Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias

L. Elizabeth Sarine

Follow this and additional works at: http://scholarship.law.berkeley.edu/californialawreview

Recommended Citation
L. Elizabeth Sarine, Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias, 100 CAL. L. REV. 1359 (2012). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol100/iss5/11

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z387221

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias

L. Elizabeth Sarine*

Incidents of discrimination due to implicit bias, or an unconscious prejudice in favor of or against certain groups, are extremely difficult to challenge in court because plaintiffs alleging discrimination in violation of the Equal Protection Clause must prove that the discrimination was purposeful. Since our legal system often fails to provide relief where implicit bias has caused systemic discrimination, advocates for equity and inclusion should explore preventative measures that guard against the harms of this kind of systemic discrimination. This Comment argues that a new term “social pollution” should be used to properly classify systemic discrimination caused by implicit bias as a problem that should be regulated. First, this Comment discusses the pervasiveness of implicit bias. Then it discusses the Intent Doctrine in equal protection cases and explores reform proposals that ineffectively attempt to address the difficulty of proving implicit discrimination in Title VII disparate-treatment cases. Finally, this Comment uses environmental pollution to introduce the concept of social pollution and explores prospects for using environmental statutes as models for regulatory reform proposals that address the social pollution of systemic discrimination caused by implicit bias.
INTRODUCTION

Stories about discrimination tend to fall into two categories: intentional explicit discrimination, which society¹ and the law² both denounce, and implicit discrimination, which contributes to social inequalities³ and is viewed with

---

³ Systemic factors resulting from the “legacy” of explicit discrimination often operate in conjunction with implicit discrimination to create social inequalities. See Samuel R. Bagenstos, The Structural Turn and the Limits of Antidiscrimination Law, 94 CALIF. L. REV. 1, 43 (2006) (describing
much more skepticism.\textsuperscript{4} Set in the 1960s, Kathryn Stockett’s best-selling novel \textit{The Help} is about intentional and explicit discrimination against African American maids. In the novel, the antagonist Hilly Holbrook insists on passing a citywide initiative that would require every black maid and nanny to use a different and typically inferior bathroom than white persons.\textsuperscript{5} While subject to some criticism,\textsuperscript{6} the book and subsequent film have been commercial successes.\textsuperscript{7} Stockett’s deliberate setting of the story more than fifty years ago—under Jim Crow laws that are no longer in effect—is likely a primary driver of the story’s success. The story easily captured the empathy of readers because it features explicit discrimination neatly cabined in a past era.\textsuperscript{8}

In contrast, the modern-day story of Betty Dukes did not capture the public to the same extent and failed to impress the Supreme Court as indicative of uniform class-wide discrimination.\textsuperscript{9} Betty Dukes, an African American woman, filed a class-action suit against Wal-Mart alleging the company discriminates against female employees in violation of Title VII of the Civil Rights Act of 1964.\textsuperscript{10} She argued that Wal-Mart systematically pays less to female employees and promotes them less often than men in comparable

\begin{itemize}
  \item\textsuperscript{4} While Title VII disparate impact claims can be brought to challenge implicit or systemic discrimination, they are rarely used, and when applied, this legal theory is often unsuccessful. See infra Part III.A; see also Bagenstos, supra note 3, at 45 (“Disparate impact doctrine has been in a massive decline over the past few decades.”); Tracy E. Higgins & Laura A. Rosenbury, \textit{Agency, Equality, and Antidiscrimination Law}, 85 CORNELL L. REV. 1194, 1205–07 (2000) (discussing the decline in the use of disparate-impact claims).
  \item See KATHRYN STOCKETT, \textit{THE HELP} 8–9 (2009) (Hilly explaining the “Home Health Sanitation Initiative” as “[a] bill that requires every white home to have a separate bathroom for the colored help”); Caitlin Flanagan, \textit{Home Land: The Secret of \textit{The Help}: Envy}, WALL ST. J., July 30, 2011, at C12 (“No reader of \textit{The Help} needs to be told that it’s horribly wrong to force your maid to use a separate toilet.”).
  \item Douglas A. Blackmon & Cameron McWhirter, Plaintiff Says \textit{‘Help’ Humiliated Her}, WALL ST. J., Feb. 18, 2011, at A3 (noting that the novel sold 2.2 million hardcover copies); BOX OFFICE MOJO, http://boxofficemojo.com/movies/?id=help2011.htm (last visited June 2, 2012) (reporting that, as of March 8, 2012, the film had grossed $211,608,112 worldwide, and had won one out of four Academy Awards for which it had been nominated); Manohla Dargis, \textit{The Maids’ Now Have Their Say}, N.Y. TIMES, Aug. 10, 2011, at C1 (reviewing the film based on the novel).
  \item Flanagan, supra note 5 (“Most important, as far as its millions of fans are concerned, it’s a book that doesn’t get up in anybody’s face. It makes you feel good about yourself: You, too, think that Jim Crow laws were rotten!”).
  \item Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547–48, 2556 (2011) (“Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice [for class certification purposes].”).
\end{itemize}
positions. In 1994, Betty started working as a cashier at a Wal-Mart in Pittsburg, California. After a promotion to customer service manager, Betty claimed she was demoted down to greeter in “retaliation for invoking internal complaint procedures.” Betty also claimed that she was paid less than two male greeters working in the same Wal-Mart store during the same time period. The Supreme Court “disqualifie[d] the class at the starting gate,” holding that Betty and the other women in the class action suit “cannot cross the ‘commonality’ line” under Federal Rule of Civil Procedure 23(a)(2).

