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Stephanie Bornstein

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# Reckless Discrimination

Stephanie Bornstein\*

*If there are known, easily adopted ways to reduce bias in employment decisions, should an employer be held liable for discriminatory results when it fails to adopt such measures? Given the vast amount we now know about implicit bias and the ways to reduce it, to what extent is an employer who knowingly fails to do so engaging in intentional discrimination? This Article theorizes a “recklessness” model of discrimination under Title VII, arguing for liability where an employer acts with reckless disregard for the consequences of implicit bias and stereotyping in employment decisions. Legal scholars have argued that Title VII should, and in some ways does, reflect a negligence model under which an employer may be held liable for failing to meet a duty of care to prevent discrimination at work. Yet the law of Title VII disparate treatment requires “intentional” discrimination—a term that courts have interpreted more broadly than a conscious purpose to discriminate, but more narrowly than a mere failure to prevent “societal” discrimination. This Article is the first to propose recklessness as the bridge between the theory of negligence and the requirement of intent as defined by Title VII jurisprudence.*

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*In doing so, the Article seeks to revive the importance of social science research on bias—research that was limited in its evidentiary role by the U.S. Supreme Court’s 2011 decision in Wal-Mart v. Dukes. Decades of scientific research have documented how implicit bias and automatic stereotyping affect decision making in discriminatory ways. Years of efforts by employers to reduce bias and increase diversity in their workforces have demonstrated what interventions work. Most recently, technology has allowed some employers to easily and dramatically reduce the biasing effects of subjectivity from their hiring decisions by, for example, using algorithms instead of people to screen applicants. This vast body of research and experience developed over a half-century has shifted the baseline knowledge about the risks of bias infecting employment decisions, this Article contends. Today, an employer who continues to rely on unchecked subjective decision making that leads to disproportionate employment outcomes by race or gender is acting so recklessly that its behavior amounts to intentional disparate treatment under Title VII.*

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## INTRODUCTION

Twenty years ago, economists Claudia Goldin and Cecilia Rouse documented perhaps the most well-known example of how biases can infect subjective performance assessments despite decision makers' efforts to be objective.<sup>1</sup> Prior to the 1970s, most major American symphony orchestras were composed overwhelmingly of male musicians.<sup>2</sup> In the 1970s and 1980s, many orchestras began using a blind audition process, whereby musicians performed behind a screen that concealed the auditioning musician's identity.<sup>3</sup> Goldin and Rouse documented that, due in part to the blind audition process, the proportion of female members of the top five U.S. orchestras increased from 5 percent to 25 percent.<sup>4</sup> They also showed that a female musician was 50 percent more likely to get further in the audition process when orchestras used a blinding screen.<sup>5</sup>

Most commentators raise this well-worn example<sup>6</sup> for its vivid illustration of the phenomenon of "implicit bias" (also known as "cognitive" or "unconscious" bias), whereby ingrained attitudes about sex, race, or another status characteristic impact perceptions of performance despite decision makers' beliefs that they are unbiased.<sup>7</sup> This Article offers the orchestra example to make two further points. First, the audition blinding screen illustrates—concretely in fact—how a simple, inexpensive tool helped an employer interrupt or block its decision makers' unrecognized biases to select those most qualified.<sup>8</sup> Second, this research by respected Harvard and Princeton economists is *twenty years old*. Two decades have passed since Goldin and Rouse documented both a clear example of the problem of implicit bias in discretionary decision making and one easy solution to reduce its impact. Yet employment discrimination jurisprudence has failed to appropriately incorporate this understanding.

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1. See generally Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AMER. ECON. REV. 715 (2000) (describing orchestra auditions study); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, (Nat'l Bureau of Econ. Research, Working Paper No. 5903, 1997) (same), <http://www.nber.org/papers/w5903.pdf> [<https://perma.cc/SNC7-ZHVU>]. This example has been cited by not only numerous scholars, see *infra* note 6, but also by Justice Ruth Bader Ginsburg in her dissent in *Wal-Mart Stores, Inc. v. Dukes*. See 564 U.S. 338, 372 n.6 (Ginsburg, J., dissenting).

2. See Goldin & Rouse, AMER. ECONOMIC REV., *supra* note 1, at 717–18.

3. See *id.* at 715–16.

4. See Goldin & Rouse, Nat'l Bureau of Econ. Research, *supra* note 1, at 1; Goldin & Rouse, AMER. ECONOMIC REV., *supra* note 1, at 717–18, 738 & n.37.

5. Goldin & Rouse, Nat'l Bureau of Econ. Research, *supra* note 1, at 1; Goldin & Rouse, AMER. ECONOMIC REV., *supra* note 1, at 738.

6. In January 2017, a Google Scholar search returned over one thousand citations to the study.

7. See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006) (defining implicit bias and its role in law).

8. See Joan C. Williams, *Hacking Tech's Diversity Problem*, HARV. BUS. REV. (Oct. 2014), <https://hbr.org/2014/10/hacking-techs-diversity-problem> [<https://perma.cc/9WYQ-XGLC>]; *Bias Interrupters*, CTR. FOR WORKLIFE LAW, <http://worklifelaw.org/bias-interrupters> [<https://perma.cc/LHT6-QLPL>] (last visited Apr. 14, 2017); *Assessing Performance and Potential*, CTR. FOR THE ADVANCEMENT OF WOMEN'S LEADERSHIP, <http://gender.stanford.edu/assessing-performance-and-potential> [<https://perma.cc/BB5D-DEXD>] (last visited Apr. 14, 2017).

If, in 2017, an orchestra knowingly chooses not to use a blinding screen for auditions and the result is disproportionately fewer female musicians selected for hire, is that intentional discrimination? The orchestra may not have intended to exclude female musicians, but it acted with what, at this point in time, can only be described as reckless disregard for the consequences of its choice to rely on a decision-making structure long-known to foster bias, while ignoring a relatively costless bias-reducing measure.

Consider the panoply of “blinding screens” that modern technology offers today. Modeling itself on the popular competition television show *The Voice* (the 2017 version of blind auditions for orchestras), start-up company GapJumpers provides a technology platform through which employers can hold “blind audition challenges” online, which test job applicants’ relevant skills.<sup>9</sup> The desire to remove implicit bias from hiring in the technology sector has sparked a cottage industry to help employers do so, through blind interviews over online instant messaging software, application-screening algorithms, pre-commitment to set assessment standards, and more.<sup>10</sup> Researchers have developed tools for employers to spot and correct for unexamined biases throughout the employment relationship—from setting compensation to evaluating work performance to awarding promotions.<sup>11</sup> The ability to prevent and correct for bias and stereotyping in the workplace is more affordable and accessible than ever before. To what degree do employers behave in an intentionally discriminatory way when they ignore both the well-known risks of implicit bias in employment decisions and accessible, affordable techniques to help prevent it?

In the fifty years since Title VII of the Civil Rights Act of 1964 first prohibited employment discrimination on the basis of race, color, sex, national origin, and religion,<sup>12</sup> societal understanding of how bias perpetuates inequality at work has advanced exponentially.<sup>13</sup> Decades of research by contemporaries of Goldin and Rouse in the fields of economics, sociology, social psychology, neuroscience, and more have created a deep body of scientific work on which our current understanding is based.<sup>14</sup> For several decades now, even prominent employers have recognized the costs of more subtle and structural inequality to their operations, leading many to voluntarily adopt and experiment with interventions.<sup>15</sup> Business interest in this research inspired corporate

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9. See Marianne Cooper, *The False Promise of Meritocracy*, ATLANTIC (Dec. 1, 2015), <http://www.theatlantic.com/business/archive/2015/12/meritocracy/418074> [https://perma.cc/P4S9-QL8R]; *Discover Great Talent “The Voice” Way*, GAPJUMPERS, <https://www.gapjumpers.me> [https://perma.cc/PN68-DZW5] (last visited Apr. 14, 2017).

10. See *infra* Part III.B.2.

11. See *id.*

12. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e *et seq.* (2012)).

13. See *infra* Part III.B.1.

14. See *id.*

15. See *infra* Part III.B.2.

commitments to diversity and expanded the field of human resources.<sup>16</sup> The technology sector has also radically reshaped this field by making tools to prevent and reduce bias in employment decision making readily available.<sup>17</sup> Yet while Title VII provides a flexible statutory framework that would allow it to adapt to such advances, employment discrimination jurisprudence has failed to keep up. Where the federal courts' application and interpretation of Title VII once led the way toward employment equality for women and minorities, it has now fallen behind, failing to adapt the doctrine to recognize what society and employers already understand.

This Article offers a path forward by theorizing a “recklessness” model of discrimination under Title VII, arguing for liability where an employer acts with reckless disregard for the consequences of implicit bias and stereotyping in employment decisions. Legal scholars have argued that Title VII should—and, under some legal theories like harassment and accommodation, does—reflect a negligence model of liability that holds an employer liable for failing to meet its statutory duty of care to prevent discrimination.<sup>18</sup> Yet most Title VII cases are pled using the disparate treatment theory of liability, which courts have interpreted to require proof of “intentional” discrimination.<sup>19</sup> The meaning of “intent” under Title VII is, itself, unclear: courts have interpreted it more broadly than animus or a conscious purpose to discriminate, but more narrowly than a mere failure to prevent “societal” discrimination from affecting the workplace.<sup>20</sup> This Article is the first to propose recklessness as the bridge between the theory of negligence and the requirement of intent as defined by Title VII jurisprudence.

In doing so, the Article also aims to salvage the legal role of social science research on implicit bias and stereotyping—research that the Supreme Court held had limited evidentiary value in the Court's 2011 decision in *Wal-Mart v. Dukes*.<sup>21</sup> Six decades of scientific research has documented that people hold stereotypes and biases that they may act on automatically, without conscious awareness or discriminatory motive.<sup>22</sup> Though implicit biases are automatic, research also shows that there are known interventions to control or interrupt them, some of which employers have been using for years.<sup>23</sup> And, while this research may not provide evidence that an individual decision maker acted on implicit bias when making a particular employment decision, it does provide a general background upon which to judge the employer entity responsible for that

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16. See generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009) (documenting the role of personnel professionals in putting antidiscrimination law into practice).

17. See *infra* Part III.B.2.

18. See *infra* Part I.A.

19. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 112 (2009) (citation omitted) (“The bulk of employment discrimination cases turn on intent, and not on disparate impact.”).

20. See *infra* Part III.A.1.

21. See *infra* Part II.A.

22. See *infra* Part III.B.

23. See *infra* Part III.B.

individual decision maker's actions.<sup>24</sup> As this Article suggests, this vast body of research and experience has shifted the baseline knowledge about both the risks of bias infecting employment decisions and the methods to control it from doing so.

The Article proceeds in three parts. Part I identifies three existing and influential theories for framing disparate treatment under Title VII upon which this Article's theory of reckless discrimination builds: employer liability for negligent discrimination; employer liability for decisions affected by implicit bias, proven with social framework evidence; and an organizational context model of direct employer entity liability. In Part II, the Article addresses how the Supreme Court's 2011 decision in *Wal-Mart v. Dukes* impacted plaintiffs' ability to redress systemic disparate treatment and implicit bias under Title VII. This Part seeks to make a course correction in Title VII jurisprudence after *Wal-Mart* by separating the deep body of reliable social science research on implicit bias and stereotyping from the now seemingly disfavored "social framework" theory of proving systemic discrimination. Part III then builds upon Parts I and II by articulating a new theoretical framework for reckless discrimination that aims to help modernize Title VII's reach. This Part suggests that Title VII jurisprudence must adapt to reflect what we know about the more subtle and structural ways discrimination occurs today, and it offers the recklessness frame as one way to do so.

Importantly, a model of reckless discrimination does not seek to end discretionary decision making at work, which is a universally adopted practice without which most employers would be unable to operate. Instead, it seeks to improve upon such systems by creating a legal incentive for employers both to monitor how that discretion is being exercised and to correct for any detected bias before it results in liability for employment discrimination.

Also, as this Article will address, a theory of reckless discrimination is not a magic bullet. It, like the theories upon which it builds, offers strengths and weaknesses. A recklessness model may be subject to criticism from employment discrimination skeptics and Title VII purists alike. Skeptics may claim that recklessness does not prove "intent" to discriminate as required under Title VII; conversely, purists may argue that a recklessness frame misappropriates tort concepts and heightens what a Title VII plaintiff need prove, beyond what is required by statute.<sup>25</sup> While acknowledging that recklessness is not a panacea, this Article looks to the concept of recklessness to contribute a pragmatic, new approach to the ongoing efforts to remedy systemic employment discrimination in the wake of *Wal-Mart v. Dukes*. As societal understanding of the operation of discriminatory bias evolves, so too should our expectations of employer behavior and the legal doctrine by which it is regulated.

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24. See *infra* note 113 and accompanying text.

25. See *infra* Part III.C.2.

## I.

## EXISTING THEORIES FOR MODERNIZING TITLE VII DISPARATE TREATMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, firing, pay, and other “terms, conditions, or privileges” of work, as well as the adoption of policies or practices that “deprive any individual of employment opportunities” “because of” a protected classification (“race, color, religion, sex, or national origin”).<sup>26</sup> As interpreted, the statute recognizes two main causes of action for discrimination: disparate treatment—in which employees allege that their protected class played a role in adverse employment actions taken against them<sup>27</sup>—and disparate impact—in which employees allege that an employer’s facially neutral policy or practice disproportionately disadvantaged members of a protected class.<sup>28</sup> In addition, the Court has recognized subcategories of disparate treatment, including harassment, stereotyping, and, for the protected classes of religion and pregnancy, failure to accommodate as required by law.<sup>29</sup>

Using these theories, from the mid-1960s to the mid-1980s, cases brought under Title VII made significant headway in redressing obvious discrimination and advancing the employment opportunities of women and racial minorities.<sup>30</sup> By the late 1980s, however, awareness of antidiscrimination laws had become widespread and workplaces opened up to more diverse workforces.<sup>31</sup> The manifestations of discriminatory bias moved from exclusion in hiring to hostile treatment in the workplace and inequality in pay and advancement opportunities.<sup>32</sup> Cases alleging harassment, disparate impact, and sex stereotyping continued to make headway in redressing less overt discrimination, but by the late 1990s and into the early 2000s, advances in workplace equality stalled.<sup>33</sup> Disparities in employment equality for women and racial minorities persisted—and continue to do so today—particularly in the lack of diversity at the middle and top of organizations.<sup>34</sup>

26. 42 U.S.C. §§ 2000e-2(a)(1)–(2) (2012).

27. See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

28. See *Hazelwood*, 433 U.S. at 299; *Teamsters*, 431 U.S. at 324; *McDonnell Douglas*, 411 U.S. at 792; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

29. See, e.g., 42 U.S.C. § 2000e(j) (religious accommodation); 42 U.S.C. § 2000e(k) (pregnancy accommodation); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (stereotyping); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment).

30. See *35 Years of Ensuring the Promise of Opportunity*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/history/35th/history/index.html> [https://perma.cc/T6EE-GYFC] (last visited Mar. 31, 2017).

31. See *id.*

32. See *id.*

33. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 921–22 (2016).

34. Recent data bears this out. See *id.* at 922–23 (citing data on race and gender inequity at work). Several studies suggest that, after controlling for variables like education and experience, sex discrimination accounts for unexplained disparities in pay and promotion rates. See, e.g., Francine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* (Nat’l Bureau of



In the mid-1990s, coinciding with this stall, and based on a growing body of social science research, legal scholars and employee advocates identified that the operation of bias—pre-judgment that shapes decision making<sup>35</sup>—was entrenched in ways existing law appeared unable to reach. They began to think about how liability under Title VII could reach subtler and “structural” forms of discrimination—meaning, discrimination built into and fostered by workplace decision-making structures, cultures, and interactions.<sup>36</sup>

A growing recognition of the science on implicit bias and stereotyping was key to these efforts. Implicit bias occurs when prior opinions and experiences unfairly influence one’s thought processes without conscious awareness (for example, a female candidate with equal qualifications is passed over for promotion because the male candidate *just seems* more like a leader).<sup>37</sup> Stereotypes are mental shortcuts that individuals make to sort information; they may be made without conscious awareness, making them a type of implicit bias, or they may be made more consciously, with a belief that they are benign (for example, a new mother is passed over for a promotion because her employer assumes she won’t want to travel).<sup>38</sup>

Where implicit bias or stereotyping related to a person’s protected class status (for example, sex) unfairly influences an employment decision against them (for example, denial of a promotion), Title VII should step in. Yet those trying to establish liability for such harm under Title VII, particularly on a group rather than an individual basis, have faced obstacles. This Part describes three of the most influential theories for holding employers liable for the impact of

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Econ. Research, Working Paper No. 21913, 2016), <https://www.nber.org/papers/w21913.pdf> [<https://perma.cc/RL4B-HFJ6>]; Francine D. Blau & Jed DeVaro, *New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires*, 46 INDUS. REL. 511, 511–50 (2007). Women compose half of the American workforce, but only about 5 to 15 percent of top earners, Fortune 500 CEOs, equity partners at law firms, and corporate senior management. See JUDITH WARNER, CTR. FOR AM. PROGRESS, *THE WOMEN’S LEADERSHIP GAP: WOMEN’S LEADERSHIP BY THE NUMBERS 1–2* (2014). Racial minorities compose one-third of the U.S. workforce, but only 4 to 6 percent of Fortune 500 CEOs and equity partners at law firms. See CROSBY BURNS, KIMBERLY BARTON & SOPHIA KERBY, CTR. FOR AM. PROGRESS, *THE STATE OF DIVERSITY IN TODAY’S WORKFORCE: AS OUR NATION BECOMES MORE DIVERSE SO TOO DOES OUR WORKFORCE 2, 5* (2012); *Despite Small Gains in the Representation of Women and Minorities Among Equity Partners, Broad Disparities Remain*, NAT’L ASS’N L. PLACEMENT (June 2015), <http://www.nalp.org/0615research> [<https://perma.cc/R5Y6-CMJ9>].

35. See JONATHAN BARON, *THINKING AND DECIDING* 41 (2008) (“A ‘bias’ is a departure from the normative model in a particular direction.”); *Bias*, BLACK’S LAW DICTIONARY, (10th ed. 2014) (defining “bias” as “[a] mental inclination or tendency; prejudice; predilection”).

36. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001).

37. Bornstein, *supra* note 33, at 938–39 (citing Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4–6 (1995)). A complete discussion of implicit or cognitive bias is beyond the scope of this Article.

