its interpretation of compliance, and antidiscrimination norms are thus filtered through a lens of market rationality. Second, Edelman has demonstrated that the organizational process of constructing compliance "generates ideologies of rationality, which legitimate and reinforce particular compliance strategies,"[412] including by obtaining approval of such strategies in legal decisions.[413]

Diversity initiatives carry the risk of being predicated on a cynical motivation to "bulletproof" the employer against litigation risk, rather than a sincere motivation to improve the prospects of women or minorities.[414] Even where the employer's motivations are not overtly cynical, the form and intensity of those measures may be undermined by the priority of business interests.[415] Indeed, employers define di-

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408 To view this phenomenon within larger trends toward deregulation and self-governance beyond antidiscrimination law, see generally Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 487 (2003).

409 Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 337, 337 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); *see also* Edelman et al., *supra* note 405, at 1592.

410 Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 407 (1999).

411 *See id.*; *see also* Edelman et al., *supra* note 405.

412 Edelman et al., *supra* note 410, at 407.

413 *See id.* at 434–36.

414 Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959, 966 (1999).

415 Employers may be persuaded to adopt voluntary compliance measures by reinterpreting legal norms to coincide with business objectives. For example, employers may embrace diversity initiatives based on the view that a diverse workforce expands the employer's access to human capital or to a clientele that shares a particular diversity profile; diversity is therefore a business resource, not a legal command to eliminate discrimination. *See* Edelman et al., *supra*

versity along a number of axes, deviating from the specific commands of federal employment discrimination law to facilitate integration measured within particular categories of social status (e.g., race, sex, religion, age, disability).[416] Edelman conducted a study of diversity rhetoric in the American management community, including corporate managers and equal employment opportunity professionals, and determined that "diversity rhetoric in fact expands the conception of diversity so that it includes a wide array of characteristics not explicitly covered by any law."[417] As diversity becomes associated with more efficient use of human capital and increased business opportunity, antidiscrimination efforts are often viewed as just the opposite—that is, as a drag on institutional innovation and efficiency.[418] Professor Edelman further observes that this rhetoric places diversity concerns relating to traits having no particular legal status on par with diversity concerns related to protected categories such as race and sex.[419] This is significant not only because it may divert employers' attention from the equality commitments of antidiscrimination law, but also because it may influence courts to conclude that the proper, and indeed prevalent, form of remedial compliance succeeds in promoting workplace equality without using status-based preferences or benchmarks. Indeed, the trend of legal interpretation has progressed exactly this way, with the *Johnson* Court, for example, upholding an affirmative policy *because* it lacked quotas and used sex-based preferences only as part of a broader set of considerations.[420]

Edelman's work further demonstrates that, through legal endogeneity, employers come to adopt and to rely on practices with little or no proven positive effect. For example, her work on equal employment opportunity offices and affirmative action plans indicates that

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note 405, at 1619 ("Profit is in fact the most frequently cited reason offered by [business-related] articles in support of organizational diversity . . . .").

416 *See id.* at 1616–17.

417 *Id.* at 1590. Edelman documents as examples of this expansion references to "[d]iversity of thought, lifestyle, culture, [and] dress." *Id.* at 1590–91.

418 *See id.* at 1620–21 (collecting examples of diversity rhetoric hostile to civil rights, including one author's comment in a management trade journal that "[u]sing diversity as a process to be managed unleashes performance energy *that was previously wasted in fighting discrimination*" (emphasis added) (quoting H. William Vroman, Book Review, ACAD. BUS. EXECUTIVE, Aug. 1994, at 107, 107)).

419 *Id.* at 1591.

420 *See supra* notes 331–34 and accompanying text. The Court's equal protection jurisprudence has even more decisively imposed restrictions on the public use of affirmative action programs. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 734 (2007); Gratz v. Bollinger, 539 U.S. 244, 275 (2003); Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

they have remained in use even though neither appears to have improved the workforce representation of women or minorities.[421] Her work on internal dispute resolution demonstrates that, although employers adopted such measures primarily to avoid legal enforcement actions, this justification is only a "rational myth," as such procedures "have little effect on the volume of complaints to external fair employment agencies."[422] One notable effect of these procedures is that they provide the employer with opportunities to recast the events that precipitated the complaint in a light that minimizes their relevance to employment discrimination law by focusing on mundane explanations for grievances, such as personality conflicts.[423] Employers' compliance strategies are therefore largely symbolic, and, "because the normative value of these structures does not depend on their effectiveness, they do not guarantee substantive change in the employment status of minorities and women."[424] In addition, these procedures develop over time as "organizational ideologies of rationality" that "*induce the judiciary* to incorporate grievance procedures into legal constructions of legal compliance with EEO law."[425] Edelman concludes that the Supreme Court's creation of the *Faragher-Ellerth* affirmative defense provides precisely such a victory for the managerialization of law.[426]

Other scholars have relied on Edelman's work to caution that courts have come to sanction diversity and antidiscrimination training programs that have little proven effect in ending discrimination.[427] Still others have corroborated this view in other contexts. For example, Professor Vicki Schultz has shown that employers often design antiharassment policies that, even when couched as litigation prevention measures, are intended to satisfy employers' assumptions that sexuality undermines business efficiency rather than to pursue the civil rights objective of improving sex equality in the workplace.[428] Schultz and other scholars have also shown that antiharassment poli-

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421 *See* Lauren B. Edelman & Stephen M. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RES. SOC. STRATIFICATION & MOBILITY 107 (1999).