While the Court’s decision does not bar Betty from bringing a new suit under a different legal theory or even another smaller class-action lawsuit, Betty is unlikely to obtain relief in court due to the high costs of litigation and the low chance that any Title VII disparate impact claim will succeed.

Implicit bias and structures of decision making likely caused the inequalities that Betty and other named plaintiffs of Wal-Mart Stores, Inc., v. Dukes experienced. The plaintiffs cannot point to a local law or Wal-Mart policy that explicitly treats female or black employees differently from male or white workers. Instead, their claims involve “social practices and patterns of interaction among groups within the workplace that, over time, exclude nondominant groups.” Professor Susan Sturm calls such claims “second generation” discrimination claims because they are “difficult to trace directly to intentional, discrete actions of particular actors,” and contrasts them to “first

11. Third Amended Complaint at para. 2, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ); see also Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 577 (9th Cir. 2010) (Dukes is one of several named plaintiffs in the class-action lawsuit).
13. Id. at 2548.
14. Id.
15. Id. at 2562 (Ginsburg, J., concurring in part).
17. Dukes, 131 S. Ct. at 2541.
19. The company’s policy of granting broad “discretion over pay and promotions” to individual supervisors does not explicitly treat women differently from male workers because “[t]he whole point of permitting discretionary decision making is to avoid evaluating employees under a common standard.” See Dukes, 131 S. Ct. at 2548, 2553. Dukes and the other plaintiffs did offer anecdotal evidence about specific sexist comments made by Wal-Mart managers, such as being told to “doll up,” or being informed in an interview that “it was a man’s world and that men control managerial positions at Wal-Mart.” Third Amended Complaint at paras. 52, 64, Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (No. C-01-2252 MJJ).
20. See Sturm, supra note 18, at 460.
Implicit discrimination involves a triggering event that activates implicit bias and leads to a negative consequence with a lack of remedy. Such discrimination occurs frequently in everyday life, with one’s words, actions, clothing, or simply skin color acting as triggers. Unfortunately, implicit discrimination is extremely difficult to challenge under the Equal Protection Clause because plaintiffs bringing claims under the doctrine must prove that the discrimination was purposeful. Termed the “Intent Doctrine” by scholars, this requirement that plaintiffs show conscious intent and animus fails to account for the existence of implicit bias. Furthermore, plaintiffs seeking to challenge implicit discrimination in employment decisions under Title VII’s disparate-impact theory, which does not explicitly require a showing of discriminatory intent, still face difficult burdens due to procedural requirements.

21. See id.


23. For purposes of simplicity, when this Comment uses the term “systemic discrimination caused by implicit bias,” it is meant to also acknowledge the contributory role of systemic factors resulting from the “legacy” of explicit discrimination. See Bagenstos, supra note 3, at 43.


25. Instead of failure to secure a job or promotion, the consequence could be a prosecutor’s seeking the death penalty because the defendant is black and victim is white. See McCleskey v. Kemp, 481 U.S. 279, 291 (1987) (finding McCleskey’s capital sentence was not unconstitutional under the Fourteenth Amendment despite statistical evidence showing that black defendants who allegedly killed white victims were more likely to receive the death penalty in Georgia than black defendants who killed black victims or white defendants who killed either black or white victims).

26. See infra Part II. Under the Equal Protection Clause, a facially neutral law that has a “disproportionately adverse effect upon a racial minority” is only unconstitutional if the “impact can be traced to a discriminatory purpose.” Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 272, 279 (1979).


28. Lawrence, supra note 27, at 322 (“Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker’s beliefs, desires, and wishes.”).