38. Bornstein, *supra* note 33, at 938–39 & n.104 (citing Greenwald & Banaji, *supra* note 37, at 4–6 (identifying and discussing three key categories of implicit cognition: “attitudes, self-esteem, and stereotypes”); Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132–35 (2012) (describing the difference between explicit, concealed, and implicit attitudes and stereotypes)).

implicit bias in the workplace—theories this Article refers to as (1) the negligence model, (2) the vicarious social framework model, and (3) the organizational context model.<sup>39</sup>

Theorizing employer liability to reach the expression of deeper, more ingrained bias in the workplace poses two separate, but related doctrinal challenges. First, such theorizing requires holding an employer entity liable for the operation of implicit biases about which individual employment decision makers may be unaware. The most commonly alleged theory of discrimination<sup>40</sup>—and the theory relevant to a recklessness model of discrimination—is disparate treatment. Using a disparate treatment approach, an employee, or group of employees, must prove that the employer engaged in “intentional” discrimination when taking an adverse employment action against them; they can do so by providing circumstantial evidence of discrimination that the employer cannot rebut with an adequate nondiscriminatory justification.<sup>41</sup> The specific framework of proof depends on whether the claim is brought by an individual or by a class of employees alleging the employer engaged in a “pattern or practice” of discrimination—also known as “systemic” disparate treatment.<sup>42</sup> And, regardless of whether an individual or class case, courts interpreting Title VII have required that disparate treatment discrimination be “intentional.”<sup>43</sup>

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39. In a previous work, I identified how another existing legal doctrine recognized under Title VII—the sub-type of disparate treatment known as stereotyping—can be more broadly applied in Title VII jurisprudence to respond to current court criticisms of systemic disparate treatment and disparate impact theories of liability. See Bornstein, *supra* note 33, at 919. A discussion of greater application of stereotype theory, as recognized in the case of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), is beyond the scope of this Article’s separate focus on conceptualizing a recklessness model for disparate treatment based on implicit bias. For further discussion of stereotyping and the relationship between implicit bias and stereotyping, see Bornstein, *supra* note 33, at 938–39.

40. See Clermont & Schwab, *supra* note 19, at 112 (most common). Under disparate impact theory, plaintiffs need not prove discriminatory intent. Instead, they must prove that the employer adopted a policy or practice that appeared neutral on its face but resulted in a disproportionately negative impact on members of a protected class, and that the employer’s use of that policy is not justified by some “business necessity” that a less discriminatory policy could not also meet. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In general, the disparate impact framework appeals less to plaintiffs because it provides no right to a jury trial, limited remedies (compensatory and punitive damages are only available for intentional discrimination under Title VII), and because the employer has a broad affirmative defense where any policy that results in a disparate impact serves a legitimate “business necessity.” See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 767–82 (2006) (describing disparate impact’s limitations); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 968, 993 (2006). Moreover, in the recent case of *Ricci v. DeStefano*, 557 U.S. 557, 576–93 (2009), the Supreme Court limited the reach of the disparate impact theory by holding that an employer may not take efforts to remedy a workplace practice that has discriminatory effects on some without risking liability for intentional discrimination against others whom the practice favors. A discussion of disparate impact theory as a means of redressing discrimination without having to prove intent is beyond this Article’s focus on using recklessness as a concept to modernize disparate treatment jurisprudence.

41. See *Hazelwood*, 433 U.S. at 299; *Teamsters*, 431 U.S. at 324; *McDonnell Douglas*, 411 U.S. at 792.

42. Compare *McDonnell Douglas*, 411 U.S. at 802-07, with *Hazelwood*, 433 U.S. at 306-13.

43. See *infra* Part.III.A.

Yet notably, the word “intent” does not appear in the statutory text that defines unlawful employment practices under Title VII.<sup>44</sup> As described more fully in Part III, “intentional” disparate treatment is a flexible concept of judicial design and interpretation.<sup>45</sup> So long as employees can show that protected class membership entered the chain of volitional acts that resulted in adverse employment actions, they may prevail.<sup>46</sup> Implicit bias arises most often when an employer entity relies on supervisors to make subjective decisions, whether those decisions are made in the context of deciding whom to hire or promote, setting assignments or pay, or evaluating performance.<sup>47</sup> Subjective employment decision-making systems can be—and, on occasion, have been—challenged under the alternate approach of disparate impact, as a facially neutral policy that has a disproportionate result by protected class.<sup>48</sup> But, as a matter of both practice and doctrinal clarity, plaintiffs have preferred to litigate such cases as disparate treatment,<sup>49</sup> which more accurately reflects the role implicit bias plays in specific workplace actions taken toward individuals or groups.<sup>50</sup> Thus, theorizing employer liability for the operation of implicit bias in a workplace requires grappling with discriminatory “intent.”

The second doctrinal challenge for redressing implicit bias and stereotyping at work is whether and how to hold an employer *entity* liable for widespread but seemingly *individual* employment decisions infected by implicit bias. As discussed further in Part II, the Supreme Court’s recent decision in *Wal-Mart v. Dukes* demonstrates the challenge of remedying pronounced, but diffuse, bias and stereotyping in a large organization that had a nondiscrimination policy on paper, yet turned a blind eye to data indicating a serious problem.<sup>51</sup> Social

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44. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012). The only reference to intent in the text of Title VII was added by the Civil Rights Act of 1991, which made compensatory and punitive damages available “against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact).” *Id.* § 1981a(a)(1).

45. See *infra* Part. III.A.1.

46. See *id.*

47. See William T. Bielby, *Minimizing Workplace Gender and Racial Bias*, 29 CONTEMP. SOC. 120, 123–27 (2000) (citation omitted) (“[P]ersonnel systems whose criteria for making decisions are arbitrary and subjective are highly vulnerable to bias due to the influence of stereotypes—as, for example, when individual managers have a great deal of discretion with little in the way of written guidelines or effective oversight.”); Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 323–27 (2000).

48. See, e.g., *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 989–1000 (1988).

49. See *supra* note 40.

50. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1219–20, 1229–37 (1995). “The disparate impact paradigm . . . is an inappropriate analytical tool for addressing the intergroup biases inherent in subjective decision-making. . . . From a phenomenological standpoint, subjective practices discrimination is a disparate *treatment* problem, not a disparate *impact* problem, and it requires a disparate treatment solution.” *Id.* at 1231; see also Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 490–95 (2005) (situating the problem of unconscious bias within disparate treatment and disparate impact doctrines).

51. See *infra* Part.II.A.

science research on the operation of implicit bias in subjective decision making may be relevant to both a discriminatory individual employment decision and the widespread occurrence of disparate treatment throughout an organization. The question becomes how to frame liability under Title VII in a way that does not allow a court to view these as mutually exclusive.<sup>52</sup>

Each of the three foundational theories for redressing implicit bias in the workplace discussed in this Part resolves these two challenges in its own way—ideas upon which a recklessness model then builds.

#### A. Negligence Model

In the late 1980s and early 1990s, a number of legal scholars began to incorporate social science research on the operation of bias into work on antidiscrimination jurisprudence.<sup>53</sup> In 1993, David Oppenheimer proposed one such foundational theory under Title VII in his important work, *Negligent Discrimination*.<sup>54</sup> In his article, Oppenheimer first carefully and rigorously detailed how, despite case law interpreting Title VII to require that plaintiffs prove intentional discrimination, most of Title VII doctrine in fact reflects a model of negligence.<sup>55</sup> As he documented, under the legal theory of sexual harassment, an employer is held strictly liable for a supervisor's harassment of a subordinate, subject to an employer's affirmative defense.<sup>56</sup> Likewise, both disparate impact theory and Title VII's requirement that religious practices be accommodated impose duties on an employer to prevent discrimination with no proof of discriminatory intent.<sup>57</sup> Because, as Oppenheimer explained, "the existing law of employment discrimination, while eschewing the term negligence, frequently incorporates the doctrine," he proposed a negligence theory for disparate treatment under Title VII.<sup>58</sup>

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52. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011) ("The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices.").

53. This Article focuses on statutory law under Title VII. A rich and vast body of work also addresses issues of intent and cognitive bias in the constitutional law of Equal Protection, which is beyond the scope of this Article. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

54. See David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1992).

55. See *id.* at 899–900, 915–19, 934–36, 967–72.

56. See *id.* at 960.

57. See *id.* at 937–39, 968.

58. See *id.* at 899.

Under a negligence theory, Oppenheimer argued, an employer could be held liable when it “fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur.”<sup>59</sup> This approach rests on recognition that Title VII created a statutory duty of care owed by employers to employees to prevent the harm of discrimination because of protected class status.<sup>60</sup> To prove an employer’s liability for disparate treatment under a negligence theory, then, a plaintiff would be required to show “a mere failure [by the employer] to have thought critically before acting” rather than showing discriminatory intent.<sup>61</sup> A negligence framework also “places the focus on the discrimination, not the motivation,” which offers the possibility of reaching structural discrimination directly.<sup>62</sup> Indeed, as Oppenheimer suggested, adopting a negligence approach would allow liability in cases involving “unconscious, but wrongful, motivation,” without having to “squeeze [them] uncomfortably into an intentional tort analysis.”<sup>63</sup>

Oppenheimer’s work has influenced scholars’ continued attempts to redress entrenched discrimination at work. Fifteen years later, Noah Zatz looked to the availability of employer liability under Title VII for harassment of employees by third parties to question the meaning of “intent to discriminate” under Title VII.<sup>64</sup> The availability of negligence approaches within some aspects of Title VII led Zatz to question the doctrinal divide between disparate treatment and other legal theories of proof.<sup>65</sup> More recent still, Richard Thompson Ford revisited and built upon a negligence framework, applying a legal realist lens, to propose a duty of care approach to structural discrimination at work.<sup>66</sup> Ford argued that the doctrine of Title VII requires concrete answers to questions that defy precise proof—that the law’s requirement of “intent” and “causation” seek facts that are difficult to measure and verify objectively.<sup>67</sup> Instead, Ford suggested, Title VII should more appropriately regulate a duty of care imposed on employers “to avoid decisions that undermine social equality,” not by redefining the legal definition of “intent” to meet social science advances, but instead by refining an employer’s duty not to undermine equality.<sup>68</sup>

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59. *See id.* at 900.

60. *See id.* at 936, 948.

61. *See id.* at 971.

62. *Id.*

63. *Id.* at 972.

64. *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1364 (2009).

65. *See id.* at 1358.

66. *See* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014).

67. *See id.* at 1381, 1390–92.

68. *See id.* at 1381, 1384, 1415–21. “[T]he law should replace the conceptually elusive goal of eliminating discrimination with the more concrete goal of requiring employers . . . to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy.” *Id.* at 1384.

As influential as it has been, Oppenheimer's negligence approach was also, perhaps, ahead of its time in its effort to adapt Title VII doctrine to insights from social science research on implicit bias that were not well-known beyond academic circles in 1993. As a result, while its descriptive power holds true for much of Title VII, courts have largely failed to adopt a negligence approach in the context of disparate treatment, due to its apparent conflict with case law interpreting such claims to require proof of "intentional" discrimination.<sup>69</sup> Oppenheimer's work, however, raised the important question of what duty employers owe to employees. His negligence approach pushed back on the intent "requirement" entirely, instead offering a way to hold an employer entity responsible for its failure to meet its statutory duty to prevent discrimination in the workplace.<sup>70</sup>

### B. Vicarious Social Framework Model

A second highly influential theory, which this Article refers to as the "vicarious social framework model," focuses on the social science of implicit bias and liability for discrimination based on the employer's role in controlling its operation. In 1995, Linda Krieger paved the way for this theory in her groundbreaking article *The Content of Our Categories*.<sup>71</sup> Since then, numerous scholars in both law and social science have contributed to its development and popularization.<sup>72</sup>

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69. See *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII . . . provides no remedy for negligent discrimination."); *Aaron v. Sears, Roebuck & Co.*, No. 3:08 CV 1471, 2009 WL 803586, at \*2 (N.D. Ohio Mar. 25, 2009) (stating that where the defendant "was merely 'negligent' in its hiring practices, [that] does not rise to the standard of intentional discrimination required by Title VII"); Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, U. ILL. L. REV. 1, 13–14 (2013) (citing *Aaron*, 2009 WL 803586, at \*2) ("To date, the courts have not embraced negligent discrimination as a basis for liability."); Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1074–75 (2014) ("To date, the courts have not embraced arguments that plaintiffs may establish a discrimination claim via a negligence analysis."). *But cf.* *Pippen v. Iowa*, 854 N.W.2d 1, 18–19 (Iowa 2014) ("There is reason to believe that at least some members of the United States Supreme Court might be interested in negligence theory in the context of subjective decision-making. At oral argument in the *Wal-Mart* matter, Justice Kennedy and Chief Justice Roberts asked questions about whether the plaintiff was advancing a 'notice theory,' namely, that an employer aware of the discriminatory impact of its subjective practices may be liable under the Federal Civil Rights Act.").

70. See Oppenheimer, *supra* note 54, at 971.

71. See Krieger, *supra* note 50.

72. See, e.g., Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Tanya Kateri Hernández, *One Path for*

Under the vicarious social framework approach, evidence on the operation of stereotypes and implicit biases—that is, biases and associations that affect our perceptions and judgments without our conscious awareness—is offered to create an inference of discrimination when workplace decisions have discriminatory results, yet the decision makers do not believe they harbor bias.<sup>73</sup> Informed by deep social science research, Krieger proposed that evidence on the “biasing effects of social stereotypes, the tendency towards schematic information processing, the salience of race, gender, and other social categories, and the apparent automaticity of ingroup favoritism,” could create an inference that an adverse employment action taken against a member of a protected class may have been “contaminated by cognitive sources of intergroup bias.”<sup>74</sup> This contamination, she argued, was enough to meet Title VII’s requirement that, to prove disparate treatment, a plaintiff must show that their protected classification was “a motivating factor” in the adverse employment decision, despite a lack of discriminatory purpose on the part of the decision maker.<sup>75</sup> While Krieger agreed that “a negligence approach . . . would further Title VII’s purpose,” she focused on an employer’s “duty to identify and control for errors in social perception and judgment which inevitably occur, even among the well-intended.”<sup>76</sup> This approach again pushed back on the formulation of disparate treatment as requiring “intent.” Disparate treatment occurred when bias infected an individual employment decision. Then, on a systemic level, the employer entity was vicariously responsible: because the employer controlled the decision-making structures in the workplace, it had a duty to prevent the operation of bias throughout the organization.<sup>77</sup>

In the twenty years since Krieger’s article was published, a vast body of social science research has identified how employers can interrupt and correct for the cognitive or implicit biases Krieger identified.<sup>78</sup> As a result, legal scholars

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“Post-Racial” *Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 J.L. & INEQ. 307 (2014); Jerry Kang, et al., *supra* note 38; Jolls & Sunstein, *supra* note 7; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1003 n.21 (2006) (cataloguing the literature on implicit bias); Ann C. McGinley, ¡Viva La Evolución!: *Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415 (2000); Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 VAND. L. REV. 481 (2002); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001). *But see, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008).

73. *See* Krieger, *supra* note 50, at 1186–90, 1241–44; Krieger & Fiske, *supra* note 72, at 1052–62.

74. *See* Krieger, *supra* note 50, at 1186–90, 1241–44.

75. *See id.*

76. *Id.* at 1245–47.

77. *See id.*

78. *See infra* Part.II.B.

and social scientists have combined research on bias with what is known as “social framework” evidence to allege systemic disparate treatment.<sup>79</sup> This approach, made popular since the early 2000s by social scientists including William Bielby and Barbara Reskin, theorizes employer entity liability for the operation of implicit bias throughout an organization.<sup>80</sup> To use a social framework approach, experts offer scientific testimony about how stereotypes and biases operate to impact individual employment decisions and how different types of organizational structures are more likely to either activate or control decision makers’ implicit biases.<sup>81</sup> When combined with evidence that an employer adopted organizational structures more likely to activate implicit biases (for example, broad, unchecked subjective decision making), and data on disparities in the employer’s workforce by protected class (for example, that a disproportionate number of women are denied promotions), a factfinder can infer discriminatory intent on the part of the employer.<sup>82</sup> The employer can then be held liable, the theory goes, for widespread disparate treatment when it fails to prevent or correct workplace structures infected with implicit bias.<sup>83</sup>

A number of federal courts have upheld plaintiffs’ cases against challenges by employers where the plaintiff alleged discrimination using implicit bias evidence or under a vicarious social framework theory.<sup>84</sup> Yet despite initial success, plaintiffs seeking to apply this approach now face an uphill battle. After growing in popularity and acceptance, both in practice and in the courts, the social framework piece of vicarious implicit bias theory has suffered a steady backlash from a small group of academics that oppose it, including the coiners

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79. See Krieger & Fiske, *supra* note 72, at 1005–06, 1052–62.

80. See, e.g., Declaration of Barbara F. Reskin, *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012) (No. C-04-3341 MHP); Declaration of William T. Bielby, Ph.D in Support of Plaintiffs’ Motion for Class Certification, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-012252 MJJ); Bielby, *supra* note 47, at 120–29; Reskin, *supra* note 47, at 319–328; see also Hernández, *supra* note 72, at 307–18 (describing the social framework method of proving systemic disparate treatment).

81. See Krieger & Fiske, *supra* note 72, at 1052–62; Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 41–50 (2010).

82. See Krieger & Fiske, *supra* note 72, at 1052–62.

83. See *id.*

84. See, e.g., *Burns v. Johnson*, 829 F.3d 1, 13 (1st Cir. 2016) (quoting *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999)) (“As this circuit has repeatedly held, stereotyping, cognitive bias, and certain other ‘more subtle cognitive phenomena which can skew perception and judgments’ also fall within the ambit of Title VII’s prohibition.”); *Thomas*, 183 F.3d at 59 (“The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus.”); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1265, 1272 (10th Cir. 1988); *Equal Emp. Opportunity Comm’n v. Inland Marine Indust.*, 729 F.2d 1229, 1236 (9th Cir. 1984); *Kimble v. Wis. Dept. of Workforce Dev.*, 690 F. Supp. 2d 765, 775–78 (E.D. Wis. 2010); *Dow v. Donovan*, 150 F. Supp. 2d, 249, 263–64 (D. Mass. 2001). *But see, e.g., Tucker v. Ga. Dep’t of Pub. Safety*, Civil Action No. CV208-33, 2009 WL 2135807, \*6 (S.D. Ga. 2009) (“At least in this Circuit, a ‘subtle bias’ claim based on subconscious cognitive stereotypes is not tenable as a disparate treatment claim.”).



of the term “social frameworks.”<sup>85</sup> An academic backlash in and of itself may pose no threat to a legal theory, but some federal courts have taken notice, including the Supreme Court in *Wal-Mart v. Dukes*.<sup>86</sup> As discussed in Part II, while *Wal-Mart* addressed such evidence in the limited context of a class certification petition, the Court’s decision raised questions about the validity of the social framework approach more generally, the full impact of which remains to be seen.

### C. Organizational Context Model

In a series of works starting in 2003, Tristin Green proposed a third important theory for systemic disparate treatment that aimed to shift liability to the employer entity more directly.<sup>87</sup> Articulating what she called the “context model” for employment discrimination litigation,<sup>88</sup> Green proposed that Title VII could “impose [a legal] obligation on employers not to facilitate discriminatory decision making in the workplace.”<sup>89</sup> Green’s approach recognizes the operation of implicit bias and stereotypes, but focuses on the employer at the entity level directly. She frames the violation under Title VII as the employer entity’s organizational choices and creation of a work context that fosters biased employment decision making.<sup>90</sup> In so doing, Green’s approach moves beyond concerns about the lack of fit between “unconscious” bias and “intentional” discrimination because the employer entity has acted intentionally *when choosing its decision-making structures*. As Green explains, it is a mistake to conflate individual manager decisions with “the employer wrong,” which, she argues, “lies less in the individual decisionmaker’s action than in the employer’s structuring of a work environment that facilitates bias in the individual decisionmaker’s action.”<sup>91</sup> As such, Title VII can hold employer entities “responsible for their causal role” in systemic disparate treatment directly,<sup>92</sup> not

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85. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 375 n.8 (2011); Mitchell & Tetlock, *supra* note 72, at 1052–56; John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of “Social Frameworks,”* 94 VA. L. REV. 1715, 1747 (2008).