422 Edelman et al., *supra* note 410, at 425.

423 *See id.* at 433.

424 Edelman et al., *supra* note 404, at 75.

425 Edelman et al., *supra* note 410, at 408.

426 *Id.* at 435–36.

427 *See, e.g.*, Bisom-Rapp, *supra* note 414, at 971–75; *see also* Kalev et al., *supra* note 405, at 604 (criticizing training as ineffectual). Of course, the most significant of these are the antiharassment policies that the Supreme Court sanctioned by making them essential to the defendant's affirmative defense against vicarious liability. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764–65 (1998).

428 *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2089 (2003).

cies and diversity training often have the perverse consequence of harming the women workers they are putatively intended to protect, for example by denying women access to effective mentoring and networking or by otherwise segregating women in the workplace because their male colleagues fear that by interacting with women they may inadvertently run afoul of antiharassment policies.[429] Furthermore, Schultz's research reveals that the human resources personnel and equal employment opportunity professionals who design and implement antiharassment policies typically describe these policies as having business purposes (e.g., promoting business efficiency by reducing the distraction of sexuality in the workplace) and rarely if ever envision them to be part of an effort to achieve sex equality in the workplace (e.g., by using investigations of sexual harassment to ask whether harassment is linked to other forms of sex discrimination).[430]

Disparate treatment theory should play an important role in shaping employers' compliance strategies, including diversity initiatives, in order to better fulfill antidiscrimination law's goal of promoting equal employment opportunity. It should establish accountability for such measures by allowing women and minorities to bring suit when a diversity initiative has resulted in an adverse employment action by denying them meaningful employment opportunities, just as it already does for nonminority workers by permitting reverse discrimination claims. As discussed in Part IV.A, courts already interpret diversity initiatives as evidence of reverse discrimination. This may seem shocking, particularly given the prevalence of diversity measures in the American workplace. And indeed there may be good reason to require courts to make careful distinctions between different types of diversity measures and to establish a nexus between those measures and challenged employment decisions before concluding that the diversity measures have probative value.[431] More outrageous, however, would be to permit nonminorities to challenge diversity initiatives through reverse discrimination claims while denying women and mi-

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429 Cynthia Fuchs Epstein et al., Report, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 292, 376 (1995); Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1177–78 (2000); Schultz, *supra* note 428, at 2134–35 (showing that segregationist responses to the threat of harassment claims occur at the individual and organizational level).

430 *See* Schultz, *supra* note 428, at 2131–36.

431 In addressing diversity initiatives that harm their intended beneficiaries, I am speaking primarily about initiatives that classify on the basis of the beneficiary's status and have a direct connection to their employment injury. These are the situations in which we can be sure that status causation is fully established without proof of motive.

norities similar opportunities to challenge practices that cause them tangible employment injuries. To take such a position would be to deny persons who are the object of such initiatives the opportunity to expose the failings of those initiatives and to hold employers accountable accordingly. This position would be fully consistent with a disparate treatment jurisprudence that limits the employer's liability based on proof of prejudice. It is, however, inconsistent with existing disparate treatment doctrine which does not limit liability based on proof of prejudice, but instead embodies normative commitments to equal treatment and equal employment opportunity. Moreover, this position would also fail to encourage effective strategies of voluntary compliance because it would not hold employers accountable for compliance strategies that perpetuate and legitimate historical patterns of social subordination, unless the plaintiff also showed that the defendant's choice to pursue a particular strategy was motivated by prejudice.

Of course, sham compliance measures used by the employer to conceal its plan to discriminate against members of a particular status group are ripe for challenge under disparate treatment theory, and their disposition will turn on evidence of the employer's invidious motive.[432] Less clear is how the law should judge compliance measures that make status-based distinctions in a good faith effort to promote prodiversity goals, if such measures cause adverse employment actions against persons whom they were intended to benefit. This Article's concern is not with the potential stigmatic or reputational harms that may be caused by status-based diversity measures.[433] Rather, it is concerned with the rights of women and minorities to equal treatment, the denial of which permits the perpetuation of workplace segregation and status inequality. It is concerned with concrete harms that women and minorities experience when access to mentoring, work assignments, training, promotions, and other employment opportunities is constrained by their status.