29. See infra Part III; Higgins & Rosenbury, supra note 4, at 1205–06; see also Elaine W. Shoben, Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?, 42 Brandeis L.J. 597, 598 (2004) (proposing that the “underutilization” of the disparate-impact theory of employment discrimination could be because class actions are difficult to bring and,
This Comment argues that a new term “social pollution” should be used to properly classify systemic discrimination caused by implicit bias and the “legacy of [explicit] discrimination” as a problem that should be regulated. In Part I, this Comment describes the pervasiveness of implicit bias. Part II discusses the Intent Doctrine in equal protection cases. Part III examines reform proposals that ineffectively attempt to address implicit bias in employment contexts. Part IV uses environmental pollution to introduce the concept of “social pollution” as encompassing systemic discrimination caused by implicit bias. Finally, Part V proposes using environmental statutes like the National Environmental Policy Act (NEPA) as models for crafting regulatory reform proposals to address the social pollution of systemic discrimination caused by implicit bias.

I.

THE PERVASIVENESS OF IMPLICIT BIAS

Discrimination due to implicit or unconscious bias against a legally protected social group presents a particularly difficult problem for advocates of equity and inclusion. In order to evaluate or discuss reform proposals that address implicit bias, one must first understand the problem. Thus, this Part discusses “evidence from experimental psychology that appears to demonstrate the pervasiveness of unconscious bias based on race, gender and other legally protected characteristics.” In doing so, it introduces important terminology and concepts as well as illustrative studies from implicit bias research.

Implicit cognition, or mental processing that functions outside “conscious attentional focus,” encompasses implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept. Unlike “intent-based claims,” there are “no compensatory or punitive damages available for disparate impact claims”).

30. While others have used the phrase “social pollution,” this Comment uses it in a new way—to specifically refer to and include systemic discrimination caused by implicit bias. See John Copeland Nagle, The Idea of Pollution, 43 U.C. DAVIS L. REV. 1, 42 (2009) (explaining that “social pollution” involves “society’s effort to preserve the order to which it aspires”).

31. See Bagenstos, supra note 3, at 43 (“Many racial minority groups also face deep-rooted structural barriers to employment . . . [that] stem from the significant wealth disparities and environmental inequalities between whites and non-whites, inequalities and disparities that themselves reflect the legacy of discrimination.”).


33. See Samuel R. Bagenstos, Implicit Bias: “Science,” and Antidiscrimination Law, 1 HARV. L. & POL’Y REV. 477, 477, 480 (2007) [hereinafter Bagenstos, Implicit Bias] (responding to criticisms of the “science that lies behind proposals for using the law to combat implicit bias,” and finding the challenged evidence to remain “highly relevant” under a broad view of discrimination as a social problem with “systemically harmful effects on the life chances of members of particular socially salient social groups”).

Implicit biases are “discriminatory biases based on implicit attitudes or implicit stereotypes.”35 Unlike explicit attitudes that are consciously expressed, implicit attitudes can result in actions that indicate “favor or disfavor toward some object” without being “understood by the actor as expressing that attitude.”36 Implicit stereotypes are the “introspectively unidentified . . . traces of past experience” that result in a belief that all members of a social category share certain qualities.37

A. Scientific Foundation for the Existence of Implicit Bias

Research involving the Implicit Association Test (IAT)38 has provided a scientific foundation for the existence of implicit bias and for systemic variations between implicit and explicit attitudes.39 Researchers have used IATs to test implicit attitudes about race, gender, age, and other stereotyped traits. For example, the “Race IAT” directs respondents to categorize images and words by pressing keys on the left side or right side of a computer keyboard.40 The first two tasks of the Race IAT ask respondents to distinguish between African American (AA) and European American (EA) faces, and then between words with pleasant and unpleasant meanings.41 The next two tasks are given in a random order.42 One of the tasks directs respondents to press a left-side key when they see an AA face or pleasant word, and a right-side key when they see an EA face or unpleasant word.43 For the other task, respondents must press the left-side key when they see an EA face or pleasant word, and a right-side key when they see an AA face or unpleasant word.44 The test assesses participants’ implicit attitudes by measuring the relative speeds with which they respond in the last two tasks. Participants will press keys faster when the categories produce cognitive consonance rather than dissonance because it is easier to press the same key for two items if those items are “cognitively associated with each other.”45 Thus, under the Race IAT, someone with an implicit preference...
for whites will respond faster when EA faces are paired with pleasant words than when AA faces are paired with pleasant words.46

IAT results demonstrate the pervasiveness of implicit bias. A survey of data collected from voluntary visitors to the IAT website over several years confirms that high levels of implicit bias favoring EA faces exist among members of all demographic subgroups except African Americans.47 Studies have also shown that IAT measures, compared to explicit self-report measures, are better predictors of behavior in situations that are “socially sensitive, like racial interactions, where impression-management processes might inhibit people from [outwardly] expressing negative attitudes or unattractive stereotypes.”48

B. How Implicit Bias Contributes to Discriminatory Behavior

When implicit bias “influenc[es] nondeliberate or spontaneous discriminatory behaviors,” it can result in both individual incidents of implicit discrimination and in systemic discrimination.49 This Section describes studies that demonstrate how implicit bias contributes to individual instances of discrimination and how such biases might result in institutional discrimination.