86. See *Wal-Mart*, 564 U.S. at 375 n.8.

87. See Green, *Discrimination in Workplace Dynamics*, *supra* note 72; Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659 (2004); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005); Tristin Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); see also Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397 (2011).

88. See Green, *A Structural Approach as Antidiscrimination Mandate*, *supra* note 87, at 852–53 (“structural approach”); Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 441–42 (“context model”).

89. See Green, *A Structural Approach as Antidiscrimination Mandate*, *supra* note 87, at 852–54.

90. See *id.*

91. *Id.* at 897–98.

92. *Id.*

merely vicariously liable for the acts of individual supervisors or decision makers.

In focusing on the entity level, Green's approach also allows Title VII to reach the contextual and cultural ways in which bias is fostered in the workplace. Rather than being a "passive bystander," Green argues, an employer intentionally creates a "distinct organizational 'ethos' [that] serve[s] as the basis for employer responsibility for the wrong of structural discrimination."<sup>93</sup> Individual supervisors make decisions within a work culture that the employer entity controls. As Green explains, "one can accept that implicit biases have been 'programmed into our brains by overarching societal influences' and at the same time expect employers to refrain from creating work environments that facilitate the operation of those biases in workplace decisionmaking."<sup>94</sup> The entity itself "necessarily shape[s]" the context within which individual decision makers act, so, if "disparate treatment is widespread within an organization . . . the entity is directly liable for producing that disparate treatment."<sup>95</sup>

Green's organizational context model moves beyond individuals to focus on entity-wide discrimination, which may allow plaintiffs to more easily overcome the hurdle of proving "intent." As Green argues, and as described more fully in Part II, below, the existing framework of proof for "pattern-or-practice" cases of systemic disparate treatment (established in the 1977 Supreme Court cases of *International Brotherhood of Teamsters v. United States* and *Hazelwood School District v. United States*) requires nothing more than circumstantial evidence of a significant workplace disparity by protected class that, if left unexplained by the employer, creates an inference of intentional discrimination.<sup>96</sup> Under existing doctrine, employees can demonstrate such disparities with statistical, social science, and anecdotal evidence.<sup>97</sup> Yet, in practice, as bias has become more subtle and covert over time, it has become less likely that a court will make that inference. As Green herself has documented, over the past decade, the promise of Title VII to reach organizational responsibility has been hampered by the courts' shift to viewing systemic disparate treatment cases as a mere "aggregation" of individual claims of biased

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93. *Id.* at 889–90, 890 n.148.

94. *Id.* at 899–900.

95. Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 441.

96. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 446–47 ("[S]ystemic disparate treatment law does not require plaintiffs to present social science testimony to the effect that particular organizational or institutional features either are producing or did produce the observed disparity. Plaintiffs need only prove widespread disparate treatment within the organization, and social science testimony can be used to help make that showing."); *infra* Part III.A.1.

97. *See* Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 446–47; TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 66–75 (2017).

treatment by biased supervisors.<sup>98</sup> The organization itself, this view goes, is innocent of wrongdoing, and seeking to hold the entity responsible for systemic disparate treatment is like punishing the entity for being a mere “conduit” of societal biases.<sup>99</sup> Thus, while Green’s model offers both an argument to hold the employer entity directly liable for its own actions and a mechanism to do so supported by Title VII, it, too, has suffered from a narrow judicial interpretation.

Despite the explanatory power of and statutory support for all three foundational theories for redressing implicit bias at work, as a normative matter, federal courts appear loathe to recognize that an employer entity has an affirmative duty to prevent, a responsibility to correct, or even an obligation not to perpetuate such bias. Yet the social science on implicit bias and its impact on subjective decision making—a system on which most employers rely extensively—remain compelling, and the resulting inequity remains a problem that Title VII must reach. To do so requires both reviving the key role of social science evidence in employment discrimination law and theorizing a frame for employer-entity responsibility to which federal courts may be more receptive, an effort to which the following Parts now turn.

## II.

### DISPARATE TREATMENT IN THE WAKE OF *WAL-MART V. DUKES*

The U.S. Supreme Court’s decision in the 2011 case *Wal-Mart v. Dukes* has hampered the initial success of existing theories articulating liability under Title VII for the operation of implicit bias at work.<sup>100</sup> A close analysis of the *Wal-Mart* decision reveals, however, that courts need not and should not throw the baby—vast and reliable social science data on stereotypes and implicit bias—out with the bathwater—the now seemingly disfavored “social framework” theory of proving systemic disparate treatment. This Part discusses the *Wal-Mart* holding and subsequent scholarship that attempts to make sense of its impact. It then provides a brief survey of cases decided in the five years after *Wal-Mart* to illustrate how courts continue to rely on implicit bias and stereotyping evidence. Thus, despite the setback to the social framework *model of litigation*, the social science *research* on bias remains as robust as ever, able to serve as the foundation for a recklessness framework.

#### A. *What Wal-Mart v. Dukes Did and Did Not Hold*

In its 2011 decision in *Wal-Mart v. Dukes*, the Supreme Court rejected class certification of a group of plaintiffs alleging, among other claims, systemic

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98. See GREEN, *supra* note 97, at 74–84; see also Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 431 n.153, 441 n.192 (describing Justice Ginsburg’s difficulty in framing systemic disparate treatment at the entity level).

99. See GREEN, *supra* note 97, at 74–84.

100. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 356–58, 366–67 (2011).

disparate treatment.<sup>101</sup> The plaintiffs sought to certify a class of current and former female Wal-Mart employees who had experienced sex discrimination in pay and promotion. Plaintiffs alleged that the employer was aware of widespread and unchecked subjective decision making that resulted in discrimination against female employees.<sup>102</sup> The *Wal-Mart* decision reached the Supreme Court on a motion for class certification; thus, the only decision before the Court was whether the plaintiffs met the requirements of Federal Rule of Civil Procedure 23 to certify a class action.<sup>103</sup> When answering this question and considering Rule 23's requirement of "commonality" (whether there are questions of fact or law common to the potential class members), the Court dealt a blow to the implicit bias social framework theory of proof more generally.<sup>104</sup> In a divided majority opinion written by Justice Antonin Scalia, the Court rejected plaintiffs' expert William Bielby's social framework evidence. The Court noted that because Bielby could not specify what percentage of decisions at the company were infected by implicit bias, the expert testimony "[did] nothing to advance [the plaintiffs'] case" and the Court could "safely disregard" it.<sup>105</sup> Ultimately, the Court viewed the claims as lacking the necessary commonality to support class certification because they sought to aggregate the harms of "literally millions of employment decisions at once . . . [w]ithout some glue holding the alleged reasons for all those decisions together."<sup>106</sup>

In *Wal-Mart's* aftermath, scholars were near-unanimous in their interpretation of the case as a significant obstacle to future claims of systemic disparate treatment.<sup>107</sup> Indeed, the decision effectively ended one common route for pursuing employment discrimination class actions: seeking back pay while certified under Rule 23(b)(2).<sup>108</sup> Moreover, over a dissent by Justice Ruth Bader Ginsburg on the issue of commonality, the Court majority disparaged an evidentiary route that had been gaining popularity among plaintiffs' counsel: using implicit bias and social framework evidence to prove intentional employment discrimination.<sup>109</sup>

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101. *See id.* at 352–57.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.* at 354.

106. *See id.* at 352.

107. *See* Joseph Seiner, *Weathering Wal-Mart*, 89 NOTRE DAME L. REV. 1343, 1350–51 (2014) (cataloguing and summarizing the academic response). *But see* Elizabeth Tippet, *Robbing a Barren Vault: The Implications of Dukes v. Wal-Mart for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L.J. 433, 454–65 (2012) (questioning empirically the impact of the *Wal-Mart* decision because similar claims (class actions to challenge discretionary decision making) are rare among all employment discrimination cases).

108. *See Wal-Mart*, 564 U.S. at 360–62. Even the dissenting justices agreed with this piece of the holding. *See id.* at 368–70 (Ginsburg, J., dissenting).

109. *See id.* at 352–62.

While *Wal-Mart* cast doubt on the role of social framework evidence, three important caveats limit its potential impact on future employment discrimination cases. First, as mentioned above, these issues were only examined in the case of a class certification petition. Thus, while the Court held it could “disregard” Bielby’s evidence, it did so only in the context of determining whether the class had common issues of law or fact, and not in any substantive holding on the underlying merits of the case.<sup>110</sup> Second, and importantly, the Court did not reject the *validity* of the scientific research upon which Bielby’s expert testimony was based—the science of how implicit bias and stereotyping operate and how different types of workplace structures allow bias to infect employment decisions.<sup>111</sup> Instead, the Court rejected the evidence because it failed to prove that individual decision makers applied discretion in a consistently discriminatory manner.<sup>112</sup> As scholars have noted, the majority ignored that plaintiffs offered this evidence as general causal proof, to support an inference of discrimination in the absence of a justification for observed disparities.<sup>113</sup> Third, the plaintiffs alleged a pattern or practice of discrimination across a massive nationwide company affecting 1.5 million class members, which was the largest class action ever attempted.<sup>114</sup> Thus plaintiffs can, and do, continue to use implicit bias evidence to help create an inference of discrimination in cases that can be distinguished from the behemoth *Wal-Mart* case.<sup>115</sup>

Nevertheless, the decision leaves an open question about how plaintiffs may prove systemic disparate treatment going forward. In a symposium on the future of pattern-or-practice cases in the wake of *Wal-Mart*, Michael Selmi, Noah Zatz, and Tristin Green, in separate pieces, each identified the source of the problem. After *Wal-Mart*, plaintiffs would have to identify a way to hold an employer *entity* liable for class-wide intentional discrimination based on *individual supervisors’* decisions infected with implicit bias.<sup>116</sup> Selmi suggested that future cases would need a more “coherent narrative” of discrimination, and Zatz described the need for greater “connective tissue”—what Justice Scalia referred to as “the glue,” for plaintiffs to prevail.<sup>117</sup> Echoing her earlier work, Green expressed concern that the Court had moved away from foundational Title

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110. *See id.*

111. *See id.*

112. *See id.* at 354–55 (stating that it was unnecessary to consider whether the evidence met the *Daubert* standard because it did “nothing to advance” plaintiffs’ case).

113. *See, e.g.,* Melissa Hart, *Civil Rights and Systemic Wrongs: The Future of Employment Discrimination Class Actions*, 32 BERKELEY J. EMP. & LAB. L. 455, 457, 472–73 (2011).

114. *See Wal-Mart*, 564 U.S. at 342–46.

115. *See, e.g.,* *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 520–21 (N.D. Cal. 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 877 F. Supp. 2d. 113, 113–19 (S.D.N.Y. 2012).

116. *See* Michael Selmi, *Theorizing Systemic Disparate Treatment Law: After Wal-Mart v. Dukes*, 32 BERKELEY J. EMP. & LAB. L. 477, 481 (2011); Noah D. Zatz, *Introduction: Working Group on the Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 387, 388, 391 (2011); Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 397.

117. *See* Selmi, *supra* note 116, at 481; Zatz, *supra* note 116, at 388, 391.

VII pattern-or-practice precedent, which allow courts to hold employer entities responsible for creating the context in which systemic disparate treatment occurs, rather than merely vicariously as an “aggregation” of individual decisions.<sup>118</sup> While the sheer size of the *Wal-Mart* class has allowed plaintiffs in a handful of subsequent cases to distinguish themselves from the decision,<sup>119</sup> the problem remains: how to theorize entity liability under Title VII to reach the structural discrimination that results when implicit bias infects workplace decision making.

*B. Case Law on Implicit Bias and Stereotyping After Wal-Mart v. Dukes*

In the wake of the *Wal-Mart* decision, it is possible that the Court’s ruling against *the way in which plaintiffs used* the scientific evidence on bias might unfairly cast a larger pall over the reliability and importance of such evidence in general. A basic survey of Title VII cases decided by federal courts in the wake of *Wal-Mart* reveals that the bark—the decision’s potential impact on the future of implicit bias evidence—may have been bigger than its bite. Of the roughly twenty-seven hundred federal court cases citing the *Wal-Mart* decision in the five years after it was announced, only twenty-one make reference to Dr. Bielby, social frameworks, or implicit bias.<sup>120</sup> Of those cases, only fifteen engage in discussion of evidence or class certification in the context of employment claims—eight cases distinguish the *Wal-Mart* case,<sup>121</sup> and only seven cases (including one subsequent proceeding in *Wal-Mart*) rely on *Wal-Mart* to either limit class certification in part or exclude some piece of plaintiffs’ evidence.<sup>122</sup> And, while thirty-two additional cases citing *Wal-Mart* reference the related

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118. See Green, *The Future of Systemic Disparate Treatment Law*, *supra* note 87, at 397; GREEN, *supra* note 97, at 74–84.

119. See, e.g., *Ellis*, 285 F.R.D. at 520–21; *Chen-Oster*, 877 F. Supp. 2d. at 118–19.

120. The *Wal-Mart* decision was announced on June 20, 2011. Results from a Westlaw search conducted August 20, 2016 (within all Key Cite results for *Wal-Mart v. Dukes*, all federal cases, search for: (“social framework!” or “Bielby” or “implicit bias” or “cognitive bias!”)).

121. See *Brown v. Nucor Corp.*, 785 F.3d 895, 901–02 (4th Cir. 2015); *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 112–17 (4th Cir. 2013); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 487–92 (7th Cir. 2012); *Chen-Oster v. Goldman, Sachs & Co.*, 114 F. Supp. 3d 110, 114–23 (S.D.N.Y. 2015); *Ellis*, 285 F.R.D. at 507–09; *Hargrove v. Ryla Teleservices, Inc.*, Action No. 2:11cv344, 2012 WL 489216, at \*4–\*6 (E.D. Va. Jan. 3, 2012); *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ, 2011 WL 3793962, at \*1–\*4 (N.D. Iowa Aug. 25, 2011); *Smith v. Ceva Logistics U.S., Inc.*, No. CV 09-4957 CAS (RCx), 2011 WL 3204682, at \*6–\*9 (C.D. Cal. July 25, 2011).

122. See *Jones v. Nat’l Council of YMCA*, 34 F. Supp. 3d 896, 903–10 (N.D. Ill. 2014) (excluding in part plaintiffs’ expert evidence); *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115, 1127–28 (N.D. Cal. 2013) (subsequent proceeding in *Wal-Mart*, similarly denying certification of a smaller class of plaintiffs); *Parra v. Bashas’, Inc.*, 291 F.R.D. 360, 402–03 (D. Ariz. 2013) (granting in part and denying in part plaintiffs’ motion for class certification); *Valerino v. Holder*, 283 F.R.D. 302, 309–19 (E.D. Va. 2012) (granting in part and denying in part plaintiffs’ motion for class certification); *Peterson v. Seagate U.S. LLC*, 809 F. Supp. 2d 996, 1006–09 (D. Minn. 2011) (excluding in part plaintiffs’ expert evidence); *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 80–86 (3d Cir. 2017) (excluding in part plaintiffs’ expert evidence); *Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2012 WL 1366052, at \*6–\*15 (C.D. Cal., Apr. 18, 2012) (same).

concept of stereotypes or stereotyping, only four resulted in limitations on plaintiffs' employment claims.<sup>123</sup> Moreover, in the five years after the *Wal-Mart* decision, nearly eight hundred other federal court cases involving Title VII referenced implicit bias or stereotyping without citing to the *Wal-Mart* case at all—meaning that case law has continued to engage with the social science of bias in the context of cases involving individuals or smaller classes.<sup>124</sup>

Importantly, in the case most similar to *Wal-Mart* itself—a systemic disparate treatment case pled using a similar evidentiary approach—the District Court for the Northern District of California upheld plaintiffs' class certification. In *Ellis v. Costco*,<sup>125</sup> the District Court relied in part on the very implicit bias research that the Supreme Court had called into question in *Wal-Mart* to certify the plaintiffs' class.<sup>126</sup> Approximately seven hundred Costco employees sought certification for a class action alleging sex discrimination in promotion.<sup>127</sup> As part of their case, the plaintiffs introduced expert testimony by sociologist Barbara Reskin to show “that Costco’s culture foster[ed] and reforc[ed] stereotyped thinking, which allow[ed] gender bias to infuse the promotion process from the top down.”<sup>128</sup> She based her testimony on “a social framework analysis, examining Costco’s personnel and promotion policies and practices in the context of social science literature.”<sup>129</sup> The court found Reskin’s evidence “persuasive” to support commonality in the case—“that Costco operate[d] under a common, companywide promotion system.”<sup>130</sup> Yet the Court noted that there was additional evidence to support such a holding, including a smaller, more concentrated number of managers involved in promotion decisions. Thus, “[u]nlike in [*Wal-Mart v.*] *Dukes*, the evidence of Costco’s culture [was] just one component among many pieces of persuasive evidence of companywide practices and policies that support[ed] a finding of commonality.”<sup>131</sup>

Reflecting upon a recent survey of relevant cases decided in its wake, the validity and importance of scientific research on implicit bias and stereotyping

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123. Results from a Westlaw search conducted August 20, 2016 (within all Key Cite results for *Wal-Mart v. Dukes*, all federal cases, search for: “stereotyp!”, minus twenty cases already captured in search described *supra* note 120). See *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1217, 1228–30 (10th Cir. 2013); *Moore v. Publicis Group SA*, 1:11-cv-1279 (ALC)(AJP), 2014 WL 11199094, at \*3–\*8 (S.D.N.Y. May 15, 2014); *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK (DTBx), 2013 WL 1490667, at \*5–\*11 (C.D. Cal. Jan. 28, 2013); *Bell v. Lockheed Martin Corp.*, Civil No. 08-6292 (RBK/AMD), 2011 WL 6256978, at \*4–\*9 (D.N.J. Dec. 14, 2011).

124. Results from a Westlaw search conducted August 20, 2016 (within all federal cases, decided since June 20, 2011, search for: (“implicit bias” or “cognitive bias” or stereotyp!) & “Title VII”). For further discussion of stereotyping and the relationship between implicit bias and stereotyping, see Bornstein, *Unifying Antidiscrimination Law*, *supra* note 33, at 938–39.

125. *Ellis*, 285 F.R.D. at 520–21.

126. *Id.* at 521.

127. *See id.* at 501.

128. *Id.* at 520.

129. *Id.*

130. *Id.*

131. *Id.* at 521.

remains strong, even after the *Wal-Mart* decision. In *Wal-Mart*, the Supreme Court rejected the purpose for which the evidence was used, not the validity of the evidence itself<sup>132</sup>—thus leaving the door open for a legal theory that uses such evidence to create direct entity liability for systemic disparate treatment.

### III.

#### THEORIZING RECKLESS DISCRIMINATION

As described in Part I, each of the three most prominent models of employer liability for systemic disparate treatment has provided key building blocks for reaching structural discrimination in the workplace. Yet, to date, federal courts have not wholly endorsed any of the three. This Part aims to offer an additional path by theorizing a model for “reckless discrimination,” under which an employer who is sufficiently reckless toward the risk and consequences of implicit bias in its workplace may, in some circumstances, be liable for intentional disparate treatment.