Discrimination as compliance may test the limits of the law's equality commitments, but we cannot and should not determine how

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432 *See, e.g.*, Lust v. Sealy, Inc., 383 F.3d 580, 587–88 (7th Cir. 2004) (upholding the exclusion of a business memorandum that explained the reasons for the employer's decision not to promote the plaintiff employee on the basis that "[t]here is no more facile a method of creating favorable evidence than writing a self-exculpatory note").

433 *See, e.g.*, Madeline E. Heilman et al., *The Affirmative Action Stigma of Incompetence: Effects of Performance Information Ambiguity*, 40 ACAD. MGMT. J. 603, 620–21 (1997); Madeline E. Heilman & Brian Welle, *Disadvantaged by Diversity? The Effects of Diversity Goals on Competence Perceptions*, 36 J. APPLIED SOC. PSYCHOL. 1291, 1301–02, 1313, 1317 (2006).

the law should meet this test by asking solely whether the motivation for a particular challenged practice conforms to a psychological definition of prejudice. On the one hand, employment discrimination laws were intended "to promote conciliation rather than litigation,"[434] and voluntary compliance measures may help to fulfill that goal. On the other hand, the Supreme Court has recognized that Congress designed Title VII to avoid circumstances in which "[d]iscrimination could actually exist under the guise of compliance with the statute."[435] Even where the employer's motivations for promulgating diversity initiatives are sincere, Edelman has shown that the subordination of diversity to business interests renders employers poor enforcers of antidiscrimination norms.[436]

Weber and *Johnson* do not speak directly to diversity initiatives that lack a traditional affirmative action component,[437] and the zone of employer discretion that might shield such initiatives from disparate treatment analysis is uncertain after *Ricci*. The Supreme Court has long encouraged employers to engage in voluntary compliance. Within disparate treatment doctrine, workplace diversity is one of the factors considered under a totality of the circumstances analysis when determining whether the employer acted on a discriminatory motivation.[438] Nevertheless, proportional representation, even as a result of affirmative action, grants no immunity from liability.[439] Rather, Schultz has observed that when employers raised affirmative action policies as a defense to disparate treatment liability in early race discrimination cases, courts adopted a "historical perspective," re-

434 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998).

435 Griggs v. Duke Power Co., 401 U.S. 424, 435 (1971) (internal quotation marks omitted).

436 *See* Edelman et al., *supra* note 404, at 76–79 (describing how affirmative action officers and in-house attorneys face a "structural conflict" in which they must negotiate between the public interest of effective law enforcement and their own personal self-interests which are intertwined with the business objectives of their employers).

437 Such diversity initiatives typically are not undertaken (as required by the *Weber-Johnson* test) to remedy a "manifest imbalance" in the employer's labor force or to remedy past discrimination, nor typically do such initiatives use benchmarks or other accountability measures that are frequently a defining feature of affirmative action policies. *See* Kalev et al., *supra* note 405, at 610.

438 *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978) ("Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.").

439 Even under disparate impact theory, an affirmative action policy cannot be used to rebut a prima facie showing of disparate impact (i.e., that the employer's policy alleviates the statistical disparity); rather, employers must defend the practice that produces the disparate impact based on job-relatedness and business necessity. *See* Connecticut v. Teal, 457 U.S. 440, 442 (1982).

specting the equality concerns of the statute and "evaluat[ing] employers' claimed efforts to attract minorities critically, with an eye toward results."[440] By contrast, an approach to the adjudication of claims brought against today's diversity initiatives that considers only the employer's motivations and overlooks the extent to which these initiatives themselves perpetuate workplace inequality will fail to ensure that these initiatives fulfill any statutory purpose.

As discussed above, good intentions do not preclude a finding of liability. They do, however, speak to damages. In *Kolstad v. American Dental Ass'n*,[441] the Court held that an employer who engaged in "good faith efforts to comply with Title VII,"[442] including through the enforcement of an antidiscrimination policy, could avoid an award of punitive damages. The Court reasoned that permitting such a limitation of damages "motivat[ed] employers to detect and deter Title VII violations."[443] Here, the Court concluded that the significance of good faith compliance lies with the determination of damages and not liability. This is consistent with the developing picture after *Ricci* that the employer's discretion is not infinite; it does not permit the employer to be excused from liability by cloaking discrimination in putative compliance.

Consider the following example. A female junior associate is assigned a female partner mentor upon accepting a position at a law firm. Work assignments are made to associates through their partner mentors. Partner-mentor evaluations of associate performance carry substantial weight in decisions regarding promotion and compensation. The firm's purpose in assigning female associates (but not male associates) partner mentors on the basis of sex is to improve recruitment and retention of women lawyers. The firm has few female partners, most of whom are not among the most powerful or well-regarded partners in the firm and therefore lack access to certain premiere clients and high-status work.[444] In addition, women partners

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440 *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1789 (1990) (criticizing sex discrimination cases in which courts gave special consideration to employers asserting a lack-of-interest defense to sex-based job segregation because those employers demonstrated that they had used affirmative action policies to attempt to attract women workers).