For example, the findings of two studies indicate how implicit bias can disadvantage black job applicants during interviews.50 One study found that white undergraduate students whose Race IAT scores indicated a strong implicit preference for whites showed higher levels of discomfort when talking with black experimenters than when talking with white experimenters.51 These students exhibited their discomfort by speaking and smiling less often, and hesitating and making speech errors more frequently when talking with black experimenters.52 A second study confirmed that white interviewers exhibited more discomfort and spoke less to black job applicants than white applicants.53 This study also found that white applicants performed poorly in interviews when paired with white interviewers who were trained to exhibit verbal discomfort and spend less time talking with the applicant.54 Collectively, these studies “reveal[] that implicit bias may affect interviews in ways that disadvantage [b]lack job applicants.”55

46. Id.
47. See id. at 958. Although the studies discussed in this Part do not explore the nuances of implicit bias held by members of a minority or subordinated group against others in their own group, this Comment acknowledges that implicit bias can contribute to discriminatory behavior by members of a minority or subordinated group against others in the same or in a different subordinated group.
48. Id. at 954–55.
49. Id. at 961.
50. Id. at 962.
51. Id. at 961 (referencing study by McConnell and Liebold).
52. Id. at 961–62 (referencing study by Word, Zanna, and Cooper).
53. Id. at 961.
54. Id. at 961–62.
55. Id.
The likelihood that an individual’s implicit biases will result in discriminatory behavior appears linked to his or her need to maintain a positive self-identity and high self-esteem. For instance, research shows that individuals tend to increase their use of stereotyping when their self-image is being threatened by negative feedback. One study found that subjects who had recently received negative feedback from a black manager engaged in higher levels of race stereotyping than participants who had not received negative feedback. Another study suggests that prejudice serves a self-affirming function. In that study, researchers attempted to weaken subjects’ self-esteem by giving them low scores on a bogus intelligence test; however, the subjects managed to elevate their self-esteem by derogating and stereotyping a fictional job applicant.

Shooter-bias studies provide especially disturbing evidence of implicit bias. As an example, one study asked participants to play a video game that required them to quickly decide whether or not to shoot an individual, who was either white or black, and who was either holding a weapon or an innocuous object like a cell phone. Participants were more likely to shoot black figures who were not holding guns and fail to shoot white figures who were holding guns. The results of these studies illustrate how implicit shooter-bias can contribute to the tragic shooting deaths of unarmed black men.

The implicit bias of individuals can also operate on a systemic scale within organizations, resulting in institutional discrimination against certain groups. Professor Ian Haney López has proposed an intriguing model of institutional racism that links individual implicit bias with organizational structures. According to his theory, organizational actors usually follow

---

56. See Stanley Feldman & Karen Stenner, Perceived Threat and Authoritarianism, 18 POL. PSYCHOL. 741, 762 (1997); David A. Wilder & Peter N. Shapiro, Role of Competition-Induced Anxiety in Limiting the Beneficial Impact of Positive Behavior by an Out-Group Member, 56 J. PERSONALITY & SOC. PSYCHOL. 60, 67 (1989).
57. See Lisa Sinclair & Ziva Kunda, Reactions to a Black Professional: Motivated Inhibition and Activation of Conflicting Stereotypes, 77 J. PERSONALITY & SOC. PSYCHOL. 885, 887–94 (1999) (discussing the study procedure and results, and pointing out that “[i]n sum, there is some evidence that when a perceiver encounters a target individual, the configuration of stereotypes activated and inhibited in the perceiver’s mind may depend on the target’s behavior as well as on the perceiver’s temporary and chronic goals and attitudes”).
59. See id.
60. See Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1525–26 (2005).
61. Id. at 1525.
62. Id. at 1526.
63. See, e.g., Lizette Alvarez, A Florida Law Gets Scrutiny After a Killing, N.Y. TIMES, Mar. 21, 2012, at A1 (discussing the shooting death of Trayvon Martin, an unarmed black teenager, and Florida’s Stand Your Ground law, which “gives the benefit of the doubt to a person who claims self-defense, regardless of [where] the killing takes place”).
complex “scripts” dictated by characteristics of organizational culture, such as expected goals and accepted measures of success or failure.\textsuperscript{65} When a script is lacking, organizational actors instead rely on “paths,” defined as “unexamined background understandings that effectively specify the range of legitimate action.”\textsuperscript{66} Both manners of “nonintentional decision making” might produce racial discrimination due to “widely shared but unconsidered understandings of race,” which shape the scripts and paths used by organizational actors.\textsuperscript{67}