#### A. *Intent and Recklessness*

Building a framework for “reckless discrimination” requires an examination of the concepts of intent and recklessness in both tort and antidiscrimination law, as well as the intersection of the two.<sup>133</sup>

##### 1. *Intent Under Title VII*

Since shortly after Title VII’s passage, courts and scholars have debated to what extent the statute requires “intent” to discriminate and how to define “intent” in this context. Given such vast scholarship,<sup>134</sup> this Article starts from the reality that—despite the absence of the word “intent” from the statute’s operative sections and whether right or wrong as a matter of jurisprudence—federal case law interpreting Title VII disparate treatment currently requires proof of “intentional discrimination.”<sup>135</sup> The question then is how to meet this “intent” requirement.

132. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351–62 (2011).

133. While the concept of recklessness appears in criminal law as well, I have omitted a discussion of criminal recklessness because it is less applicable to employment discrimination. See Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 114 n.7 (2009) (noting that because of the “so-called rule of lenity,” whereby “punitive laws ought to be interpreted to provide maximum protection to the accused[,] . . . criminal law has a built-in mechanism for resolving . . . disputes [over] . . . the fine lines between recklessness, negligence, and intentional tort” that tort law lacks).

134. A recent Westlaw search resulted in over 4,600 cases and over 2,100 journal and law review articles discussing intentional discrimination or intent to discriminate under Title VII, dating back to 1967. Results from a Westlaw search conducted August 20, 2016 (within all federal materials, search for: (“intentional discrimination” or “intent to discriminate”) w/20 “Title VII”).

135. See, e.g., Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1450–51 (2012) (“There is no principle more basic to Title VII . . . than that the disparate treatment



Reflecting upon the inordinate amount of time and ink devoted to this issue over the past fifty years, two principles are clear. First, Title VII prohibits many forms of discrimination without requiring proof of a decision maker's discriminatory intent.<sup>136</sup> Indeed, only one of the four major theories for proving unlawful discrimination under Title VII has been interpreted by the Court to require intent.<sup>137</sup> Second, for the legal theory under Title VII that does require intentional discrimination—disparate treatment—there is no universal definition of, and there is more than one way to prove, “intent.”<sup>138</sup> By design and interpretation, proof of “intent” to discriminate under Title VII is a flexible concept that has been adapted and modernized over time.<sup>139</sup>

As noted previously, the key text of Title VII that defines unlawful employment practices makes no mention of intent.<sup>140</sup> In the section of the statute defining unlawful “employer practices,” the statute prohibits employers from (1) discriminating in hiring, firing, compensation, and “terms, conditions, or privileges of employment” and (2) limiting or classifying employees or applicants “in any way which would . . . tend to deprive any individual of employment opportunities or . . . adversely affect his status” at work “because of” the individual's protected classification.<sup>141</sup> In one of the earliest Supreme Court decisions to interpret and apply Title VII, the 1971 case *Griggs v. Duke Power Co.*, the Court held that discriminatory effects of employer practices could be actionable under Title VII even without evidence of the employer's intent to discriminate.<sup>142</sup> As the Court explained, Congress's statutory intent in Title VII was “plain” from the statute's text: “to achieve equality of employment

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theory requires ‘intent to discriminate.’ The term ‘intentional discrimination’ appears multiple times in Supreme Court opinions and has been used literally thousands of times in the lower courts.”)

136. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); Oppenheimer, *supra* note 54, at 917–25.

137. See *infra* notes 140–68 and accompanying text.

138. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506–10 (1993) (discussing how prima facie proof will vary); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–06 (1973) (same); Sullivan, *supra* note 135, at 1450–51 (describing how the Supreme Court has alternately spoken of “intent,” “motive,” “discriminatory purpose,” and “animus,” when describing the requirement that disparate treatment be “intentional”); Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, *supra* note 69, at 38 (“Scholars disagree on whether disparate treatment cases require a showing of intent, both as a descriptive and a normative matter. Even if it is possible to say that, as a descriptive matter, courts require plaintiffs to establish intent in disparate treatment cases, this intent standard is itself inconsistent.”).

139. See, e.g., Ford, *supra* note 66, at 1383, 1396–403 (discussing the challenge of defining discriminatory intent and noting that, at best, one can only have “a conception or impression of discrimination” because “[d]iscrimination’ is not a fact in and of itself; it is a narrative, an interpretation”); Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1248, 1289–94 (2008).

140. 42 U.S.C. § 2000e-2(a)(1)–(2) (2012). One reference to intent was added to Title VII by the Civil Rights Act of 1991, which made compensatory and punitive damages available “against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact).” § 1981a-(a)(1).

141. § 2000e-2(a)(1)–(2).

142. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–33 (1971).

opportunities and remove barriers that . . . operate[]” to advantage one group of employees over another.<sup>143</sup> Thus an employer’s practices “even neutral in terms of intent” were not beyond Title VII’s reach: “good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>144</sup> When Congress drafted Title VII, the Court explained, it “directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”<sup>145</sup> In this early case establishing what is known as the disparate impact theory for proving unlawful discrimination, the Court made clear that, in the statutory text of Title VII as written, Congress did not impose a requirement of discriminatory intent.<sup>146</sup>

Two years later, in 1973’s *McDonnell Douglas v. Green*, the Court articulated the alternative to disparate impact—the disparate treatment theory of proof for discrimination, which is now commonly understood to require proof of an employer’s discriminatory intent.<sup>147</sup> Where a plaintiff lacks direct evidence of bias and the employer denies discriminatory motivation, the plaintiff can prove intent through circumstantial evidence using a three-phase, burden-shifting mechanism.<sup>148</sup>

First, the plaintiff makes out a *prima facie* case that would knock out the most obvious reasons for the adverse employment decision—for example, that she was unqualified, performing poorly, or did not apply for the job or promotion (phase 1).<sup>149</sup> The employer can then articulate its legitimate, non-discriminatory reason for taking the adverse employment action against the plaintiff (phase 2), after which the plaintiff can rebut the employer’s assertion as a pretext (phase 3), thus allowing the court to infer discriminatory intent.<sup>150</sup>

In two cases decided in 1977, *International Brotherhood of Teamsters v. United States* and *Hazelwood School District v. United States*, the Court explained how a group of plaintiffs alleging a class-wide or systemic claim of disparate treatment could prove that an employer engaged in a pattern or practice of intentional discrimination, also through circumstantial evidence.<sup>151</sup> To do so, plaintiffs must provide statistical evidence documenting a significant disparity by protected classification in some element of the employer’s workforce; if the

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143. *Id.* at 429–30.

144. *Id.* at 430, 432.

145. *Id.* at 432.

146. *See* Oppenheimer, *supra* note 54, at 919.

147. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792–93 (1973); *see* Sullivan, *supra* note 135, at 1450–51.

148. *McDonnell Douglas*, 411 U.S. at 802–03.

149. *See id.*

150. *See id.* at 802–04; *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07, 526 (1993).

151. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

employer cannot rebut the statistics or provide an alternative explanation, the court may infer intentional discrimination.<sup>152</sup>

Over time, as courts continued to interpret and apply Title VII, two additional theories of proof developed—harassment (considered a sub-type of disparate treatment) and accommodation—neither of which require proof of discriminatory intent to establish entity-level liability.<sup>153</sup> Harassment law first developed in the context of a racially hostile work environment, in which the Court recognized that harassing an employee on the basis of a protected classification could amount to disparate treatment in the terms and conditions of work.<sup>154</sup> In the 1980s, the Court extended the theory to discrimination because of sex, first recognizing the quid pro quo form of sexual harassment, and later extending the hostile work environment theory to any protected classification.<sup>155</sup>

In two cases decided in 1998, *Faragher v. City of Boca Raton*<sup>156</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>157</sup> the Court placed an affirmative duty on employers to prevent and correct harassment based on a protected class. The Court established that an employer entity may be held strictly liable for the harassing behavior of its supervisors regardless of proof of intent, subject to an affirmative defense.<sup>158</sup> Where a co-worker or third party perpetrated the harassment, a plaintiff need only prove employer negligence, still far less than intent to discriminate.<sup>159</sup> As David Oppenheimer described it, in the context of harassment doctrine, employer liability is “based not on an intent to do wrong but rather on a failure to do right.”<sup>160</sup>

Likewise, for religion and, to some extent, pregnancy, Title VII places a duty on an employer to affirmatively accommodate employee differences.<sup>161</sup> An employee may prove disparate treatment in these circumstances by showing the employer entity failed to meet this duty to accommodate, regardless of any intent or bias toward the employee’s religion or pregnancy.<sup>162</sup> These affirmative duties Title VII places on employers prove that, beyond just disparate impact, discriminatory intent is decidedly *not* required to establish certain forms of liability.<sup>163</sup> Thus, of the four major theories for proving unlawful discrimination

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152. *Teamsters*, 431 U.S. at 325, 339; *Hazelwood*, 433 U.S. at 307–09, 361; *see also* Selmi, *supra* note 116, at 500–01 (describing application of this theory to the *Wal-Mart* case).

153. *See* Oppenheimer, *supra* note 54, at 936, 944.

154. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 767 (1998) (Thomas, J., dissenting) (discussing “landmark case” of *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234 (1971)).

155. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65–66 (1986).

156. 524 U.S. 775, 780, 792 (1998).

157. *Ellerth*, 524 U.S. at 759.

158. *Faragher*, 524 U.S. at 791–92, 798, 804; *Ellerth*, 524 U.S. at 756, 765.

159. *See Zatz*, *supra* note 64, at 1364.

160. *See* Oppenheimer, *supra* note 54, at 950.

161. *See* 42 U.S.C. § 2000e(j), (k) (2012).

162. *See Equal Emp’t Opportunity Comm’n v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031–32 (2015); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1342 (2015).

163. *See* Oppenheimer, *supra* note 54, at 950, 967; *Zatz*, *supra* note 64, at 1374–75.

under Title VII—disparate treatment, disparate impact, harassment, and failure to accommodate—the Court has interpreted only disparate treatment to require intent.

In disparate treatment cases, proof of intent to discriminate can be established using circumstantial evidence to *disprove* the employer’s claim that it *lacked* discriminatory intent. This proof structure opens the door for a definition of intent that goes well beyond a decision maker’s conscious choice to act in a biased manner.<sup>164</sup> If, for example, a supervisor assumes incorrectly that a male employee is better suited for a promotion than a female employee, the female employee may prove intentional discrimination even though the supervisor would say he did not *intend* to disadvantage the female candidate.<sup>165</sup> In this way, “intent to discriminate” under Title VII can include an intentional, volitional act that results in discriminatory consequences—what Noah Zatz identified as “class membership enter[ing] the causal chain.”<sup>166</sup> What is more, after the Civil Rights Act of 1991 amended Title VII, a plaintiff’s protected classification need not be the only explanation for the adverse employment action: it must only be a “motivating factor” in a claim of disparate treatment.<sup>167</sup> Thus a plaintiff alleging disparate treatment may now articulate what Michael Zimmer described as a “chain of inferences leading to a finding of discrimination.”<sup>168</sup>

Court decisions focused on the issue of discriminatory intent under Title VII bear out this broad and flexible approach. A plaintiff may prove intent to discriminate under Title VII by offering evidence that the decision maker’s stated reason for the adverse action is not entitled to credence.<sup>169</sup> The court may infer discriminatory intent because the employer’s stated reason is untruthful or inaccurate—for example, the person selected for the promotion was not, objectively, more qualified than the plaintiff. Alternatively, the court may infer discriminatory intent because, even if truthful, the stated reason did not actually motivate or does not justify the adverse action—for example, the employer fired the plaintiff for a seemingly trivial reason.<sup>170</sup>

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164. See Krieger, *supra* note 50, at 1176.

165. See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580, 582–84, 591 (7th Cir. 2004) (reducing punitive damages but upholding a jury verdict in favor of a female plaintiff who was passed over for promotion “because she had children and [her supervisor] didn’t think she’d want to relocate her family, though she hadn’t told him that”).

166. See Zatz, *supra* note 64, at 1377.

167. See Civil Rights Act of 1991, Pub. L. 102-166, § 107, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §2000e (2012)); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90 (2003).

168. See Zimmer, *supra* note 139, at 1243, 1266.

169. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

170. See *Reeves*, 530 U.S. at 147; *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000) (“A plaintiff can demonstrate pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant’s challenged conduct, or (3) was insufficient to warrant the challenged conduct.”); Zimmer, *supra* note 139, at 1272.

In one recent case, a plaintiff survived summary judgment on his claim of intentional race discrimination by showing that his minor dispute with a co-worker did not justify his termination from a job he had performed for nine years.<sup>171</sup> In another, a Court of Appeals upheld a jury verdict for a plaintiff on her claim of intentional sex discrimination where she showed that she did, in fact, have her paramedic's license, despite her employer's claim that not obtaining the license led to her suspension and ultimate termination.<sup>172</sup>

In a class-wide disparate treatment case, a court infers that an employer is engaged in a pattern or practice of intentional discrimination when the employer fails to rebut or explain away the plaintiffs' statistical proof.<sup>173</sup> In a recent case decided after *Wal-Mart v. Dukes*, plaintiffs succeeded in obtaining certification for a pattern-or-practice intentional sex discrimination class based on their statistical evidence that the employer's culture and practices of discretionary promotion decisions resulted in qualified women receiving disproportionately fewer promotions than men—evidence that the employer's expert could not explain away satisfactorily.<sup>174</sup> In this way, the intent requirement for alleging disparate treatment under Title VII is more accurately described as an “inferred intent” requirement: courts have never required a Title VII plaintiff to provide either direct proof or proof of animus to succeed on an “intentional” disparate treatment claim.<sup>175</sup>

To be sure, at least some members of the current Roberts Court would likely reject this characterization of inferred intent. As described in Part II, above, and as Michael Selmi has observed, the Court majority in *Wal-Mart v. Dukes* may have raised the bar for what is needed to prove a pattern or practice of intentional discrimination, beyond just statistics and anecdotal evidence that support an

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171. *Wheat v. Fifth Third Bank*, 785 F.3d 230, 241 (6th Cir. 2015) (“A jury could reasonably conclude that each of the rationales proposed by the defendant for its decision to fire [the plaintiff] either had no basis in fact, did not actually motivate the defendant’s decision, or was insufficient to warrant the challenged conduct. [The plaintiff] thus has . . . raised the specter that those rationales were merely pretextual.”).

172. *Smith v. City of New Smyrna Beach*, 588 Fed. App’x 965, 977–78 (11th Cir. 2014) (“[T]he jury could have inferred that the City’s reasons for [plaintiff]’s termination were pretextual. The City justified [her] suspension, which then led to her termination, by stating that she was no longer qualified, but evidence at trial indicated that [she] could have continued working as a firefighter/EMT and that she presented her EMT license to the City.”).

173. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307–10 (1977); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977).

174. *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 522–28 (N.D. Cal. 2012). After plaintiffs succeeded on class certification, defendants agreed to settle the case for \$8 million. *See Abigail Rubenstein, Costco Agrees to Pay \$8M to End Sex Bias Class Action*, LAW360 (Dec. 18, 2013, 3:20 PM), <http://www.law360.com/articles/496932/costco-agrees-to-pay-8m-to-end-sex-bias-class-action> [<https://perma.cc/RH8T-MK49>].

175. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–03 (1973). *But see* Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1303–04, 1330, 1340–43 (1995) (suggesting that Title VII and the Fair Housing Act need a new, explicit standard, which she also describes as “inferred intent,” to be able to reach unconscious race discrimination).

inference of discrimination.<sup>176</sup> Justice Scalia was notoriously hostile to the disparate impact theory of liability under Title VII except as a way to “smoke out” hidden intentional discrimination,<sup>177</sup> a position shared by like-minded Justices on the current Court.<sup>178</sup> In the context of Equal Protection doctrine, the Court defines intentional discrimination as more purposive and does not recognize a disparate impact theory of discrimination against governmental (as opposed to private) actors.<sup>179</sup> Scholars have noted the potential for such skepticism to impact the Court’s vision of intent under Title VII doctrine as well.<sup>180</sup>

That said, based on the actual statutory text of Title VII—which sweeps more broadly than the Equal Protection clause<sup>181</sup>—and decades of precedent interpreting and applying it, “intent to discriminate” under Title VII is its own animal. Proving intentional disparate treatment under Title VII requires no more than showing that a protected classification entered into the process of an adverse employment decision—a showing that can be inferred from circumstantial evidence.

## 2. *Intent and Recklessness in Tort Law*

Because of its connection to an employer’s behavior toward applicants and employees, the concept of intent in Title VII bears resemblance to issues of negligence, intent, and recklessness in tort law. The basic tort of negligence allows plaintiffs to recover for damages when they are owed a duty of care that

176. See *supra* Part II.A; Selmi, *supra* note 116, at 500–01.

177. See *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring) (citations omitted) (“It might be possible to defend the law [of disparate impact] by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment. . . . But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion.”); see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354–55 (2011) (Scalia, J., writing for the majority) (“[L]eft to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”).

178. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Comtys. Project*, 135 S. Ct. 2507, 2526–28 (2015) (Thomas, J. dissenting) (“We should drop the pretense that *Griggs*’ interpretation of Title VII was legitimate. . . . Under any fair reading of the text, there can be no doubt that the Title VII enacted by Congress did not permit disparate-impact claims.”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

179. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273, 276 (1979); *Washington v. Davis*, 426 U.S. 229, 245–48 (1976).

180. See *Sullivan*, *supra* note 135, at 1452–53 (quoting *Feeney*, 442 U.S. at 269) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009)) (describing how many scholars believe the Court carries over its Equal Protection jurisprudence on intent to the context of Title VII, including the view of “discriminatory purpose” as acting with “more than intent as volition or . . . awareness of consequences”—as acting “‘because of,’ not merely ‘in spite of’ . . . adverse effects upon an identifiable group”).

181. Compare the thirteen-word Equal Protection Clause’s “No state shall . . . deny to any person . . . the equal protection of the laws,” U.S. CONST. amend. XIV, § 1, to the 13,000-word full statutory scheme enacted by Title VII, 42 U.S.C. § 2000e (2012).

has been breached.<sup>182</sup> Establishing negligence requires a plaintiff to prove the elements of duty, breach, causation (both in fact and proximate), and damages.<sup>183</sup> Where a party owes a general duty of care to another, it is a “duty of reasonable care under the circumstances.”<sup>184</sup> A breach giving rise to liability for negligence occurs where the party owing the duty “falls short of such care,” by, for example, “conduct that is unreasonably risky.”<sup>185</sup> To prove that the breach caused the damages giving rise to the claim, a typical tort plaintiff must prove that the breach was both the “cause in fact,” without which there would be no harm, and a reasonably foreseeable “proximate cause” that bears some relation to the resulting harm.<sup>186</sup> Requiring both “but for” and proximate cause means that “the defendant’s conduct not only in fact caused the plaintiff’s harm but that it was a reasonably significant cause,” as opposed to the harm being an unforeseeable “fortuitous” result of negligence or the defendant’s conduct being an insignificant cause among other more significant causes.<sup>187</sup>

As described in Part I, some legal scholars, most notably David Oppenheimer, have articulated a theory of employment discrimination as negligence: Title VII creates a duty on employers to prevent discrimination, so when discrimination occurs, the employer has breached this duty and is liable.<sup>188</sup> As Oppenheimer convincingly demonstrates, Title VII jurisprudence reflects the view that employers have clear duties in the context of claims alleging sexual harassment, accommodation, and even disparate impact.<sup>189</sup> For individual and class disparate treatment claims, however, the affirmative duty on employers is less clear. Because disparate treatment has been characterized as “intentional” discrimination, courts have yet to adopt the negligence framework, holding, instead, that disparate treatment requires more than mere negligence on the part of the employer.<sup>190</sup>

The most obvious alternative comparison in tort, then, is the higher standard of purposefulness required to make out an “intentional tort.” Under the

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182. See DAN B. DOBBS, *THE LAW OF TORTS* § 114 (WEST 2000); RESTATEMENT (SECOND) OF TORTS §§ 281–82 (AM. LAW INST. 1965).