441 Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999).

442 *Id.* at 544.

443 *Id.* at 546 (internal quotation marks omitted).

444 *See, e.g.*, Belle Rose Ragins, *Diversified Mentoring Relationships in Organizations: A Power Perspective*, 22 ACAD. MGMT. REV. 482, 514 (1997) (discussing the danger to minority workers of receiving mentorship from minority superiors who lack institutional power).

carry a disproportionately high number of mentees to fulfill the needs of the same-sex mentor system. If our hypothetical junior associate is denied compensation and subsequently partnership due to her lack of access to high-status work assignments and the relative weight assigned by the firm to her mentor's otherwise positive performance reviews, is she also required to show that the firm's policies are motivated by pernicious sex stereotypes or other prejudice in order to bring a successful sex discrimination claim? Certainly not. Where, as here, the defendant's policy discriminates on its face and that discrimination results in adverse employment action, no further evidence of the defendant's motivation is needed to prove causation.

In order for the employer's discretion to experiment with compliance measures to fulfill the objectives of antidiscrimination law, diversity initiatives that practice status-based distinctions between employees must be subject to the scrutiny of disparate treatment theory. Women and minorities must be permitted to challenge these practices when they are harmed by them, just as nonminority employees would be able to do. The legal and sociological scholarship in this field demonstrates that it would be naive to presume that all voluntary compliance measures redound to the advantage of their intended beneficiaries or even that the majority of such measures adopt workplace equality as their primary goal.[445] Antidiscrimination laws define a narrow band of prohibited conduct based primarily on *how* the employer arrives at the challenged action, and they leave the employer wide latitude to determine what conduct falls within the broad, undifferentiated category of "compliance." However, when the employer designs compliance measures based on the protected statuses of their putative beneficiaries and those beneficiaries suffer adverse employment actions as a result, those beneficiaries have suffered disparate treatment regardless of the employer's benevolent intentions. No additional proof of invidious motive is necessary, nor should it be. Subjecting such practices to the scrutiny of disparate treatment theory would give employers proper incentive to design effective measures and to enforce them diligently. It may also cause employers to abandon some measures; however, failed compliance measures that maintain and legitimize workplace inequality are no victory for antidiscrimination law.

When viewed in this light, the crossroads faced by disparate treatment doctrine is not about prejudice, and the uniqueness of contem-

445 *See supra* notes 415–36 and accompanying text.

porary workplace discrimination is not solely defined by a new kind of prejudice. This does not mean, however, that the cognitive account of discrimination will not be helpful in assessing status causation when such causation cannot be proved through other means.

Consider again the prior hypothetical. What if our hypothetical firm had the very same mentoring policy, but our junior associate's partner mentor had substantial access to high-quality work? Suppose also that this partner mentored our female junior associate and a male junior associate. Both associates have preschool-age children. The partner assigns high-quality work to the male associate, but assigns only superficial, less time-intensive work to the female junior associate. Were she now to bring a claim, she could not rely on the sex-based nature of the partner assignment system. She may, however, successfully rely on role-congruity sex stereotyping to explain why the unequal treatment suffered at the hands of her partner mentor was because of sex. In this version of our hypothetical, the cognitive account of prejudice is poised to make a very substantial difference to the outcome.[446] We have here an overlap between the phenomenon of discrimination as compliance and the phenomenon of implicit discrimination. The central point, however, is that theories of prejudice should influence only those cases in which proof of prejudice is required to establish causation. This will not be so in all cases, and so we must not think of prejudice as constitutive of discrimination.

The conversation that ought to be had in relation to discrimination as compliance is a conversation about Title VII's equality commitments and their application to practices undertaken without prejudice. Ordinarily, we associate antisubordination norms with disparate impact theory or with affirmative action. Here, however, equal treatment and antisubordination norms are aligned in that the application of disparate treatment theory serves to ensure that policies purported to fulfill the objectives of equality law do so or, if they do not, that their failure is not because of the plaintiff's status. Certainly such practices may fail because they were intended to conceal an invidious purpose, or they were motivated by implicit stereotypes. But they also may fail because they were given facile consideration and dedicated insufficient resources to enforce accountability, or because employers considered them to be litigation-prevention measures that

446 *See supra* note 194 (citing cases in which employers similarly engaged in sex stereotyping by making performance-related assumptions about female plaintiffs with caregiving responsibilities); *see also* Glick & Fiske, *supra* note 78, at 507 (reporting that women, as well as men, engage in some forms of ambivalent sexism).

have exculpatory value regardless whether they actually increase workplace equality, or because employers considered them to be simply another means of promoting business efficiency. From the victim's perspective, the failure is identical regardless of the employer's motivation and, where these practices are status-based, this should be the law's perspective as well.[447]