The link between individual implicit bias and organizational structures can be seen in the decisions made by organizational actors like judges and managers. For example, when Haney López applied his institutional analysis to the Los Angeles Superior Court’s grand juror selection practices, he discovered that judges systematically underselected Mexican American grand jurors due to their tendency to nominate friends and neighbors.\textsuperscript{68} Similarly, in Dukes,\textsuperscript{69} the wide discretion given to local Wal-Mart managers to make pay and promotion decisions resulted in systematic inequality. The plaintiffs presented evidence showing: (1) Wal-Mart paid women in hourly positions $1100 less annually than their male counterparts; (2) women in salaried management positions faced an annual pay gap of $14,500; and (3) while women made up 67 percent of hourly workers and 78 percent of hourly department managers, women only represented 35.7 percent of salaried assistant managers, 14.3 percent of salaried store managers and 9.8 percent of salaried district managers.\textsuperscript{70}

Despite some criticism of the scientific foundation for the existence of implicit bias,\textsuperscript{71} psychological studies have generated significant and convincing evidence that implicit bias is pervasive and “contributes to a serious social problem that denies opportunities” to subordinated and disadvantaged groups.\textsuperscript{72} Therefore, implicit bias should be properly addressed in legal and regulatory frameworks.

\textsuperscript{65} Id. at 1724–25.
\textsuperscript{66} Id. at 1725.
\textsuperscript{67} Id. at 1729.
\textsuperscript{68} Id. at 1728.
\textsuperscript{69} Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010).
\textsuperscript{71} See Mitchell & Tetlock, \textit{supra} note 39, at 1030.
\textsuperscript{72} See Bagenstos, \textit{Implicit Bias, supra} note 33, at 490.
II.
THE INTENT DOCTRINE’S FAILURE TO ADDRESS IMPLICIT BIAS IN EQUAL PROTECTION CASES

A. A Brief Overview of Legal Theories Used to Challenge Discrimination

Since plaintiffs often sue using multiple legal theories, a brief overview of the different mechanisms available for challenging discrimination is helpful to a discussion of the Intent Doctrine. First, a plaintiff can allege a constitutional violation. The Equal Protection Clause,73 Due Process Clause,74 and Substantive Due Process doctrine75 all allow plaintiffs to challenge discrimination resulting from government actions and laws, with equal protection challenges being the most relevant to this Comment. Second, a plaintiff can allege a statutory violation such as a violation of Title VII of the Civil Rights Act of 1964, which provides protections that reach beyond government actions and prohibits discrimination in the private sector.76 In particular, Title VII bars discrimination in employment decisions on the basis of “race, color, religion, sex, or national origin.”77 While equal protection cases arise in additional contexts, including jury selection, electoral discrimination, and school desegregation,78 this Part focuses on employment discrimination cases where equal protection claims can overlap with Title VII claims.

B. Washington v. Davis: The Turning Point

In Washington v. Davis,79 four African American police officers sued the Commissioner of the District of Columbia and several other government officials, alleging that the police department’s promotion and recruiting procedures were racially discriminatory and unconstitutional.80 More specifically, the complaint alleged that “Test 21,” a written personnel test given to police recruits, was illegal under the Fifth Amendment’s Due Process Clause, 42 U.S.C. § 1981, and a D.C. statute prohibiting discrimination in recruitment and hiring for government positions.81 The officers did not bring a

73. U.S. CONST. amend. XIV, § 1.
74. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V (containing an equal protection component comparable to the Equal Protection Clause in the Fourteenth Amendment).
78. See Ortiz, supra note 27, at 1134–35 (explaining how the Intent Doctrine “allocate[s] burdens of proof between the individual and the state” in different ways depending on the subject matter of the equal protection suit, and also discussing the contexts of jury selection, voting, and school desegregation separately from housing and employment discrimination cases).
80. Id. at 232–34.
81. Id. at 233 & n.2.
Title VII claim because the Civil Rights Act of 1964 did not apply to the federal government at that time. The court of appeals held that Test 21 was unconstitutional, reasoning that discriminatory intent was irrelevant and finding the “critical fact was rather that a far greater proportion of blacks—four times as many—failed the test than did whites.” The Supreme Court reversed, stating that the appeals court had erred in applying “the legal standards applicable to Title VII cases,” which allow disparate-impact claims, to the purely constitutional issue of whether Test 21 violated the equal protection component of the Fifth Amendment’s Due Process Clause. In particular, the Court rejected the proposition that “a law or other official act, without regard to whether it reflects a racially discriminatory purpose, [can be] unconstitutional solely because it has a racially disproportionate impact.”