183. DOBBS, *supra* note 182, § 114.

184. *Id.* § 115.

185. *Id.* § 115(1).

186. *Id.* §§ 114–15. While I use this simplified definition of “proximate cause” for clarity and ease, note that even within tort law itself, it has been defined and applied inconsistently. See Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, *supra* note 69, at 6–10.

187. DOBBS, *supra* note 182, § 115.

188. See Oppenheimer, *supra* note 54, at 967; Zatz, *supra* note 64, at 1364; *supra* Part I.A.

189. See Oppenheimer, *supra* note 54, at 967–69; *supra* Part I.A.

190. See Sperino, *The Tort Label*, *supra* note 69, at 1075 (citing *Aaron v. Sears, Roebuck & Co.*, No. 3:08CV1471, 2009 WL 803586, at \*2 (N.D. Ohio Mar. 25, 2009); *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998)) (“To date, the courts have not embraced arguments that plaintiffs may establish a discrimination claim via a negligence analysis.”); see also *Jalal*, 4 F. Supp. 2d at 241 (“Title VII . . . provides no remedy for negligent discrimination.”); *Aaron*, 2009 WL 803586, at \*2 (being “merely ‘negligent’ . . . does not rise to the standard of intentional discrimination required by Title VII.”).

Third Restatement of Torts, to be guilty of an intentional tort—for example, battery—a tort victim must show that the person committing the tort acts either “with the purpose of producing that consequence” or “knowing that the consequence is substantially certain to result.”<sup>191</sup> Intentional torts can arise even if the tortfeasor did not set out to accomplish the results of the tort: if the tortfeasor goes ahead with his action, despite knowing that its “consequences are certain, or substantially certain to result,” then “he is treated by the law as if he had in fact desired to produce the result.”<sup>192</sup> Like intent in Title VII, intent in tort focuses on a specific subjective state of mind that is proven through inference from objective evidence,<sup>193</sup> and intentional torts require neither a bad motive nor consciousness that an act is a legal wrong.<sup>194</sup>

Yet the “substantial certainty” test for tortious intent sets a significantly higher bar than the inferred intent allowed in Title VII disparate treatment. As torts scholar Dan Dobbs explains, “even a very high risk” that a consequence will occur is not enough for an intentional tort, which requires that the specific harm against the plaintiff was substantially certain at the time and place it occurred.<sup>195</sup> Intent and negligence in tort are also “mutually exclusive” and opposed concepts: intent focuses on the actor’s purposeful state of mind in taking an act rather than on any consideration of the outward act itself.<sup>196</sup> For example, if a driver hits a mailbox, he may only be liable of an intentional tort if he veered off the road on purpose to hit the mailbox or knowing that it was substantially certain he would do so, otherwise he may be negligent; he cannot be both. In contrast, discrimination under Title VII reflects and incorporates both concepts—a concern for both the action and the motivation.

Because of its narrow focus on purposeful state of mind, tortious intent fails to capture the full range of inferred intent allowed in Title VII disparate treatment claims.<sup>197</sup> This mismatch invites comparison to what serves as a middle ground

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191. RESTATEMENT (THIRD) OF TORTS § 1 (AM. LAW INST. 2005); accord DOBBS, *supra* note 182, § 124.

192. RESTATEMENT (SECOND) OF TORTS § 8A, cmt. b (AM. LAW INST. 1965); see also RESTATEMENT (THIRD) OF TORTS § 1, cmt. c (AM. LAW INST. 2005) (“[K]nowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm.”). Because of the relative newness of the Third Restatement of Torts and the fact that it, “while accepting the . . . definition of intent incorporated into § 8A of the Restatement Second of Torts, differs from [it]” slightly, *id.* at cmt. A, I refer to both versions of the Restatement in my discussion of intent.

193. DOBBS, *supra* note 182, § 24.

194. *Id.* § 25.

195. DOBBS, *supra* note 182, § 24; see also RESTATEMENT (THIRD) OF TORTS § 1, cmt. e (“The applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area.”).

196. DOBBS, *supra* note 182, § 26.

197. Other scholars may disagree with my formulation here and characterize the concept of intent in tort to be *broad*er—not narrower—than intent in Title VII. See, e.g., Sandra F. Sperino, *Let’s Pretend Discrimination is a Tort*, 75 OHIO ST. L.J. 1107, 1114–17 (2014). For my discussion of this issue, see *infra* Part III.C.



in tort law: recklessness. In tort, reckless conduct falls somewhere between intentional and negligent conduct, reflecting pieces of both categories.<sup>198</sup> While recklessness “adds a degree of confusion or uncertainty” to tort law that makes it an unpopular topic,<sup>199</sup> this characteristic mirrors the lack of clarity about the meaning of “discriminatory intent” in Title VII, making it, ironically, an apt comparison.

Recklessness in tort goes further than negligence to account for situations in which the actor takes risks that are unusually high and for which the costs of preventing the harms are low.<sup>200</sup> As defined in the Third Restatement of Torts, recklessness occurs where an actor “knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation” and the burden to “eliminate or reduce the risk” is “so slight relative to the . . . risk” that the actor’s “failure to adopt the precaution[s]” demonstrates the actor’s “indifference to the risk.”<sup>201</sup> To prove recklessness requires that the actor was aware of a significant risk and “proceed[ed] without concern” for the impact on others.<sup>202</sup> Recklessness incorporates a state of mind or “mental element” of “conscious indifference” to the consequences of one’s actions: the actor “intentionally or consciously runs a very serious risk” of harming the victim “with no good reason to do so.”<sup>203</sup> Because of this, to be reckless, the tortfeasor must have had “reason to know or notice” of the risks of harm that they consciously ignored—“information that would lead directly to an inference of the relevant facts or conditions” (as compared to the lesser negligence standard of “should have known”).<sup>204</sup>

It is this state of mind element that makes recklessness more like intent than like negligence—so much so that, in some instances, recklessness meets the required mental state for an *intentional* tort. To be reckless, an act “must be intended by the actor,” even though “the actor does not intend to cause the harm

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198. See Rapp, *supra* note 133, 116–18; DOBBS, *supra* note 182, § 27.

199. DOBBS, *supra* note 182, § 27; see Rapp, *supra* note 133, at 115 (noting that “recklessness has remained one of the murkiest standards in tort,” and “has rarely been the subject of academic analysis”). To be sure, within tort law and scholarship itself, there is mixed sentiment and confusion over the standard of recklessness and its comparison to related concepts of gross negligence or willful or wonton conduct. See *id.* at 127–31, 133–35. Despite this lack of complete certainty in tort law, the concept of recklessness provides a useful counterpoint to explore the meaning of “intent” in disparate treatment.

200. DOBBS, *supra* note 182, § 147 (noting that “the risk-utility balance strongly disfavors the defendant’s conduct—the risk was high, or very serious harm was threatened, or the cost of avoiding danger was very low”).

201. RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2005).

202. DOBBS, *supra* note 182, § 27.

203. *Id.* § 147 & n.13 (citing Bader v. Lawson, 898 S.W.2d 40 (Ark. 1995); Morris v. Leaf, 534 N.W.2d 388 (Iowa 1995); Campbell v. City of Elmira, 644 N.E.2d 993 (N.Y. 1994)).

204. DOBBS, *supra* note 182, at 351 n. 12 (citing RESTATEMENT (SECOND) OF TORTS § 12 (1965)). See, e.g., Morris v. Leaf, 534 N.W.2d 388 (Iowa 1995) (defining recklessness as acting “in disregard of a risk known to or so obvious that he must be taken to have been aware of it”), as cited in DOBBS, *supra* note 182, § 147, at 351 n.13.

which results from it.”<sup>205</sup> Thus, even though recklessness is not, by definition, intentional, “in extreme cases courts may treat [it] more like an intentional tort than like negligence.”<sup>206</sup> Moreover, a finding of recklessness may be enough in tort to create liability for punitive damages<sup>207</sup>—damages that are only available under Title VII in cases of *intentional* discrimination.<sup>208</sup>

In particular, the tort of intentional infliction of emotional distress requires a mental state that may be met by an actor’s recklessness. The Third Restatement of Torts defines this tort as:

An actor who by extreme and outrageous conduct intentionally *or recklessly* causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.<sup>209</sup>

In explanatory comments, the Restatement authors note that “[c]ourts uniformly hold that reckless conduct, not just intentional conduct, can support a claim for intentional infliction of emotional harm.”<sup>210</sup> Likewise, a typical state common law definition of the required mental state for this intentional tort requires the tortfeasor to act with “intention to cause *or reckless disregard of the probability of causing* emotional distress.”<sup>211</sup> Given that the tort of intentional infliction of emotional distress often arises in employment discrimination litigation,<sup>212</sup> the

205. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (AM. LAW INST. 1965).

206. DOBBS, *supra* note 182, § 147 & n.14 (citing *Ziarko v. Soo Line R.R. Co.*, 641 N.E.2d 402 (Ill. 1994)) (“sometimes more like negligence, sometimes more like intent”); *see also* RESTATEMENT (THIRD) OF TORTS § 2 cmt. b (“In emotional-harm cases, . . . a finding of recklessness may subject a defendant . . . to liability for intentional infliction of emotional harm.”); Rapp, *supra* note 133, at 122–25, 136–37 (discussing when recklessness suffices to serve as an intentional tort). “At times, it is difficult for courts to distinguish recklessness from intentional tort. Recklessness has been described as ‘tantamount to’ or a ‘proxy for’ intentional misconduct. In his judicial writings, Richard Posner has described recklessness as having such a close proximity to intentional torts that they are virtually indistinguishable, and are treated indistinguishably by the law. Courts have emphasized that a reckless defendant must ‘intentionally do the act or intentionally fail to do the act’ which causes harm, meaning that the defendant must make a choice of a ‘course of action that spells danger.’” Rapp, *supra* note 133, at 136 (citation omitted).

207. RESTATEMENT (THIRD) OF TORTS § cmt. b (“[T]he standard for awarding punitive damages commonly refers to the defendant’s reckless conduct—or reckless indifference to risk, or reckless disregard for risk.”).

208. *See* 42 U.S.C. § 1981a(a)(1) (2012) (“In an action brought by a complaining party . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . the complaining party may recover compensatory and punitive damages . . .”).

209. RESTATEMENT (THIRD) OF TORTS § 46 (emphasis added).

210. *Id.* § 46 cmt. h.

211. *See, e.g., Agarwal v. Johnson*, 603 P.2d 58, 66–67 (Cal. 1979) (en banc) (emphasis added).

212. *See* RESTATEMENT (THIRD) OF TORTS § 46 cmt. n (“Claims of intentional infliction of emotional harm arise with some frequency in the workplace. Some of those claims overlap with federal and state civil-rights statutes that prohibit certain forms of discrimination, including harassment.”); L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345, 1352–54 (2014) (citing case law and explaining how discrimination and harassment claims have been “likened to” or plead with claims for intentional infliction of emotional distress).

fact that recklessness constitutes “intent” in the tort context lends additional support for considering how recklessness might apply in the context of Title VII.

### 3. *The “Tortification” of Employment Discrimination Law*

Looking to the tort concept of recklessness as a means for theorizing liability for disparate treatment requires addressing a recent body of thought on what Charles Sullivan and Sandra Sperino, in separate works, refer to as the “tortification” of employment discrimination law.<sup>213</sup> Since the 1970s, in a handful of cases interpreting Title VII, courts have drawn analogies between statutory antidiscrimination protections and tort law.<sup>214</sup> When Congress enacted Title VII, it created a statutory right to be free from discrimination at work, above and beyond the common law of tort. Yet Title VII allows plaintiffs to recover damages for civil wrongs; as such, some courts perceived Title VII to bear a resemblance to common law tort claims for personal injury, like intentional infliction of emotional distress.<sup>215</sup> While references to tort law appeared on occasion throughout Title VII jurisprudence, the comparisons were, for the most part, just that: parallels or analogies, suggesting that Title VII was “tort-like,” but not that it was a tort.<sup>216</sup>

In the era of the Roberts Court, however, this changed. In a series of three cases decided between 2009 and 2013, the Court applied tort law concepts more actively and directly to cases alleging discrimination or retaliation at work, thus “tortifying” the law of employment discrimination.<sup>217</sup> First, in 2009, in *Gross v. FBL Financial Services, Inc.*, a divided Court rejected the mixed-motive theory of liability under the Age Discrimination in Employment Act (ADEA), instead requiring a plaintiff to prove that age was the “but for” cause of the adverse employment action.<sup>218</sup> With no direct reference to tort law—other than one string cite that referenced *Prosser and Keeton on the Law of Torts*—the Court reasoned that the “motivating factor” theory of proof available under Title VII was not similarly available under the ADEA, which Congress had failed to amend in the Civil Rights Act of 1991.<sup>219</sup> Thus, unless Jack Gross could prove that his age was the cause in fact for his demotion when his employer gave his duties to a

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213. Sperino, *The Tort Label*, *supra* note 69, at 1054; *see* Sullivan, *supra* note 135, at 1431.

214. *See* Oppenheimer, *supra* note 54, at 917–19 (citing, for example, *United States v. Burke*, 504 U.S. 229, 254 (1992); *Curtis v. Loether*, 415 U.S. 189, 196–97 (1974)); Sperino, *The Tort Label*, *supra* note 69, at 1052, 1054, 1067 (same).

215. *See* Oppenheimer, *supra* note 54, at 917–19; Sperino, *The Tort Label*, *supra* note 69, at 1054.

216. *See* *Burke*, 504 U.S. at 254 (1992) (O’Connor, J., dissenting) (“I remain of the view that Title VII offers a tort-like cause of action.”), *cited in* Sperino, *The Tort Label*, *supra* note 69, at 1067.

217. *See* Martha Chamallas & Sandra F. Sperino, *Torts and Civil Rights Law: Migration and Conflict: Symposium Introduction*, 75 OHIO ST. L.J. 1021, 1021–22 (2014); Sperino, *The Tort Label*, *supra* note 69, at 1052 (describing a “radical shift in the prominence and importance of tort law within discrimination jurisprudence”); Sullivan, *supra* note 135, at 1431–34.

218. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173–80 (2009).

219. *Id.*

younger employee as part of a “corporate restructuring,” he was not entitled to prevail.<sup>220</sup>

After joining the four-Justice dissent (which argued that the majority misconstrued Congressional intent to treat the ADEA like Title VII), Justice Stephen Breyer wrote a second dissent to address the majority’s improper tort approach.<sup>221</sup> “[I]t is one thing to require a typical tort plaintiff to show ‘but-for’ causation . . . [in a] context [where] reasonably objective scientific or commonsense theories of physical causation” apply, Breyer wrote, but “it is an entirely different matter to determine a ‘but-for’ relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.”<sup>222</sup>

Two years later, in *Staub v. Proctor Hospital*, the Court continued its application of tort causation theories to employment claims, this time in the context of the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>223</sup> Vincent Staub alleged that his employer discriminated against him because of his obligations as a U.S. Army Reservist when his supervisor, who resented Staub’s unavailability, targeted Staub in a series of baseless disciplinary actions.<sup>224</sup> Because of the supervisor’s complaints and Staub’s disciplinary record, the vice president of human resources fired Staub for poor performance.<sup>225</sup>

The Supreme Court held that the vice president need not have acted as an unwitting “cat’s paw” for the supervisor, because Title VII required only that Staub’s military status be “a motivating factor” for the adverse employment action.<sup>226</sup> In so doing, the Court explained that it was relying on the tort law concept of “proximate cause,” stating that they were operating “from the premise that when Congress creates a federal tort it adopts the background of general tort law.”<sup>227</sup> Thus the Court, in its own words, “incorporate[d] [a] traditional tort-law concept” directly into antidiscrimination law to justify its holding.<sup>228</sup> The Court also noted that USERRA “is very similar to Title VII,”<sup>229</sup> opening the door to further application of similar tort concepts.

While, in *Staub*, the Court’s application of tort seemed to expand the reach of USERRA to protect employees, the other shoe dropped two years later when, building upon *Gross* and *Staub*, the Court applied tort law “but for” causation to

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220. *See id.* at 169–73, 176.

221. *See id.* at 190 (Breyer, J., dissenting).

222. *Id.*

223. 562 U.S. 411 (2011).

224. *Id.* at 413–15.

225. *Id.* at 414–15.

226. *Id.* at 414–22.

227. *Id.* at 417.

228. *Id.* at 420.

229. *Id.* at 417.

Title VII directly. In *University of Texas Southwest Medical Center v. Nassar*,<sup>230</sup> the Court rejected the mixed-motive theory of proof for retaliation claims under Title VII.<sup>231</sup> As it had done in *Gross* for the ADEA, the Court held that the inclusion of the “motivating factor” approach in Title VII’s discrimination provision did not extend to Title VII’s *retaliation* provision.<sup>232</sup> As a result, unless Naiel Nassar could prove that retaliation for his complaints of religious and national origin discrimination were the “but for” cause for his constructive discharge from his position as a hospital doctor, he could not prevail.<sup>233</sup>

Unlike in *Gross*, however, this time, the Court’s reliance on tort law was front and center. In two prominent paragraphs devoted to explaining how “[c]ausation in fact . . . is a standard requirement of any tort claim,” which “includes federal statutory claims of workplace discrimination,” the Court described “but for” causation as “textbook tort law,” “the background against which Congress legislated in enacting Title VII,” and “the default rule[] [Congress] is presumed to have incorporated.”<sup>234</sup> Indeed, the acceptance of the application of tort law was so complete that even Justice Ginsburg, writing for the four dissenters, used tort law to argue her position—not that the Court was wrong to apply tort causation concepts to Title VII but that the Court applied those tort concepts incorrectly.<sup>235</sup>

The full impact of the recent trio of cases applying tort concepts more directly to antidiscrimination doctrine remains to be seen. Most legal scholars considering this move by the Court view it as a mistake—either because it is an incorrect mismatch of legal doctrines, or because it is unnecessarily limiting to the reach of Title VII, or both.<sup>236</sup> On the other hand, some commentators recognize that tort concepts have been beneficial to the interpretation of employer duties under antidiscrimination statutes and acknowledge the potential for tort ideas to broaden certain aspects of Title VII doctrine.<sup>237</sup> Because both

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230. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2525 (2013); *see also* Sullivan, *supra* note 135, at 1431 (suggesting “that, rather than widening the notion of discriminatory intent, which *Staub* at first blush seems to do, the opinion actually adds another layer to the plaintiff’s burden”).