V. THE NORMATIVE INADEQUACY OF PREJUDICE AS A REQUIREMENT OF DISCRIMINATION

Discussions of prejudice have unique significance for the theory and practice of antidiscrimination law.[448] Contemporary psychology offers both descriptive and normative contributions to the law's understanding of prejudice in relation to disparate treatment theory. Descriptively, contemporary psychology explains the cognitive processes through which prejudice may influence social behavior; these processes may be relevant to the evaluation of evidence in disparate treatment cases. For example, according to the cognitive account of prejudice, the plaintiff's inability to disprove the defendant's professed innocent intentions should be viewed as largely inconsequential to a finding of discrimination, because the defendant should not be presumed to be aware of cognitive biases that may have influenced his judgment or perception.[449] In such cases of implicit discrimination, the defendant may sincerely believe that he acted for a legitimate, nondiscriminatory reason, and yet cognitive bias and not the defendant's conscious reason was the true cause of the defendant's action.[450] The cognitive account of prejudice offers a useful contribution in this instance because its application is fully consistent with disparate treatment theory: the cognitive account of prejudice provides the factfinder with a means to look beyond the decisionmaker's professed good intentions to make the finding of status causation necessary to sustain a claim of disparate treatment,[451] or, alternatively, it may enable the plaintiff to show that status was a motivating factor in the defendant's decision even if other considerations cannot be disproved.[452]

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447 *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–55 (1978).

448 *See supra* Part II.A.

449 *See supra* notes 171–73 and accompanying text; *see also supra* Part I.B.1.

450 *See supra* notes 165–70 and accompanying text.

451 *See supra* note 216 and accompanying text.

452 *See supra* notes 313–17 and accompanying text.

Normatively, the cognitive account of prejudice stands in tension with the legal definition of discrimination, because psychology does not define the decisionmaker's conduct as discriminatory except based on evidence of his bias. Such an approach is consistent with the intuitive assumption of a constitutive relationship between prejudice and discrimination, but it is inconsistent with existing disparate treatment doctrine, which defines conduct as discrimination because it constitutes status-based unequal treatment. Within the discipline of psychology, the cognitive account of prejudice expands upon prior conceptions of prejudice, providing a more inclusive understanding of prejudice and enlarging the category of behaviors that may be called discrimination because they are caused by a decisionmaker's bias.[453] In relation to disparate treatment doctrine, however, the cognitive account of prejudice represents a contraction of the definition of discrimination to the extent that it views prejudice to be a defining feature of discrimination. Disparate treatment doctrine does not—and due to its equality commitments should not—require proof of prejudice in order to remedy adverse employment actions that are motivated by the plaintiff's status.[454] The critical issue according to disparate treatment doctrine is not whether the plaintiff has been the victim of either conscious or unconscious prejudice, but whether the plaintiff has been treated differently from other similarly situated persons because of his or her status. Status-based unequal treatment is the defining feature of disparate treatment discrimination, and proof of prejudice is relevant only to the extent that it is required to demonstrate that the defendant's conduct was caused by the plaintiff's status.

Moreover, to describe prejudice as an element of disparate treatment may discourage claims predicated on the defendant's well-intentioned actions, unless those actions were otherwise tainted by implicit bias. Such talk of prejudice signals to employers and prospective plaintiffs[455] that benevolent employers cannot be discriminators and

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453 *See supra* Part I.B.

454 *See supra* Part III.E.

455 In particular, employees' understandings of employment law and the employer's legal obligations are largely shaped by information received from the employer and by observing the employer's efforts to implement compliance frameworks. *See* Sally Riggs Fuller et al., *Legal Readings: Employee Interpretation and Mobilization of Law*, 25 ACAD. MGMT. REV. 200 (2000). To a certain extent, employer policies such as internal grievance procedures and compliance officers have a quasi-juridical appearance that lends to their impression of legal sanction and legitimacy. *See id.* at 203–04; *see also* Edelman et al., *supra* note 410, at 416–18. As a consequence, diversity initiatives may continue to be infrequent subjects of legal challenge by their purported beneficiaries until legal actors and scholars more directly clarify that such practices are subject to challenge. The proliferation of reverse discrimination claims following the Reagan

that diversity initiatives in particular are beyond legal challenge even where they perpetuate historical patterns of workplace inequality or lack internal accountability measures sufficient to ensure the sincere pursuit of prodiversity goals. The cognitive account of prejudice appears to endorse this result, for it suggests that the plaintiff's failure to demonstrate that the defendant's actions were tainted by cognitive bias is tantamount to a failure to prove discrimination. If adopted, such an approach would depart from existing doctrine and restrict the plaintiff's protections against discrimination.