Previously, the Supreme Court had considered “motivation” and “intent” to be “largely irrelevant to equal protection” claims. With its 1976 *Washington v. Davis* decision, the Court articulated a new doctrine: a plaintiff alleging discrimination based on the “racially disproportionate impact” of a law or other government act must show a racially discriminatory purpose before the law or act can be deemed unconstitutional. However, the Court noted that the “necessary discriminatory racial purpose” does not need to be “express or appear on the face of the statute.” In fact, the Court stated that “invidious discriminatory purpose” can be “inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.” Nonetheless, subsequent interpretations of what came to be known as the Intent Doctrine have overshadowed and swallowed these finer distinctions.

82. Id. at 236–37 n.6.
83. Id. at 237.
84. Id. at 238.
85. See infra Part III.A.
86. 426 U.S. at 233, 238.
87. Id. at 239.
88. See Ortiz, supra note 27, at 1106; Palmer v. Thompson, 403 U.S. 217, 224 (1970); Issacharoff, supra note 27, at 328 (“Not until *Washington v. Davis* was it suggested that the intent to discriminate was a necessary part of an equal protection violation.”).
89. See 426 U.S. at 239. In contrast, Title VII at the time already prohibited an employment practice that had a disparate impact even where there was no proof of discriminatory intent, as long as the practice lacked a necessary business purpose. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (explaining that an employment practice that is “fair in form” but has disparate impacts is prohibited unless there is some “business necessity” for the practice).
90. 426 U.S. at 241.
91. See Pillai, supra note 27, at 531 (“It has been the Court’s tradition to express the concept of invidious intent in multiple interchangeable terms such as ‘discriminatory intent,’ ‘invidious discrimination,’ and ‘purposeful discrimination’ at times using more than one or a combination of these terms in the same case.”).
92. 426 U.S. at 242.
C. The Intent Doctrine Today

Equal protection decisions after Washington v. Davis demonstrate that it is extremely difficult for plaintiffs to win without proof of express discrimination. For example, in McCleskey v. Kemp, the Court held that Georgia’s imposition of the death penalty was constitutional and did not violate the Equal Protection Clause because the Court found no purposeful discrimination in Georgia’s capital sentencing process, despite statistics showing a strong correlation between decisions to execute and the respective racial identities of the defendant and victim. Under the Intent Doctrine that developed, the Court noted that a plaintiff in an equal protection case must prove that the defendant “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” In so holding, the Court adopted a bright-line formulation of the Intent Doctrine and turned away from the nuanced language in Washington v. Davis that “invidious discriminatory purpose” can be “inferred from the totality of the relevant facts.”

Many scholars criticize the Intent Doctrine for setting a high evidentiary standard that effectively bars the equal protection claims of most discrimination plaintiffs. Pursuant to the Intent Doctrine, the Court has insisted that a “blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged.” This approach is problematic because it ignores the

93. See, e.g., Pers. Adm’t of Mass. v. Feeney, 442 U.S. 256, 279 (holding that a state law providing a benefit for veterans in civil service appointments did not deprive women of equal protection); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (finding that the evidence did not prove that “discriminatory purpose was a motivating factor” in the challenged decision to deny rezoning of a single-family tract to a multifamily classification).


95. See id. at 286–87, 297 (“[T]he Baldus study] indicate[d] that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases,” and “the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.”); Ortiz, supra note 27, at 1142–43.

96. Feeney, 442 U.S. at 279.

97. Id. (“[N]othing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.”).


99. See, e.g., John Hart Ely, The Centrality and Limits of Motivation Analysis, 15 SAN DIEGO L. REV. 1155, 1160–61 (1978) (“It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional.”); Jill E. Evans, Challenging the Racism in Environmental Racism: Redefining the Concept of Intent, 40 ARIZ. L. REV. 1219, 1279 (1998); Lawrence, supra note 27, at 319.

100. Lawrence, supra note 27, at 324.
existence of implicit bias and its role in perpetuating both individual and systemic discrimination.101

III. THE INEFFECTIVENESS OF TITLE VII AND EXISTING REFORM PROPOSALS TO ADDRESS IMPLICIT BIAS IN EMPLOYMENT CONTEXTS

While employment discrimination may not be the most troubling instance of implicit bias and institutional discrimination, it is ubiquitous and worth considering in light of extensive analyses by several scholars. Unlike the Intent Doctrine in equal protection cases, Title VII does not explicitly require discriminatory intent in disparate-impact cases, but as interpreted by courts, Title VII still fails to adequately address implicit bias.102 This Part describes the inadequacies of current law under Title VII and then examines reform proposals that ineffectively attempt to address implicit bias in employment contexts.