231. *See Nassar*, 133 S. Ct. at 2525.

232. *Id.*

233. *Id.* at 2522–23.

234. *Id.* at 2524–25.

235. *Id.* at 2546–47.

236. *See, e.g.*, Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty and Causation*, 75 OHIO ST. L.J. 1375, 1398–401 (2014) (mismatch); Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1330–32 (2014) (mismatch); William R. Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law?*, 75 OHIO ST. L.J. 1027, 1028–32 (2014) (both); Sperino, *The Tort Label*, *supra* note 69, at 1052–53 (mismatch); Charles A. Sullivan, *Is There a Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079, 1080–83 (2014) (both); Sullivan, *supra* note 135, at 1459 (both).

237. *See, e.g.*, Ifeoma Ajunwa, *Genetic Testing Meets Big Data: Tort and Contract Law Issues*, 75 OHIO ST. L.J. 1225, 1261–62 (2014); Corbett, *supra* note 236, at 1068–76; Hébert, *supra* note 212, at 1362; Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1207, 1215–16, 1219–22 (2014); Laura Rothstein, *Disability Discrimination Statutes or*

areas of law are complex and multifaceted, whether it is harmful or helpful to import tort concepts into antidiscrimination doctrine often turns on which concepts are being imported.

Most of the scholarly concern about tortifying antidiscrimination law relates to issues of causation. As described previously, tort law usually requires that a defendant's conduct was both the actual cause—the cause in fact of the harm, but for which the harm would not have occurred—and the proximate cause—a reasonably foreseeable and not insignificant cause—of the harm.<sup>238</sup> In stark contrast, causation under Title VII requires only that a protected classification be “a motivating factor” of the harm—neither the only but-for cause, nor an anticipated proximate cause.<sup>239</sup> Thus, as legal scholars have rightly identified, applying tort law causation concepts to antidiscrimination cases significantly ups the ante of what plaintiffs must prove to show that the adverse employment action in question was “because of” their protected classification.<sup>240</sup> This appears to be what the Supreme Court did: it required but-for causation for ADEA and Title VII retaliation claims in *Gross* and *Nassar*, and it suggested that proximate cause would be an appropriate consideration in USERRA claims in *Staub*.<sup>241</sup>

Relative to concerns about causation issues, less attention has been paid to the issue of intent in tort and its application to intentional discrimination under Title VII. Where scholars have weighed in, opinions are mixed. Again, some, including Sperino, raise concerns about mismatch between the two doctrines, arguing that intent in tort and intent in employment discrimination are conceptually and doctrinally different ideas.<sup>242</sup> Some view a move to import tort intent into intentional discrimination as potentially limiting Title VII's reach. For example, Sullivan cautions that, in *Staub*, the Court appeared to “disaggregate” intent and motive, paving the way for it to now require plaintiffs to prove *both* under antidiscrimination statutes.<sup>243</sup> Thus where intent may be proven fairly easily by consequences from volitional acts, motive implies an underlying discriminatory motivation that may be more difficult to prove.<sup>244</sup>

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*Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1263, 1299–301 (2014); Sperino, *supra* note 197, at 1114–24; Sperino, *The Tort Label*, *supra* note 69, at 9.

238. See *supra* notes 218–35 and accompanying text.

239. 42 U.S.C. § 2000e-2(m) (2012); see *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–102 (2003).

240. See Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, *supra* note 69, at 1459; Sullivan, *supra* note 135, at 1459–67.

241. See *supra* notes 218–35 and accompanying text; see also Sperino, *The Tort Label*, *supra* note 69, at 1064–65.

242. See Sperino, *The Tort Label*, *supra* note 69, at 1074–75 (suggesting that such a comparison “ignores two important factors: whether individual disparate treatment cases actually require a showing of intent and whether the intent required is similar to the type required in intentional tort cases”).

243. See Sullivan, *supra* note 135, at 1451–55.

244. See *id.*

On the other hand, while remaining skeptical on *causation*, Sperino and others acknowledge potential advantages to looking to tortious *intent*.<sup>245</sup> For example, as described more fully in Part III, below, if applied to its full logical conclusion, adopting tort concepts of intent in Title VII offers the potential to reach more structural forms of discrimination.<sup>246</sup> In particular, an incorporation of tort concepts into Title VII should, at the very least, open the door to revisiting an employer's duty to not discriminate under Title VII. If Title VII is just another tort, then an employer entity and its agents must take reasonable care not to discriminate—which begs the question of what, if anything, that standard now requires.

Interestingly, in the handful of antidiscrimination cases it has decided since *Nassar* in 2013, the Court has arguably strengthened employer duties under Title VII in line with a negligence framework while referring less explicitly to tort doctrine or authority. In two cases decided in 2015, *EEOC v. Abercrombie & Fitch*<sup>247</sup> and *Young v. UPS*,<sup>248</sup> the Court held in favor of employee plaintiffs, expanding an employer's duty to accommodate employees' religious differences and pregnancy disabilities under Title VII.

In *Abercrombie*, the Court noted that discrimination “because of” a protected classification “typically imports, at a minimum, the traditional standard of but-for causation,” but also that “Title VII relaxes this standard” by prohibiting adverse employment decisions when a protected class is merely a “motivating factor.”<sup>249</sup> Thus, when Abercrombie refused to hire Samantha Elauf, who wore a hijab, after assuming she could not comply with its “look policy” of no hats or headwear, it engaged in disparate treatment, despite the fact that it lacked “actual knowledge” that Elauf would need a religious accommodation.<sup>250</sup> Moreover, contrary to Abercrombie's assertion that Elauf's claim must be raised as a disparate impact claim, the Court held that, because the protected classification of “religion” is defined by Title VII to include “religious observance and practice, as well as belief,” a failure to accommodate a religious practice constitutes disparate treatment.<sup>251</sup>

In *Young*, the Court made it easier for employees to prove intentional disparate treatment under Title VII's requirement that an employer treat pregnant employees “the same as” all other employees with similar work capabilities or limitations.<sup>252</sup> A plaintiff can reach a jury, the Court held, “by providing

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245. See, e.g., Hébert, *supra* note 212, at 1362–63; Smith, *supra* note 237, at 1209–16; Sperino, *supra* note 197, at 1114–20.

246. See, e.g., Hébert, *supra* note 212, at 1352–55; Smith, *supra* note 237, at 1209–16; Sperino, *supra* note 197, at 1116–18.

247. 135 S. Ct. 2028 (2015).

248. 135 S. Ct. 1338 (2015).

249. *Abercrombie*, 135 S. Ct. at 2032–34.

250. *Id.* at 2031–34.

251. *Id.* at 2032–34.

252. See *Young*, 135 S. Ct. at 1351–56.

sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.”<sup>253</sup> The Court went on to explain that this framework “is consistent with our longstanding rule that a plaintiff can use circumstantial proof” to make out her case; for example, proof “that an employer's general policy and practice with respect to minority employment—including statistics[—]could be evidence of pretext.”<sup>254</sup>

What seems clear at this point is that the Court has incorporated tort concepts, particularly those around causation, into antidiscrimination jurisprudence, while not entirely adopting a tort approach. Regardless of scholarly concerns about the lack of fit between the two fields and the limiting impact of tort law on statutory civil rights laws, to some extent, the ship has already sailed in *Gross*, *Staub*, and *Nassar*. Given this reality, if the Court is willing to look to tort causation concepts when interpreting Title VII, it can look to tortious intent, too.

#### B. Knowledge of the Risk of Bias in Employment Decisions

Once it is established that intent under Title VII may parallel intent and, in some cases, recklessness in tort, the next analytical step is to assess the foreseeability of bias as a result of current structures of employment decision making. If intent arises when an actor acts despite knowing that “the [harmful] consequences are certain, or substantially certain, to result from his act,”<sup>255</sup> or when he has “conscious indifference” to the harmful consequences of his actions,<sup>256</sup> the focus of the inquiry becomes assessing how well known the risk is that bias may infect subjective employment decision making.

This Section documents that this risk is now so widely and pervasively known that, when an employer becomes aware of disparities by gender or race in its workforce, a failure to respond to the situation amounts to conscious indifference. First, six decades of social science research has documented again and again how bias infects common patterns of employment decision making, resulting in discriminatory outcomes and inequality. Second, this research is so established that, for at least the past two of those six decades, many employers have voluntarily and publicly adopted bias-prevention measures to counteract the known impact of bias—so much so that successful intervention measures are now well known. What is more, technology has made bias-reducing interventions cheaper and easier to adopt than ever before. Yet the law of Title VII still lags behind current scientific knowledge and modern business practices.

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253. *Id.* at 1354.

254. *Id.* at 1355 (internal quotation marks omitted).

255. RESTATEMENT (SECOND) OF TORTS § 8A, cmt. b (AM. LAW INST. 1965).

256. DOBBS, *supra* note 182, § 147.



### 1. *Social Science Research on Bias*

Scientific research documenting that stereotypes and biases disadvantage minority group members in the workplace predates Title VII. As early as the 1930s, social psychologists identified and began measuring and studying the phenomenon of racial prejudice.<sup>257</sup> Research continued at a rapid pace throughout the 1940s and 1950s, producing what Linda Krieger described as “a mind-dazzling number of definitions of prejudice” and culminating in the 1954 publication of Gordon Allport’s *The Nature of Prejudice*.<sup>258</sup> While early research on prejudice linked it with the notion of stereotyping, biased decision making was still viewed as a conscious, motivated act.<sup>259</sup>

Then, in the late 1950s and 1960s experimental social psychologists began to connect the dots between our human tendency to categorize information automatically and those underlying stereotypes. In a series of experiments during this time, researchers first documented a “cognitive approach to intergroup bias,” whereby the normal mechanisms our brains use to categorize information “might in and of themselves produce and perpetuate intergroup bias,” regardless of motivation.<sup>260</sup> Thus, even before Title VII was enacted in 1964, researchers had identified what is known today as cognitive or implicit bias: prejudice that occurs automatically as a result of the brain’s normal tendency to categorize between members of in-groups and out-groups.

Since the 1970s, researchers in an array of fields, including social psychology, industrial-organizational psychology, sociology, neuroscience, and more, have built upon early social cognition theory.<sup>261</sup> Such research has documented countless aspects of the operation of stereotypes and biases based on protected status characteristics like race, sex, national origin, and religion—along with its potential to be corrected.<sup>262</sup> The depth and breadth of the research is so vast that it is hard to quantify. In her seminal 1995 article *The Content of Our Categories*, Krieger cited over 125 different major studies on social

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257. See Krieger, *supra* note 50, at 1175 (citing GARDNER MURPHY, LOIS BARCLAY MURPHY & THEODORE M. NEWCOMB, *EXPERIMENTAL SOCIAL PSYCHOLOGY* (1931); Daniel Katz & Kenneth Braly, *Racial Stereotypes of One Hundred College Students*, 28 *J. ABNORMAL & SOC. PSYCHOL.* 280 (1933); JOHN DOLLARD ET AL., *FRUSTRATION AND AGGRESSION* (1939); JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1937)).

258. See Krieger, *supra* note 50, at 1176 (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954)).

259. See *id.* at 1187.

260. See *id.* at 1186–87 (citing three key early studies: Donald T. Campbell, *Enhancement of Contrast as Composite Habit*, 53 *J. ABNORMAL & SOC. PSYCHOL.* 350, 355 (1956); Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgement*, 54 *BRIT. J. PSYCHOL.* 101, 104 (1963); W. Edgar Vinacke, *Stereotypes as Social Concepts*, 45 *J. SOC. PSYCHOL.* 229, 229 (1957)) (emphasis removed).

261. See generally DOBBIN, *supra* note 16 (describing the development of this research); Frank Dobbin & Alexandra Kalev, *The Origins and Effects of Corporate Diversity Programs*, in *THE OXFORD HANDBOOK OF DIVERSITY AND WORK* 253–81 (Quinetta M. Roberson ed., 2013) (same); Krieger, *supra* note 50 (same).

262. See *supra* note 261.

cognition theory published between 1956 and 1995.<sup>263</sup> The research has grown exponentially in the two decades since: today, tens of thousands of studies have been published on cognitive, implicit, or unconscious bias, over 1,200 of which focus on cognitive bias in employment discrimination alone.<sup>264</sup>

In addition, the phenomenon of implicit bias has now entered the mainstream lexicon with help from scientists Anthony Greenwald, Mahzarin Banaji, and Brian Nosek's Project Implicit at Harvard University.<sup>265</sup> Now almost twenty years old, the Project made widely available an online "Implicit Association Test" that allows the website's visitors to test their own implicit biases based on a wide array of group membership dimensions, including race, gender, national origin, disability, age, and sexuality.<sup>266</sup> The researchers' work has been covered by many major news sources<sup>267</sup> and was recently compiled into a book incorporating the data collected by the Project over its first decade and a half.<sup>268</sup> Implicit bias has also entered the public discourse on policing and criminal justice reform through the concept of "racial profiling" and the Black Lives Matter movement.<sup>269</sup> Societal understanding of implicit racial bias is now so widespread that 2016 presidential candidate Hillary Clinton referred to it in her campaign materials,<sup>270</sup> and a moderator of one 2016 presidential debate asked both candidates whether they "believe that police are implicitly biased against black people."<sup>271</sup>

The vast body of scientific research developed over the past sixty years now supports some universal principles about stereotyping and implicit bias that

263. See Krieger, *supra* note 50, at 1187–218.

264. Searches conducted August 20, 2016, in Google Scholar for works published since 1995 with the term "cognitive bias," "implicit bias," or "unconscious bias" returned 18,900; 10,800; and 9,600 results respectively. With each of those terms and "employment discrimination," the search returned 1,250; 1,390; and 1,060 results respectively.

265. *About Us*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/aboutus.html> [<https://perma.cc/L5FR-UYCD>] (last visited Apr. 2, 2017).

266. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> [<https://perma.cc/NB39-CM6Y>].

267. *Reaction*, BLINDSPOT, <http://blindspot.fas.harvard.edu/Reaction> [<https://perma.cc/7MHA-SUWD>] (last visited Apr. 16, 2017).

268. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013).

269. See, e.g., Radley Balko, *The Black Lives Matter Policy Agenda Is Practical, Thoughtful—and Urgent*, WASH. POST (Aug. 25, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/08/25/the-black-lives-matter-policy-agenda-is-practical-thoughtful-and-urgent> [<https://perma.cc/2E68-GCT2>].

270. *Criminal Justice Reform*, HILLARY FOR AM., <https://www.hillaryclinton.com/issues/criminal-justice-reform> [<https://perma.cc/ZC5H-RTBX>] (last visited Apr. 17, 2017) (acknowledging that "implicit bias still exists across society" and proposing to "tackle [implicit bias in policing] together" by promising to "commit \$1 billion in [Clinton's] first budget to find and fund the best training programs, support new research, and make this a national policing priority").

271. *Presidential Debate at Hofstra University in Hempstead, New York*, AM. PRESIDENCY PROJECT (Sept. 26, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=118971> [<https://perma.cc/NH5H-VFF5>].

relate to employment decision making. First, people hold stereotypes about others based on group membership—for example, based on race or sex—that can be positive, negative, or neutral.<sup>272</sup> Second, people often act on those stereotypes automatically, as a part of their brain’s sorting function, without their conscious awareness.<sup>273</sup> Third, automatic stereotypes can shape perceptions, such that the same record or performance (for example, a resume or performance on a job task) may be viewed differently when it is associated with people with different status characteristics (for example, a man or a woman, a white person or a black person).<sup>274</sup> They can also lead to shifting criteria for that performance, such that valued criteria (for example, a candidate’s level of education or, alternatively, experience) change to match whichever criteria the higher-status candidate has.<sup>275</sup> Fourth—and most importantly, for employer liability under a recklessness framework—while this process may happen automatically, it is not inevitable: it can be controlled and corrected.<sup>276</sup>

While experts may disagree about the *role* such research should play in employment litigation, the dispute is not over the validity of the research findings themselves.<sup>277</sup> Specifically, there is agreement on the last of these four findings: implicit bias can be counteracted, interrupted, or corrected to prevent or reduce its impact on employment decisions.<sup>278</sup> It is this finding that has led to a cottage industry of experts and businesses designed to help employers reduce bias in their workplaces.

## 2. Employer Behavior to Reduce Bias

Alongside the development of social science research on bias, since the 1960s, employers have engaged in voluntary efforts to reduce discrimination and promote diversity in their own operations.<sup>279</sup> The types of policies and practices

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272. See, e.g., Krieger, *supra* note 50, at 1187–218 (citing and summarizing in detail the social science on implicit bias); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMP. RTS. & EMP. POL’Y J. 401, 442 (2003) (citing and summarizing in detail the social science on stereotyping).

273. See *supra* note 272.

274. *Id.*

275. *Id.*

276. *Id.*

277. Compare Hart & Secunda, *supra* note 81, at 51–55 (“[T]here is in fact a substantial agreement among scientists about the operation of cognitive processes like bias and stereotyping[; thus critics’ concerns] go[] to the weight a fact finder should place on the evidence, not to whether the evidence is admissible in the first instance.”), with Monahan et al., *supra* note 85, at 1715–19, 1742–49 (“If experts . . . simply described social science findings on the circumstances under which gender stereotyping is more or less likely to occur within the research settings, leaving it to the fact-finder to determine the applicability of this research to the circumstances of a particular employer, such testimony would be entirely consistent with . . . our [concept of] social frameworks [and their legal role]. . . . In many cases, however, experts have not been content to provide a description of the general research to create a context for the facts of the case, and judges have not required such circumspection.”).

278. See, e.g., Krieger, *supra* note 50, at 1216–17; Williams, *supra* note 272, at 442.

279. See Dobbin & Kalev, *supra* note 261, at 253–73.

employers may adopt have changed and evolved over time, mirroring advances in social science research and responding to measures of existing programs' effectiveness.<sup>280</sup> Importantly, as Lauren Edelman and her colleagues have identified, because Congress did not prescribe particular measures for employers to take to achieve statutory antidiscrimination goals, the practices that employers and their human resources personnel developed have helped shape the limits of Title VII.<sup>281</sup> As such, employer awareness of and involvement in preventing and correcting for biases dates as far back as the passage of the statute.

As Frank Dobbin and Alexandra Kalev have documented, employers' efforts to prevent discrimination and promote diversity evolved through a series of phases.<sup>282</sup> In the 1960s, employers focused on establishing nondiscrimination policies and diversifying their recruitment efforts to create a more diverse pipeline of potential applicants and employees.<sup>283</sup> In the 1970s, efforts focused on systematizing hiring and promotion decisions to make them more objective. For example, employers began creating job postings and descriptions and establishing complaint procedures for employees.<sup>284</sup> This was followed by a period in the 1980s, when a new literature developed that promoted the "business case" for diversity by encouraging employers to diversify their workforces as a way to remain economically competitive in an increasingly diverse society.<sup>285</sup> This period also saw the growth of trainings on diversity topics and programs to expand mentorship and networking opportunities for minority employees.<sup>286</sup> In the 1990s, as both the proportion of women in the human resources profession and liability for sexual harassment grew, employers shifted their focus to training and policies to prevent harassment and improve work-family balance.<sup>287</sup> And, by the mid-1990s and early 2000s, the science on implicit bias made its way into discussions of workplace diversification efforts and discrimination prevention.<sup>288</sup> Focused on the sociological finding that even automatic stereotypes can be controlled or counteracted, researchers proposed methods for

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280. *Id.* at 253–54.