The defendant's benevolent intentions are irrelevant to the adjudication of a disparate treatment claim not only in cases of implicit discrimination, where the plaintiff can show that the defendant was deceived regarding the extent to which his intentions were in fact regulating his behavior, but also in a more general sense because the defendant's good intentions do not excuse status-based unequal treatment.[456] The *Ricci* decision reaffirms this conclusion by holding that even an employer's voluntary compliance efforts are not immune from disparate treatment liability when they subject plaintiffs to status-based unequal treatment.[457] Although in *Weber* and *Johnson* the Supreme Court held that Title VII's commitment to equal employment opportunity justified an exception to disparate treatment liability for affirmative action programs addressing a manifest racial or gender imbalance, the *Ricci* Court concluded that at least some compliance efforts not covered by the *Weber-Johnson* rationale are susceptible to challenge under disparate treatment theory.[458] Future cases may address what restrictions should be placed on this type of challenge, including whether women and minorities who are the purported beneficiaries of these voluntary compliance efforts stand on equal footing with nonminorities to challenge these practices.

The example of discrimination as compliance discussed in Part IV presents a set of circumstances under which to permit such challenges would be fully consistent with Title VII's equality commitments and would also represent a permissible encroachment on the employer's

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Era of enforcement demonstrates that the public interpretations of legal actors matter in conveying to prospective plaintiffs the nature and authority of their civil rights.

456 Evidence of a defendant's good faith compliance and prodiversity efforts may be relevant in other ways, such as by undermining the credibility of plaintiff's contention that the defendant's actions were motivated by bias, *see supra* note 377 and accompanying text, or by supporting an affirmative defense against an award of punitive damages, *see supra* note 371 and accompanying text.

457 Ricci v. DeStefano, 129 S. Ct. 2658 (2009).

458 *See supra* notes 366–75 and accompanying text.

discretion because the employer's conduct was indeed status-based.[459] Moreover, by permitting women and minorities to bring such challenges, the law would provide a meaningful check against the proliferation of status-based compliance measures that do not enhance equality of employment opportunity and are instituted merely to serve the employer's self-interest. By contrast, a determination that such compliance measures are immune from disparate treatment challenge would effectively grant to employers the authority to determine the form of legal compliance and to set the terms by which their employment practices may evade legal scrutiny.[460]

One may object that the constitutive view of the relationship between prejudice and discrimination is the right approach for disparate treatment theory because it best establishes the employer's fault as a basis for liability. This argument is at its most powerful when it adopts a more restrictive view of prejudice, more akin to the concept of prejudice originally proposed by Allport than the current cognitive view, because Allport's concept of prejudice maintained that prejudicial attitudes and beliefs are amenable to self-reporting and that awareness of one's own prejudices (and their contradiction of social norms) produces inner conflict.[461] The view that prejudices are subject to conscious awareness and manipulation is better suited to advance a fault-based theory of liability than a view that raises questions about the perpetrator's ability to avoid discriminatory behavior through conscious control.[462] It would, however, suffer from the very deficiencies identified by behavioral realists,[463] and it would be contrary to existing disparate treatment doctrine. Disparate treatment liability is not based on such a restrictive view of prejudice or a theory of individual fault.[464] Disparate treatment represents a theory of accountability based on causation rather than a traditional notion of fault. Proof of prejudice, or discriminatory intent, may be particularly helpful in collapsing factual inquiries into status causation and control causation into a single inquiry—that is, was the defendant's action

459 *See supra* Part IV.B.

460 Edelman describes a process of "legal endogeneity" through which employers shape the form of legal compliance and influence judicial determinations of the sufficiency of their compliance under circumstances where their discretion to pursue compliance strategies is less certain than it would be if compliance measures were held to be immune from disparate treatment challenge. *See supra* notes 408–11 and accompanying text.

461 *See supra* Part I.A.

462 *See supra* notes 116–21 (discussing issues raised by implicit social cognition research regarding conscious control of implicit biases).

463 *See supra* notes 159–74 and accompanying text.

464 *See supra* Part III.D–E; *see also* Bagenstos, *supra* note 1, at 483–84.

motivated by prejudice? Evidence of conscious prejudice is particularly effective at streamlining this inquiry, because we typically expect that actors are responsible for actions that comport with their intentions. However, disparate treatment theory permits the individuation of these distinct causal inquiries. The point is that they must be satisfied, not that they must necessarily be satisfied in unison.