A. Current Law Under Title VII

Title VII of the Civil Rights Act of 1964 forbids an employer from discriminating against an individual with “respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”103

The Equal Employment Opportunity Commission (EEOC), established by Title VII,104 enforces numerous federal statutes, including Title VII, the Equal Pay Act,105 the Age Discrimination in Employment Act,106 and the Americans with Disabilities Act.107 Except for claims under the Equal Pay Act, nonfederal


102. This Comment does not explore the disparate-impact standard of Title VI in this Section because, unlike Title VII, Title VI is not privately enforceable even though it imposes obligations at the administrative level. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that Title VI does not “display an intent to create a freestanding right of action to enforce [an agency’s disparate-impact] regulations promulgated under § 602”); Olatunde C.A. Johnson, Disparity Rules, 107 COLUM. L. REV. 374, 377, 392 (2007) (suggesting that the “Title VI disparate impact standard assimilated many of the limitations of the constitutional intent rule”).


106. 29 U.S.C. §§ 621–634 (prohibiting employment discrimination against people over 40 years of age).

107. 42 U.S.C. §§ 12101–12213 (prohibiting employment discrimination against qualified
employees and applicants must file a discrimination charge with the EEOC before filing a lawsuit against their employer. For a large percentage of discrimination charges, the EEOC investigates and uses “conciliation or other informal methods” to “resolve[] charges of employment discrimination” instead of engaging in litigation. For example, in 2010, the EEOC received 99,922 charges and only filed 271 enforcement suits. Whether or not the EEOC decides to file a suit depends not only on whether it finds evidence of discrimination during its investigation but also on several factors, such as the “wider impact” that the lawsuit could have on efforts to combat employment discrimination. If the EEOC decides not to file suit on a claimant’s behalf after completing its investigation, it issues a Notice of Right-to-Sue letter that informs the claimant that he or she may proceed to court.

Title VII plaintiffs can allege discrimination based on either disparate treatment or disparate impact. In disparate-treatment cases, the complainant must show “a discriminatory intent or motive,” or a causal link between the employer’s action and the complainant’s race, sex, or other protected characteristic. In disparate-impact cases, on the other hand, courts do not explicitly require a complainant to show discriminatory intent but instead look for adequate statistical evidence of a pattern or practice of discrimination against a protected class. Disparate-impact cases are difficult to win due to limitations on admissible data and the high level of statistical significance generally required in such cases; consequently, most Title VII cases are brought under the disparate-treatment theory.

individuals with disabilities).


112. Id.


116. Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 Va. L. Rev. 1893, 1922 (2009) (“While courts frequently use language of discriminatory intent and motive in disparate treatment cases, typically they do so in order to distinguish discrimination based on a prohibited factor from employment action taken for non-discriminatory reasons, such as a violation of company rules or a lack of qualifications.”).


118. Plaintiffs “cannot just identify the consequences” or “rely on the proportion of minorities
In *McDonnell Douglas Corp. v. Green*, the Supreme Court set forth the traditional proof structure for Title VII disparate-treatment cases. In that case, the Supreme Court held that a plaintiff must first establish a prima facie case that the employer discriminated against him or her because of a protected attribute. If a plaintiff can prove the necessary elements of a prima facie case, the burden shifts to the employer to articulate “some legitimate, nondiscriminatory reason” for the employment action. If the defendant-employer can meet this burden, the defendant is entitled to summary judgment in its favor unless the plaintiff can raise a genuine issue of material fact as to whether the asserted reasons were pretexts. Thus, the requirement of discriminatory intent in Title VII disparate-treatment cases is similar to and raises comparable concerns as the Intent Doctrine in equal protection cases.

Even in Title VII disparate-impact cases, where courts technically do not require a finding of explicit discriminatory intent, courts seem hesitant to punish defendants without sufficient showing of purposeful discrimination. Accordingly, criticism of Title VII echoes criticism of the Intent Doctrine for setting a high evidentiary standard that effectively bars most discrimination plaintiffs from establishing successful claims.

In the general population as a baseline for measuring disparate impact,” They must “prove the specific technique of discriminatory practices” and calculate the racial composition of the relevant qualified labor pool instead of relying on the percentages of racial minorities in the general population. *Id.* (explaining how “the decline of disparate impact” cases in employment law can be attributed to the increased burden on plaintiffs); see also Bagenstos, *supra* note 3, at 2 n.3 (citing various scholars that discuss “the current vitality of (or lack thereof) of the disparate impact theory”).