281. Lauren Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 888–91 (2011); Lauren Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1589–93 (2001); *see also* Dobbin & Kalev, *supra* note 261, at 254–55 (discussing Edelman and her colleagues' work).

282. Dobbin & Kalev, *supra* note 261, at 253–54.

283. *Id.* at 256–59.

284. *Id.* at 259–65.

285. *Id.* at 265–69.

286. *Id.*

287. *Id.* at 269–73.

288. *See, e.g.*, Bielby, *supra* note 47, at 120–29; Reskin, *supra* note 47, at 319–28; Barbara F. Reskin & D.B. McBrie, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 210, 210–33 (2000), *cited in* Dobbin & Kalev, *supra* note 261, at 263.

doing so, including creating accountability within organizations and monitoring the results of employment decisions for biased effects.<sup>289</sup>

As voluntary employer efforts evolved over time, researchers also tracked their success. A variety of studies have documented the efficacy of each of these types of interventions to change either individuals' attitudes or the composition of workforces.<sup>290</sup> Dobbin and his colleagues' research on workforce composition documents that more dispersed efforts to alter people's views through diversity training, evaluations, or increased bureaucracy have been less successful than concrete interventions backed by institutional authority, such as active diverse recruiting, management-level responsibility for mentoring, and staff devoted to diversity efforts.<sup>291</sup> Social psychologists and sociologists tracking efforts around implicit bias have determined that, while changing the implicit attitudes of individuals may be difficult, interventions that seek to reach the entity or organizational level—rather than prevent individual decision makers from acting on implicit bias—can be effective. Examples include efforts to reign in the operation of subjective decisions and to provide oversight that connects employment decisions to workforce demographics.<sup>292</sup> While this means that there is no one-size-fits-all solution and that successfully reducing the operation of stereotyping and implicit bias may depend on the organizational context,<sup>293</sup> it still means that employers can and should do *something* to address the phenomenon within their workplaces, rather than turn a blind eye.

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289. See, e.g., ROBERT D. GATEWOOD & HUBERT S. FEILD, HUMAN RESOURCE SELECTION (5th ed. 2001); HERBERT G. HENEMAN III, ROBERT L. HENEMAN & TIMOTHY A. JUDGE, STAFFING ORGANIZATIONS (2d ed. 1997), cited in Declaration of William T. Bielby, Ph.D in Support of Plaintiffs' Motion for Class Certification at 23 n.56, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-012252 MJJ).

290. See, e.g., DOBBIN, *supra* note 16 (citing dozens of such studies); Dobbin & Kalev, *supra* note 261, at 254–76 (same); Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 589–617 (2006).

291. Dobbin & Kalev, *supra* note 261, at 273–76.

292. See William T. Bielby, *The Challenge of Effective Interventions 5* (2013) (conference paper, *Gender & Work: Challenging Conventional Wisdom*), <http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/bielby.pdf> [<https://perma.cc/UQX5-DSPR>] (citing BANAJ & GREENWALD, *supra* note 268, at 152; Calvin K. Lai, Kelly M. Hoffman & Brian A. Nosek, *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCHOL. COMPASS 315 (2013)) (“[T]he IAT researchers often advocate organizational interventions, ranging from completely removing race and gender from the decision-making process when feasible (as in blind orchestra auditions) to reducing subjectivity and discretion in the criteria for making decisions about hiring, promotion, job assignment etc. and establishing oversight and accountability for adhering to objective standards.”).

293. See Bielby, *supra* note 292, at 10 (“There is a consensus among psychologists and organizational sociologists about how habits of mind intersect with organizational policies, structures, and practices to create and sustain workplace gender bias. That consensus supports a formalist intervention strategy based on the idea of constraining discretion and establishing oversight and accountability for how personnel decisions are made and for their impact on gender and racial equity in the workplace. But that kind of intervention is easier to advocate, implement, and institutionalize in some organizational contexts than in others.”).

Over the past five years, academic research centers, including those at business schools, have made major strides in operationalizing the research on implicit bias to help businesses reduce its impact on their workforces. Harvard's Project Implicit now has an entire consulting arm that provides experts to consult with businesses on, among other things, "applications of implicit bias to organizational practice" and on "developing or evaluating interventions and programs for human resource management."<sup>294</sup> The Center for WorkLife Law at the University of California, Hastings College of the Law has a project working with corporate partners to develop and pilot a system of "Metrics-Driven Bias Interrupters"<sup>295</sup>—a project that Center director and law professor Joan C. Williams described in a 2014 article in the *Harvard Business Review*.<sup>296</sup> Likewise, under the direction of sociologist Shelley Correll, Stanford University's Clayman Institute for Gender Research developed a program called "See Bias/Block Bias™" that provides employers workshops and toolkits that offer concrete steps for identifying and stopping bias from impacting performance assessments.<sup>297</sup> In 2015, Harvard Business School launched the Gender Initiative to advance gender equity in business and leadership, for which one identified goal is to "challenge discrimination, stereotypes, [and] implicit biases" that limit both men and women.<sup>298</sup> In addition, for more than a decade, many large law firms have served as intermediaries between researchers and the business sector by offering their own information and training on implicit bias to clients and other lawyers.<sup>299</sup>

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294. *Project Implicit Consulting*, PROJECT IMPLICIT, <https://www.projectimplicit.net/consulting.html> [<https://perma.cc/JE2P-8DFW>] (last visited Apr. 3, 2017). Project Implicit also has a training services group, through which it provides certified trainers to provide training customized to the organization's business sector and goals. *Lectures and Training*, PROJECT IMPLICIT, <https://www.projectimplicit.net/lectures.html> [<https://perma.cc/VF4H-H4C9>] (last visited Apr. 17, 2017).

295. CTR. FOR WORKLIFE LAW, *supra* note 8; *We Help Companies Interrupt and Correct Implicit Bias in the Workplace*, CTR. FOR WORKLIFE LAW, <http://biasinterrupters.org> [<https://perma.cc/36DT-7ETG>] (last visited Apr. 17, 2017).

296. *See* Williams, *supra* note 8.

297. *Blueprint for Change*, CTR. FOR THE ADVANCEMENT OF WOMEN'S LEADERSHIP, <https://womensleadership.stanford.edu/blueprint> [<https://perma.cc/R3BV-5AGY>] (last visited Apr. 17, 2017) ("See Bias/Block Bias: Our interactive workshops focus on solutions for effective management. Over 90 minutes, we introduce the concept of bias as a structural issue within organizations. We then lead participants through interactive exercises to illustrate how to block bias in hiring, performance evaluations and team dynamics.")

298. *Harvard Business School Launches Gender Initiative*, HARV. BUS. SCH., (May 18, 2015), <http://www.hbs.edu/news/releases/Pages/hbs-launches-gender-initiative.aspx> [<https://perma.cc/FCV7-A5C4>]; *Gender*, HARV. BUS. SCH., <http://www.hbs.edu/faculty/initiatives/Pages/gender-initiative.aspx> [<https://perma.cc/6VTF-EBQ2>] (last visited Apr. 17, 2017).

299. *See, e.g.*, Maureen Minehan, *EEOC Targets Unconscious Bias*, HR WIRE (May 22, 2007) (discussing EEOC efforts to highlight unconscious bias in employment); *EEOC Launches Initiative to Educate on Changing Forms of Race Discrimination*, 13 HR COMPLIANCE LAW BULLETIN ART. 19 (Apr. 15, 2007) (same); *How to Limit Your Firm's Exposure to Employee Lawsuits*, 03-12 COMPENSATION & BENEFITS L. OFF. 4 (Dec. 2003) (discussing unconscious bias in law firm practice); Pedro A. Noguera & Susan K. Springborga, *Increasing Diversity in Law Firm*, 13 LEGAL MGMT. 53

Moreover, technology has now made it easier and more affordable than ever for companies to reduce the harmful effects of bias in their decision-making processes, while still operating with discretion. For example, the Center for WorkLife Law's website, Biasinterrupters.org, provides free information, worksheets, and toolkits with small, concrete steps that employers can implement—"tweaks to basic business systems (hiring, performance evaluations, assignments, promotions, and compensation) that interrupt implicit bias in the workplace, often without ever talking about bias."<sup>300</sup> Proven interventions can be as simple as pre-committing to criteria for evaluating candidates for a promotion, requiring specific examples to support a performance appraisal overall rating, having multiple people review resumes for hiring, and reviewing compensation rates to spot demographic disparities.<sup>301</sup>

Technology has also provided a wide array of "blinding" screens for use in hiring and promotion. One approach is to use an algorithm programmed to detect set objective hiring qualifications as a first line sorter of job applicants rather than a person, in an effort to improve or diversify hiring.<sup>302</sup> Scientific evidence supports the potential success of this approach: researchers from the Universities of Minnesota and Toronto conducted an "analysis of 17 studies of applicant evaluations" that documented "that a simple equation outperforms human decisions by at least 25%" in accurately predicting the job and academic performance of applicants.<sup>303</sup> According to the *New York Times*, the promise of algorithms has led to "a new wave of startups" that have focused on "ways to automate hiring," including Doxa, Entelo, Guild, Textio, and GapJumpers.<sup>304</sup>

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(Sept./Oct. 1994) (same); Christine Steiner, *Performance Appraisals—Reducing Legal Risks*, C579 AM. L. INST. – AM. B. ASS'N CONTINUING LEGAL EDUC. 427 (Mar. 20, 1991) (raising unconscious bias as something to prevent when conducting employee performance appraisals). In recent versions of these efforts, one major employer-side law firm now offers data analytics services to its clients, see *Little Big Data Initiative*, LITTLER, <https://www.littler.com/service-solutions/littler-big-data-initiative> [<https://perma.cc/YG9S-QSE2>] (last visited Apr. 3, 2017), and another offered a continuing legal education program to lawyers on preventing implicit bias in their own law practice, see *What You Don't Know Can Hurt You: Unconscious Bias In Law Practice—How to Recognize and Interrupt*, JACKSON LEWIS, <https://www.jacksonlewis.com/event/what-you-dont-know-can-hurt-you-unconscious-bias-law-practice-how-recognize-and-interrupt> [<https://perma.cc/RBD8-BRTU>] (last visited Apr. 14, 2017) (noting a June 2016 continuing legal education training on "how unconscious bias can impact the workplace and the practice of law," including "how to recognize our own unconscious biases and practical ways to interrupt them to make better decisions").

300. *We Help Companies Interrupt and Correct Implicit Bias In The Workplace*, CTR. FOR WORKLIFE LAW, *supra* note 295.

301. *Id.*

302. Claire Cain Miller, *Can an Algorithm Hire Better Than a Human?*, N.Y. TIMES (June 28, 2015), <https://www.nytimes.com/2015/06/26/upshot/can-an-algorithm-hire-better-than-a-human.html> [<https://perma.cc/2LBU-JNS8>].

303. Nathan R. Kuncel, Deniz S. Ones & David M. Klieger, *In Hiring, Algorithms Beat Instinct*, HARV. BUS. REV. (May 2014), <https://hbr.org/2014/05/in-hiring-algorithms-beat-instinct> [<https://perma.cc/TZF5-NJE9>] (describing Nathan R. Kuncel et al., *Mechanical Versus Clinical Data Combination in Selection and Admissions Decisions: A Meta-Analysis*, 98 J. APPLIED PSYCHOL. 1060, 1060–72(2013)).

304. Miller, *supra* note 302.

The use of technology to improve hiring decisions has spread to even “[e]stablished headhunting firms like Korn Ferry,” which are now “incorporating algorithms into their work, too.”<sup>305</sup>

One technology-based hiring firm, Infor Talent Science, reported that their algorithmic software and predictive model led to “an average increase of 26 percent” in African-American and Latino hires “across a variety of industries and jobs”—with a 31 percent increase in Latino hires for their clients in the wholesale sector and 60 percent increase in African-American hires for their restaurant sector clients.<sup>306</sup> Another startup, Unitive, recently received \$7.5 million in seed money to design a “hiring platform created to tackle unconscious bias in corporations,” with a particular focus on using “pre-commitment” to hiring criteria to resolve the bias problem of shifting standards.<sup>307</sup>

Beyond screening, some companies are using the blinding ability of technology for other parts of their hiring and evaluation process. For example, inspired by Goldin and Rouse’s research on blind orchestra auditions, British website-hosting company ByteMark adopted an anonymous application process for system administrator positions that maintained the anonymity of their applicants through several rounds of the hiring process.<sup>308</sup> After applicants submitted anonymous applications online they participated in skills tests remotely and two rounds of interviews by online instant message chat.<sup>309</sup> Interviewers posed questions that applicants answered through text messages.<sup>310</sup> The final round of hiring was conducted by in-person interview.<sup>311</sup> While, due to a small sample size, ByteMark was unable to say reliably that the anonymity improved its diversity, it reported that the anonymous process drew far more applications than they would normally receive, and that they benefitted from the process, which they plan to continue.<sup>312</sup>

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305. *Id.*

306. Bourree Lam, *For More Workplace Diversity, Should Algorithms Make Hiring Decisions?*, ATLANTIC (June 22, 2015), <https://www.theatlantic.com/business/archive/2015/06/algorithm-hiring-diversity-HR/396374> [<https://perma.cc/AFM2-A2JD>].

307. Valentina Zarya, *Startup Tackling Unconscious Bias Raises \$7.5 Million in Series A Funding*, FORTUNE (Nov. 13, 2015), <http://fortune.com/2015/11/13/unconscious-bias-unitive> [<https://perma.cc/89QZ-U3HY>]; see Bryce Covert, *People Can’t Be Trusted To Make Unbiased Hiring Decisions. So This Woman Created A Computer Program*, THINK PROGRESS (May 13, 2015), <https://thinkprogress.org/people-cant-be-trusted-to-make-unbiased-hiring-decisions-so-this-woman-created-a-computer-program-33e47d5d058e> [<https://perma.cc/R7KQ-TZT3>].

308. Matthew Bloch, *Bytemark Is Hiring, by Anonymous Interview*, BYTEMARK BLOG (May 20, 2015), <https://blog.bytemark.co.uk/2015/05/20/bytemark-is-hiring-by-anonymous-interview> [<https://perma.cc/5K5U-XLKK>].

309. *Id.*; see also Phil Johnson, *How One Tech Company Fights Hiring Bias with Anonymous Recruitment*, ITWORLD (July 29, 2015), <http://www.itworld.com/article/2953817/careers/how-one-tech-company-fights-hiring-bias-with-anonymous-recruitment.html> [<https://perma.cc/S6BH-CRHX>].

310. See Bloch, *supra* note 307.

311. See *How We Hire*, BYTEMARK, <https://careers.bytemark.co.uk/process> [<https://perma.cc/9APW-2W5M>].

312. See Johnson, *supra* note 309.



Another approach incorporates “gamification” into the hiring process by using anonymous simulations or video-game style challenges to the job application process.<sup>313</sup> The startup GapJumpers in particular focuses on using anonymity and gamification in the hiring process to reduce implicit bias.<sup>314</sup> The organization, which modeled itself on the competition television show “The Voice” (the 2017 equivalent of blind auditions for orchestras), provides “an online technology platform that enables hiring managers to hold blind audition challenges,” in which “job applicants are given mini assignments that are designed to assess the applicant for the specific skills required for the open position.”<sup>315</sup> According to GapJumpers, “[a]bout 60 percent of the top talent identified through [its] blind audition process come from underrepresented backgrounds.”<sup>316</sup>

Of course, incorporating technology into hiring is neither a panacea for reducing implicit bias nor a one-size fits-all solution, as it may be particularly well-suited for technology-sector employers. There is also a serious risk that biasing features could be programmed inadvertently into an algorithm, or that an employer may feel overly confident that the technology has solved the problem.<sup>317</sup> A recent literature has begun to warn of the potential risks of collecting and incorporating data into employment decisions as, itself, a possible driver of discrimination.<sup>318</sup> That said, the growth of the cottage industry of bias-reducing tools targeted at employers—and the major start-up money being invested in such ventures—shows that the problem of implicit bias is now such a well-known and significant concern among the business sector that it has become profitable to address.

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313. See Ken Gaebler, *The Future of Hiring: Human Resources, Without the Humans*, ATLANTIC (Feb. 3, 2012), <https://www.theatlantic.com/business/archive/2012/02/the-future-of-hiring-human-resources-without-the-humans/252518> [<https://perma.cc/3XTU-GWQ8>]; Aki Ito, *Hiring in the Age of Big Data: Online Games and Quizzes Are a New Way to Judge Job Applicants*, BLOOMBERG (Oct. 24, 2013), <https://www.bloomberg.com/news/articles/2013-10-24/new-way-to-assess-job-applicants-online-games-and-quizzes> [<https://perma.cc/KKQ7-3PDJ>]; Don Peck, *They're Watching You at Work*, ATLANTIC (Dec. 2013), <https://www.theatlantic.com/magazine/archive/2013/12/theyre-watching-you-at-work/354681> [<https://perma.cc/TPF8-GPWC>]; Catherine Rampell, *Your Next Job Application Could Involve a Video Game*, N.Y. TIMES MAG. (Jan. 22, 2014), <https://www.nytimes.com/2014/01/26/magazine/your-next-job-application-could-involve-a-video-game.html> [<https://perma.cc/MFN3-YFGB>].

314. Cooper, *supra* note 9.

315. *Id.*; see also GAPJUMPERS, *supra* note 9 (offering clients the ability to “discover great talent ‘The Voice’ way”).

316. Cooper, *supra* note 9.

317. Miller, *supra* note 302; Lam, *supra* note 306.

318. See, e.g., Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 677, 694–712 (2016); danah boyd & Kate Crawford, *Critical Questions for Big Data*, 15 INFO. COMM. & SOC'Y 662, 666–68 (2012); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 884–92 (2017).

### C. Reckless Discrimination

As described previously, some legal scholars have suggested that Title VII should, and under some legal theories does, reflect a negligence model of liability, whereby an employer who fails to meet its duty to prevent discrimination at work violates the statute.<sup>319</sup> While negligence concepts appear throughout statutory antidiscrimination jurisprudence, particularly under legal theories of proof for harassment and failure to accommodate claims,<sup>320</sup> federal courts have yet to adopt a negligence approach to disparate treatment.<sup>321</sup> This failure stems from federal courts' characterization of disparate treatment claims as requiring proof of "intentional discrimination."<sup>322</sup> Yet the requirement of "intent" was read into the doctrine of Title VII by the courts, not drafted into the text of Title VII by Congress.<sup>323</sup>

What is more, the Supreme Court itself allows employees to prove *inferred* discriminatory intent in disparate treatment claims through circumstantial evidence (anecdotal, comparative, statistical, or other) that creates an inference of discrimination by *discrediting* the employer's justification for its adverse employment actions.<sup>324</sup> This Section argues that, so constructed, the burden to prove intentional disparate treatment under Title VII should be met by an employer's knowing and reckless disregard for the operation of implicit bias and stereotyping in its workplace. After constructing a theory of "reckless discrimination" under Title VII, this Section addresses potential counterarguments and comparisons to prior theories.