If one rejects that portion of the Supreme Court's doctrine that makes no special concession for well-intentioned acts of disparate treatment, one may define disparate treatment according to the cognitive account prejudice and simply accept the consequence that acts of discrimination as compliance will be largely immune from legal challenge. Such a position could not claim to expand the enforcement of antidiscrimination law for the reasons discussed here; it must be content to refocus the law's attention. This approach represents a dilution of the law's equality commitments, for the reasons discussed above. Even setting aside those commitments, this position should give us pause because the cognitive account of prejudice suffers from its own deficiencies. For example, as shown in Part I, the cognitive account of prejudice represents an evolving construct that is at times a source of ambiguity and contestation rather than analytical clarity. Contemporary psychology rejects the limiting elements of Allport's definition of prejudice, which equated the negative component of prejudice with hostility. The new prejudice is understood as an attitudinal response to feelings of guilt, shame, or sympathy, and may also be motivated by an individual's inflated perception of his own objectivity or by anxiety relating to the individual's sincere egalitarian values.[465] An individual may hold both hostile and benevolent stereotypes of a target's group, and either may trigger the individual to engage in discriminatory behavior.[466] With such a variety of bases on which bias may be classified as negative and therefore prejudicial, the new prejudice suffers from boundary problems that would make a constitutive view of the relationship between prejudice and discrimination difficult to enforce, particularly without the option to prove status causation by other means.[467] Some may argue that the success

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465 *See, e.g.*, *supra* notes 71–77 and accompanying text.

466 *See, e.g.*, *supra* notes 78–89 and accompanying text.

467 Along these lines, Professors Hal Arkes and Philip Tetlock have protested that "the case has yet to be made that implicit prejudice is prejudice." Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?,"* 15 PSYCHOL. INQUIRY 257, 258 (expressing the assumption that prejudice *is* a "value-laden characterization"). Professors Gregory Mitchell and Tetlock have responded to legal scholars' attempts to make use of cognitive science by arguing that the theory of implicit prejudice

of bias claims ought to turn on the plaintiff's ability to convince the court and the jury that paternalistic values are inherently pejorative and degrading; that is, that they are hostile no matter how they are endorsed or intended. Perhaps this approach would have the benefit of encouraging the factfinder to update the law's understanding of prejudice in response to evolving social norms, but it does not solve the boundary problem. What biases qualify as paternalistic? Should plaintiffs succeed only by proving hostility or paternalism? What if the defendant were motivated by an egalitarianism that, once put into action, is spoiled by feelings of mistrust or personal guilt?

Even psychologists have puzzled over this boundary problem. Some have attempted to clarify it through the use of experiments, such as those separating the effects of hostility from those of egalitarianism and misperceived objectivity.[468] Others have argued that, to be able to explain prejudice as a "social problem" (e.g., sexism or racism) psychologists must appreciate the social context that makes cognitive bias socially salient.[469] Some have described this approach as "sociocultural psychology," which seeks to connect theories of cognitive bias with a sociological understanding of racism, for example, that views it as a structural source of oppression.[470] The desire of these authors to place cognitive prejudice and stereotyping in a social and historical context in order to distinguish those biases that have social relevance from those that do not, reinforces the point that there is prejudice, and then there is prejudice.[471] Blurring the distinctions between cognitive and sociohistorical concepts of prejudice will not result in a clearer understanding regarding what concept of prejudice ought to have legal significance. Rather, these scholars demonstrate that the search for stability and normative salience will bring one be-

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contradicts the commonsense understanding that all attitudes "imply an evaluative preference that, when brought to people's attention, they endorse and are even prepared to justify under appropriate conditions." Mitchell & Tetlock, *Perils of Mindreading*, *supra* note 3, at 1080. These authors propose a critique of the science of implicit social cognition that is not the project of this Article. These authors have, however, exploited a boundary problem in the theory of implicit bias that poses a further problem of legal interpretation, which is an important consideration here.

468 *See, e.g.*, *supra* notes 100–02 and accompanying text.

469 *See* Eagly, *supra* note 67, at 55–59.

470 Glenn Adams et al., *Beyond Prejudice: Toward a Sociocultural Psychology of Racism and Oppression*, *in* COMMEMORATING *BROWN*: THE SOCIAL PSYCHOLOGY OF RACISM AND DISCRIMINATION 215 (Glenn Adams et al. eds., 2008).

471 *See supra* notes 103–07 (discussing research demonstrating that the cognitive account of prejudice is overinclusive because it considers attitudes to be prejudice that members of a society may believe to be justified).

yond the cognitive account of prejudice to a sociohistorical account that is generally more consistent with the manner in which legal norms are typically identified and expressed.

The concept of prejudice is a rich and complex source of interpretive meaning in antidiscrimination law. It aids in the articulation of the law's founding normative commitments, but in doing so it reaches beyond limited cognitive models to embrace a sociohistorical account of the social meaning and structural impact of prejudice. Implicit social cognition theory is not bounded by a sociohistorical narrative to which it can periodically return to refresh or, if necessary, to re-anchor its understanding of prejudice. Nor should it be. What it means for the cognitive conception of prejudice to be unbounded is that it has the potential to exist at a level of analytical clarity and scientific objectivity. But it also means that it lacks a clear account of its relation to social and legal norms. The cognitive account may encourage us to believe that the reason to enforce antidiscrimination law is to neutralize cognitive bias, but then our question must be, why should we be limited to doing only that?