#### 1. Reckless Disregard for Implicit Bias as Intent under Title VII

As scholars identifying the tortification of employment law have documented, recent decisions by the Roberts Court have changed the prior relationship between tort and antidiscrimination law.<sup>325</sup> Where the Court once drew parallels and analogies between the two fields, it has now described antidiscrimination law as "a federal tort," and has adopted and applied tort

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319. See *supra* Part I.C.

320. See *supra* Parts I.C, III.A.3.

321. See Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, *supra* note 69, at 13–14 ("To date, the courts have not embraced negligent discrimination as a basis for liability."); Sperino, *The Tort Label*, *supra* note 69, at 1074–75 ("It is at least possible to state that most intentional discrimination cases, at least descriptively, are not negligence cases. To date, the courts have not embraced arguments that plaintiffs may establish a discrimination claim via a negligence analysis.").

322. See Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, *supra* note 69, at 13–14 & n.80 (quoting *Aaron v. Sears, Roebuck & Co.*, No. 3:08 CV 1471, 2009 WL 803586, at \*2 (N.D. Ohio Mar. 25, 2009) (stating that where "Defendant was merely 'negligent' in its hiring practices, [that] does not rise to the standard of intentional discrimination required by Title VII"); *id.* (quoting *Jalal v. Columbia Univ.*, 4 F. Supp. 2d 224, 241 (S.D.N.Y. 1998) ("Title VII . . . provides no remedy for negligent discrimination . . .").

323. See *supra* Part III.A.1.

324. See *id.*

325. See *supra* Part III.A.3.

causation concepts directly into interpretations of the ADEA, USERRA, and Title VII retaliation claims.<sup>326</sup> Having done so, it is then doctrinally incoherent for the Court to fail to extend tort concepts of intent to Title VII as well<sup>327</sup>—concepts that have the potential to help modernize Title VII and extend its reach to more stubborn forms of discrimination harder to redress under current doctrine.<sup>328</sup>

While remaining skeptical about the Court's move to apply tort law to Title VII, several scholars have recognized that the limitations created by tort causation may be counterbalanced by the expansion created by tortious intent.<sup>329</sup> Without prescribing any particular recommendation for how to do so, Catherine Smith considered the theoretical possibilities of “regulating implicit bias in the workplace by cautiously turning to tort law.”<sup>330</sup> Expressing concern that “we should avoid treating Title VII as the equivalent of a common law tort without appreciating their different purposes and objectives,” Smith looks to tort principles that reflect our societal belief in encouraging duty and reducing risk separate from and regardless of moral culpability.<sup>331</sup> This, she suggests, explains why Title VII should recognize liability for implicit bias, despite the “hyper-focus[] on discriminatory intent and a seek-and-find-the-‘bad-actor’ framework” that the courts have read into Title VII doctrine.<sup>332</sup> Noting that “what constitutes discrimination has continually evolved and should continue to do so,” Smith poses, but stops short of answering the question, “Is it feasible to regulate implicit bias by rooting out the risks of discrimination?”<sup>333</sup>

More concretely, Sandra Sperino's thought experiment, pushing the bounds of what the Court really means when it applies tort law to antidiscrimination law, unearths similar possibilities.<sup>334</sup> Sperino identifies that, if Title VII was truly a tort, “[r]eplacing an intent standard with a causation standard makes it possible to prove cases of unconscious or structural discrimination” as disparate

326. *See id.*

327. *See* Sperino, *supra* note 197, at 1116–18.

328. *But see* Sullivan, *supra* note 135, at 1476–77 (expressing concern that proximate cause ideas of foreseeability “may oust cognitive bias from discrimination jurisprudence”). “As applied to cognitive bias, how foreseeable is it to the decisionmaker that he might be influenced by unconscious influences? Almost by definition, the decisionmaker is unaware of the wellsprings of his conduct—they are, therefore, not actually foreseen. But perhaps they were foreseeable—if not by the decisionmaker himself then by the employer. This is all [that is] require[d] for liability for negligence, and much current scholarship on employer liability for cognitive bias is rooted in seeking to have employers take reasonable steps to debias the workplace.” *Id.* at 1477 (citing Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, *supra* note 87, at 897–98; Oppenheimer, *supra* note 54, at 900).

329. *But see* Sullivan, *supra* note 135, at 1450–55 (expressing concern that, in *Staub*, the Court “disaggregated” tort motive and intent in a way that, if applied to Title VII, could make it more difficult for a plaintiff to prove “intentional discrimination”).

330. *See* Smith, *supra* note 237, at 1208.

331. *See id.* at 1208–09.

332. *See id.*

333. *See id.* at 1209–10.

334. *See* Sperino, *supra* note 197, at 1117.

treatment.<sup>335</sup> Citing to the examples of non-blind orchestra auditions, compensation decisions based on prior salaries, and subjective promotion decisions like those alleged by the *Wal-Mart* plaintiffs, Sperino argues that liability would be proved by “transferring the concept of intent to the entity context.”<sup>336</sup> And, “[i]f courts are required to presume that Congress was legislating against a common law backdrop,” she suggests, then “the standard tort definition of intent [should] appl[y] in discrimination cases”—meaning that a Title VII plaintiff need only prove that her employer “believes that the consequences are substantially certain to result from the action.”<sup>337</sup> This, Sperino suggests, “would be an important innovation,” that would also “help the courts to see a way in which they have not been careful about conceptualizing [discriminatory] intent.”<sup>338</sup>

This Article pushes Smith and Sperino’s suggestions further. Given the lack of clarity on “intent” in Title VII, the breadth of circumstantial evidence allowed to show “intentional” discrimination by inference, and the fact that recklessness suffices to establish some intentional torts, it is possible to extend the comparison between tort and antidiscrimination law beyond just tortious intent to tortious recklessness.

As applied to intentional disparate treatment under Title VII, the recklessness approach would offer a way to bolster an employer entity’s responsibility for the widespread operation of implicit bias in its workplace. Drawing upon the negligence and organizational context models, a recklessness analysis would focus on the employer entity’s failure to act with sufficient care in creating the context and organizational structures within which employment decisions are made. Of course, tortious intent is conceived of as an individual concept, which makes it an odd fit with systemic discrimination at an entity level. It is this conceptual disconnect that led the Court in *Wal-Mart* to view the vicarious social framework model as merely aggregated individual harms, supervisors’ individual decisions for which the entity could not be held responsible.<sup>339</sup> Yet to the extent that the theory of systemic disparate treatment exists at all, as it has for forty years since the *Teamsters* and *Hazelwood* cases recognized pattern-or-practice discrimination,<sup>340</sup> those at the top of the organization who set the employment practices used and the culture within which those decisions are made can and should be held responsible where those practices and cultures perpetuate the expression of implicit bias.

As such, plaintiffs seeking to use a recklessness approach would pursue their case like any other pattern-or-practice case of systemic disparate treatment.

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335. *See id.*

336. *See id.* at 1116–19.

337. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1965)) (internal modifications and quotation marks omitted).

338. *See id.* at 1119.

339. *See supra* notes 104–06, 112–13 and accompanying text.

340. *See supra* notes 96–97, 151–52 and accompanying text.

They would introduce statistical, anecdotal, and social science evidence to show that the subjective decision-making system in question created a disparity by protected class under circumstances giving rise to an inference of discrimination. Any evidence demonstrating that a uniform approach or culture in the workplace fostered implicit bias or stereotyping would be most helpful. Recklessness can bridge the gap, however, where plaintiffs have difficulty producing such evidence and courts, following *Wal-Mart*, view the defendant employer as a mere “conduit” for individual supervisors’ biases.<sup>341</sup> By positing that the employer entity was not just negligent but, in fact, reckless about the operation of implicit biases in its midst, plaintiffs unmask the “innocent” institution and make it easier for a court to infer intentional discrimination.

Because recklessness is composed of two elements, plaintiffs should introduce additional evidence on both, which would help the court infer discrimination. First, plaintiffs would show that the employer “[knew] of the risk of harm created by the conduct” or had knowledge of “facts that make the risk obvious to another in the person’s situation.”<sup>342</sup> As detailed above, sixty years of data on implicit bias and stereotyping and decades of employer efforts to counteract it show that the possibility of implicit bias in subjective decision making is an obvious risk for employers.<sup>343</sup> In particular, lawyers have been warning employers of the risks of implicit bias for over a decade.<sup>344</sup> While evidence that the specific employer in question received information or advice on the risk of bias infecting subjective employment decisions would likely be the strongest, plaintiffs could also present evidence showing a common understanding of such risks within the employer’s industry or among its competitors. To show “conscious indifference” to this risk, however, would also require statistical or anecdotal evidence that suggest to the employer that implicit bias may be impacting *its own* employment decision-making structures. This type of proof should not be onerous, as it has always been and would always be required in any systemic disparate treatment case: plaintiffs collect relevant data through discovery and then provide expert analysis that shows statistically significant disparities by protected class.<sup>345</sup>

Second, the plaintiff would show that the burden to “eliminate or reduce the risk” is “so slight relative to the . . . risk” that the actor’s “failure to adopt the precaution[s]” demonstrates the actor’s “indifference to the risk.”<sup>346</sup> As detailed above, the vast cottage industry of diversity experts and new bias-reducing technology have greatly reduced the cost and burden of adopting structures to

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341. See *supra* notes 104–06, 112–13 and accompanying text; GREEN, *supra* note 97, at 74–84 (describing the “conduit” view).

342. See *supra* Part III.A.2; RESTATEMENT (THIRD) OF TORTS § 2 (AM. LAW INST. 2005).

343. See *supra* Part III.B.1.

344. See *supra* note 299 and accompanying text.

345. See *Teamsters*, 431 U.S. at 336–43 (1977); *Hazelwood*, 433 U.S. at 306–09 (1977).

346. See *supra* Part III.A.2; RESTATEMENT (THIRD) OF TORTS § 2.

interrupt implicit bias in the workplace.<sup>347</sup> To be a “slight” burden relative to the risk would also require an analysis of the particular employer’s decision-making structures, size, budget, and related factors. Again, evidence on the specific employer’s ability to act—or willingness to act on other unrelated issues of a similar cost—would be the plaintiff’s strongest evidence. Evidence of effective bias-reducing measures adopted by the employer’s industry or competitors would also be instructive. In essence, the circumstances would show that the employer entity was so consciously indifferent to the operation of implicit bias in its decision-making structures that its intent to discriminate can be inferred.

Even under a recklessness model, this proof structure makes it possible that, to be found reckless, an employer would need both to be sizeable and to rely on subjective decision making that results in noticeably disproportionate outcomes. Yet that’s not nothing: under a recklessness model, it may be possible to hold accountable large employers who have the means to reduce implicit bias, but perpetuate it by failing to act.<sup>348</sup> And the increased specter of liability among large employers could reverberate out to reach smaller employers who may take efforts to avoid similar liability.

It is important to note that a theory of reckless discrimination is neither proposed with the goal of, nor would it have the effect of, ending discretionary decision making in employment. Allowing supervisor discretion to make decisions about hiring, firing, promotion, compensation, and more is a universally adopted employment practice without which most employers would be unable to operate. A recklessness theory of liability would merely improve upon discretionary decision making by creating an incentive for employers to pay attention to how that discretion is being exercised in their workplaces. It would also motivate employers to correct for any bias they perceive in their decision-making structures before it leads to claims of discrimination. Even in the given examples of employers using technology to remove biasing information from their hiring processes,<sup>349</sup> all of the ultimate decisions were made by supervisors exercising their discretion. The point of the interventions was to prevent bias from impacting the way in which that discretion is applied; as a result, some employers reported that the de-biasing intervention led them to make better decisions.<sup>350</sup>

## 2. *Counterarguments and Comparisons*

A theory of reckless discrimination is not a magic answer to the limits of existing antidiscrimination law, and it suffers from its own limitations. The most obvious criticism, likely from adherents to the late-Justice Scalia’s skepticism about holding employers liable for “societal discrimination,” is that “reckless”

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347. *See supra* Part III.B.2.

348. *See, e.g.,* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

349. *See supra* Part III.B.2.

350. *Id.*

behavior is not “intentional” behavior. While this may be true under a narrow reading of case law that interprets Title VII disparate treatment as requiring intentional discrimination, the operative text of the statute itself never uses the word “intent.” Actionable discrimination requires merely that an adverse employment action be “because of” a protected class. Moreover, in recent years Justice Scalia and his fellow skeptics have interpreted Title VII to be, in effect, a federal tort.<sup>351</sup> Taking a coherent and consistent approach to Title VII in the wake of the tortification cases requires that, if tort causation now applies to Title VII, tort intent should, too. Thus, where recklessness suffices to commit an intentional tort, it should certainly suffice to meet the “inferred intent” standard actually required by Title VII case law.<sup>352</sup>

A second criticism, likely from the opposite camp, is that adopting a tort approach to discriminatory intent heightens what plaintiffs are required to prove under the statutory text of Title VII. Indeed, such a criticism is warranted: since the *Teamsters* and *Hazelwood* cases in the 1970s, all that has ever been required for a plaintiff to prove systemic disparate treatment is enough unrebutted statistical and anecdotal evidence to create an inference of discrimination. Importing new expectations that a plaintiff show an employer’s “knowledge of” and “conscious indifference” to the risk of biased decision making limits the broad reach of Title VII that Congress intended. There is, indeed, a risk of opening up Title VII to an unnecessarily limiting interpretation and, what is worse, to creating an unintended affirmative defense for employers who argue that they lacked knowledge or resources to remedy an obvious problem in their organization for which they should not be held liable. Yet there is also a risk of doing nothing to push Title VII to reach the operation of implicit bias. The tortification ship has sailed,<sup>353</sup> and, after *Wal-Mart*, federal courts are increasingly unwilling to draw an inference of widespread discrimination based on individual supervisors’ decisions.<sup>354</sup>

Perhaps the strongest reason for considering the frame of recklessness is a normative one: in a post-*Wal-Mart* world where it is increasingly difficult to create an inference of organization-wide discrimination, calling attention to the fact that an entity has the knowledge and resources to prevent implicit bias infecting its operations, yet fails to do so, may be the moral imperative courts need to make Title VII reach its full potential.<sup>355</sup> The theory of reckless

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351. See *supra* Part III.A.3.

352. See *supra* Part III.

353. See *supra* Part III.A.3.

354. See *supra* Part II.A.

355. For example, Justice Anthony Kennedy raised a different, but somewhat related, concept during oral argument in *Wal-Mart* when he questioned the parties’ attorneys about the relevance of a “deliberate indifference” standard—drawn from Section 1983 and Title IX cases against governmental entities—in the private employment context. See Transcript of Oral Argument, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (No. 10-277), 2011 WL 1131405, at \*6, \*40. *But see* Deborah M. Weiss, *A Grudging Defense of Wal-Mart v. Dukes*, 24 *Yale J.L. & Feminism* 119, 157–161 (2012) (characterizing the oral argument questions as a missed opportunity for plaintiffs to argue for a “notice-

discrimination offers a new way to frame and redress the wrong of entrenched discriminatory bias in the workplace—a way that is pragmatic, realistic, and (like most compromises) imperfect.

#### CONCLUSION

It has been fifty years since Title VII was enacted to prohibit protected class discrimination in employment—fifty years during which social scientists have amassed an inordinate amount of research on the operation of bias in discretionary decision making and how to reduce its impact. For most of the time since Title VII's enactment, its jurisprudence developed and advanced, simultaneously advancing gender and racial equality in the workplace. In the past decade, however, this advancement has stalled—both in the workplace and in the courts. Yet embedded bias in workplace decision-making structures remains, and is particularly apparent in the still unexplained disparities in compensation and leadership in many industries and businesses. This Article proposes a new model for conceptualizing the harm of systemic discrimination: as recklessness by an employer entity.

Allowing liability for reckless discrimination is, of course, a thorny proposition. As many scholars have noted, it remains questionable whether continuing to apply tort concepts into antidiscrimination law is a good idea.<sup>356</sup> It is more questionable, still, whether—despite the ability to do so under the existing jurisprudence of Title VII—federal courts would recognize a theory of reckless discrimination.<sup>357</sup> And, if they were to do so, it will still require plaintiffs to prove that their employers acted recklessly.

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based negligence” approach); *Pippen v. Iowa*, 854 N.W.2d 1, 18–19 (Iowa 2014) (same, citing *Weiss, supra*). Applying a deliberate indifference standard directly to private employment is highly problematic, both because the standard was developed in the context of *limiting* the liability of governmental actors and, as Tristin Green has identified, because of its focus on vicarious liability for individual acts rather than direct entity liability. See Green, *The Future of Systemic Disparate Treatment Law, supra* note 87, at 429–32. To the extent that remedying the wrong of indifference to discrimination appeals to the Court, however, a reckless discrimination framework, which draws on private tort law, provides a more appropriate analogue for doing so in the private employment context than Section 1983 or Title IX, which apply to government actors. A discussion of the deliberate indifference standard for public entities is beyond this Article's focus on a reckless discrimination standard for private entities. For more on the complexities of applying the deliberate indifference standard to claims of discrimination in public education, see, for example, Deborah L. Brake, *School Liability for Peer Sexual Harassment After Davis: Shifting From Intent to Causation in Discrimination Law*, 12 *Hastings Women's L.J.* 5 (2001); Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 *U. Ill. L. Rev.* 175 (2015).

356. See *supra* Part III.A.3.

357. Among the cases tortifying antidiscrimination law, the entire concept of recklessness is mentioned only once in passing: In *Staub v. Proctor Hospital*, the Court notes that “[i]ntentional torts such as this [action under USERRA], ‘as distinguished from negligent or reckless torts, . . . generally require that the actor intend the consequences of an act,’ not simply ‘the act itself.’” 562 U.S. 411, 417 (2011) (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998)) (internal modifications and quotation marks omitted) (bankruptcy case). This fleeting reference to a “reckless” tort does not, this Article



Despite potential criticisms, however, theorizing a recklessness model adds a new tool to the toolshed that builds incrementally upon many legal scholars' attempts to theorize liability under Title VII for structural discrimination and the operation of implicit bias at work. Where courts have limited Oppenheimer's negligence framework from reaching intentional disparate treatment,<sup>358</sup> a recklessness model bridges the gap between an employer's mere failure to meet a duty to prevent discrimination and its volitional behavior that fosters discrimination—the latter being closer to “intent” under Title VII. Where Krieger and her colleagues' vicarious social framework model has been cabined by resistance to holding employer entities responsible for seemingly individual biases,<sup>359</sup> a recklessness model takes the individual decision maker out of the equation. Where Green's organizational context model articulated the importance of holding employer entities directly liable for work cultures and systems that foster implicit bias and stereotyping, recklessness provides an additional legal tool for doing so.<sup>360</sup>

It is time to incorporate what we know about the science of bias into the doctrine of Title VII. An employer entity that knows about the risks of implicit bias, has evidence that such bias may be infecting its decision-making structures, and fails to act to prevent it is acting so recklessly that a court can infer its discriminatory intent.

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contends, foreclose the possibility that recklessness could satisfy the intent required to for intentional disparate treatment under Title VII.

358. *See supra* Part I.C.

359. *See supra* Part I.A.

360. *See supra* Part I.B.