The reason to address prejudice in the form of cognitive bias must be that bias-related discrimination is a source of inequality. Prejudice is salient to antidiscrimination law because equality is its goal. A sociohistorical approach to prejudice more closely aligns with a concern for social equality than the cognitive approach, but both present interpretive limits on the law.[472] The former includes not only individual attitudes but also institutional structures and patterns of subordination.[473] When one speaks of neutralizing prejudice in this sense one is not only stating that the law's purpose is to render the bias of individual social actors ineffective or to transform it through incentives and deterrence into a more benign set of attitudes and beliefs. One is also saying that it is the purpose of antidiscrimination law to disestablish institutional arrangements that have maintained historical patterns of social subordination. Certainly reducing cognitive bias in the workplace is relevant to equal treatment, and therefore relevant to avoiding disparate treatment. It seems indifferent, however, to structural inequality except when we consider its origins in shared cultural experience and social meaning.

Finally, social psychology itself provides an additional reason to suspect that making liability turn on a finding of prejudice will decrease the likelihood that the factfinder will find certain conduct to be

472 *See supra* notes 318–24 and accompanying text.

473 *See supra* Part II.A.

discrimination. In experiments, laypersons have been shown to find attributions of prejudice more difficult and anxiety-provoking than judgments of discrimination, and they apparently do not require an antecedent finding that a particular person is prejudiced in order to identify that person's conduct as discriminatory.[474] These experiments demonstrate that laypersons are capable of judging conduct discriminatory without clear evidence of prejudice or intent, and, when evidence of intent is either absent or ambiguous, individuals often decouple attributions of prejudice from judgments of discrimination.[475] Put another way, we should not expect consistency between attributions of prejudice (which are personal to the agent whose actions are under evaluation) and judgments of discrimination (which concern the nature of the action under evaluation and the harm that it causes, not just whether the relationship of action to injury were part of the agent's intentional plan).[476] To deny such consistency may frustrate the common sense constitutive view of the relationship between prejudice and discrimination. Regardless whether they would expect such a relationship ex ante when making judgments of discrimination, however, laypersons do not require evidence of such a relationship.[477] As psychologist Janet Swim and her colleagues have noted, "[p]eople may be more confident about labeling a particular behavior as discriminatory than generalizing from one behavior to the character of an actor, an attribute that may be presumed to have some cross-situational consistency."[478]

There is no reason to expect that attributions of prejudice—particularly of racism and sexism—decrease in controversy or social significance just because we have come to include implicit biases as species of prejudice. What makes attributions of prejudice unappealing is the stigma perceived to attach to a person who has been identi-

474 *See, e.g.*, Janet K. Swim et al., *The Role of Intent and Harm in Judgments of Prejudice and Discrimination*, 84 J. PERSONALITY & SOC. PSYCHOL. 944, 955–56 (2003) (stating that individuals may deem conduct discriminatory without clear evidence of intent and may find it easier to do so because attributions of prejudice confer stigma that individuals may feel uncomfortable conferring).

475 *See id.*

476 *Id.* at 944.

477 *Id.* at 945.

478 *Id.* Swim and her colleagues rightly acknowledge that this tendency may be reversed in special cases where factfinders understand the agent's actions to be constrained such that he is prevented from treating persons differently in a way that could be considered discriminatory. *Id.* at 957. In such cases, they acknowledge that "[i]f a person knows that an actor wants to discriminate against a woman," but is precluded from doing so, "then the person may be more likely to judge the actor to be prejudiced than the actor's behavior to be discriminatory." *Id.*

fied to hold an unjustifiably biased point of view that might influence behavior across a range of social situations. Attributions of prejudice are personal in ways that judgments of discrimination are not. By emphasizing status causation over the particular motivation of the decisionmaker, we may preserve for the factfinder the option of assessing the act and not the actor—to find discrimination whether or not the factfinder also finds prejudice. Rather than forcing plaintiffs to produce evidence of prejudice in order to prove discrimination, antidiscrimination law rightly offers plaintiffs the opportunity to minimize the significance of prejudice in cases where causation is otherwise proved and, in doing so, demonstrates its superior interest in matters of inequality over attributions of prejudice.

CONCLUSION

The urgency expressed by calls to use the cognitive account of prejudice to reform disparate treatment doctrine reflects the legitimate concern of some antidiscrimination scholars that subtle forms of discrimination may otherwise go without remedy. We must not, however, underestimate psychology's capacity to restrict rather than to enlarge the scope of the law's protections. Under a variety of circumstances and through a variety of means, women and minorities face potential disadvantage by practices sincerely formulated to achieve compliance with antidiscrimination law. These plaintiffs ought not to be casualties of such practices without sufficient accountability structures to ensure that these practices are not indifferent to the plaintiffs' interests and to the purposes of antidiscrimination law. Existing doctrine gives plaintiffs the tools to enforce established norms of equal treatment and equal employment opportunity against such practices, and they should be encouraged to do so by a legal discourse that properly puts equality before prejudice.