120. 411 U.S. 792 (1973).
121. *Id.* at 802.
122. To establish a prima facie case, the plaintiff must show that he or she (1) is a member of a protected class; (2) was qualified for the position in question; (3) suffered an adverse employment action; and (4) was treated differently from similarly situated individuals outside the protected class. See *id.*; see also Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004).
124. *See id.* at 804–05; *see, e.g.*, Peterson, 358 F.3d at 605 (concluding that the employee’s evidence failed to “meet the threshold for defeating summary judgment in disparate treatment cases”).
125. 42 U.S.C. § 2000e-2(a)(1) (2006); see Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 & n.15 (1977) (explaining that “[p]roof of discriminatory motive is critical” in disparate-treatment cases); Higgins & Rosenbury, *supra* note 4, at 1208 (noting that where a plaintiff cannot offer direct evidence of discriminatory intent, the plaintiff could still prove discrimination in a disparate treatment case “by establishing that her employer had treated her less favorably than members of other groups and had provided a pretextual explanation for that treatment”).
126. *See Bagenstos, supra* note 3, at 45 (“Courts are hostile to disparate impact law for precisely the same reason they hesitate to read disparate treatment doctrine as embracing implicit bias—because actions taken without conscious intent to discriminate do not fit the paradigm of a fault-based understanding of ‘discrimination.’”).
B. Title VII Reform Proposals That Inadequately Focus on Changing the Existing Title VII Proof Structure, Liability Standards, and Procedural Rules

Due to the infrequent use of the disparate-impact theory, Title VII reform proposals have largely focused on disparate treatment. Several scholars have proposed reforms that attempt to address the difficulty of establishing such claims. Many of these proposals focus on changing the law in ways that can impede the internalization of norms of equality—a widely held belief that individuals of a particular minority or subordinate group should have the same status, rights, and opportunities as the dominant group. Consequently, these proposals fail to adequately address implicit bias.

For instance, Ann McGinley proposes changing the proof structure of Title VII by changing the permissive presumption currently in place to a mandatory presumption of discrimination if a plaintiff makes both a prima facie case of discrimination and shows that the defendant’s given reason for the employment decision is pretext.127 Under this proposal, the fact that the employer gave a false reason for the employment decision creates a presumption that the employer had a discriminatory purpose.128 The problem with this proposal is that an employer could use pretexts for nondiscriminatory reasons.129 That is, an employer may give a false reason for its employment decisions to conceal an objectionable but not discriminatory reason. For example, an employer may use the recession as “an excuse to let go [] of [] less productive employees” without having engaged in discrimination.130 Another example is that employers may use pretexts to avoid “having to prove [] performance problems” or to avoid public disclosure of damaging company information such as an employee’s embezzlement or sexual assault against another employee.131 While the use of pretexts for these reasons is unsavory, it is not illegal under the Title VII proof structure because the traditional proof structure allows an inference of discrimination based on pretext but does not require that conclusion as this reform proposal would require.132 Finally, the proposed reform is flawed because it could punish acts that are not motivated by either conscious or implicit bias. As discussed below, this could interfere with efforts to establish norms of equality.

127. McGinley, supra note 1, at 481–82.
128. See id. at 452, 456–58, 481–82 (explaining the difference between a “mandatory presumption” and “permissive presumption,” and advocating for a “mandatory presumption” to overcome the effect of St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993), which held that a fact finder is not required to “make an ultimate determination of discrimination upon a finding of pretext”).
129. See Bartlett, supra note 116, at 1927.
130. Id.
131. Id.
132. See St. Mary’s Honor Ctr., 509 U.S. at 518–19, 523–24 (“Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proven to have taken adverse employment action by reason of (in the context of the present case) race.”).
Other proposals focus on changing liability standards and procedural rules to make employment discrimination easier to prove. For instance, Professor Russell Robinson has proposed creating an intermediate liability category. Under his proposal, a defendant can be held partially liable for damages under Title VII when “a reasonable outsider would find the claim compelling, yet an insider judge might not.” Professor David Oppenheimer, on the other hand, has proposed that Title VII should impose upon employers a tort-like duty to take all reasonable precautions to prevent discrimination, such as by establishing appropriate job screening procedures, employee evaluation practices, and employee disciplinary standards. Similarly, Tristin Green has proposed that employers should be found liable for failures to correct structural features of the workplace that enable discrimination due to implicit bias, such as a lack of demographic balance in work team assignments. Like Oppenheimer, Green would impose on employers a responsibility to “refrain from creating work environments that facilitate the operation of those biases in workplace decisionmaking.”

Professor Katherine Bartlett has examined and critiqued these proposals. Her work raises important issues about how legally coercive laws “undermin[e] the conditions necessary to motivate people to want to avoid implicit discrimination” and “feed rather than reduce implicit discrimination.” Bartlett is particularly persuasive in cautioning against proposals that trigger “defensive, resentful responses.”

Sociological studies support Bartlett’s assertion that coercive laws can impede the internalization of equality norms, and thus the underlying goals of legal mandates. For instance, studies have shown that efforts to suppress stereotyping can result in a “rebound effect” where stereotyping returns with greater force when the external pressure to suppress it is relaxed. For example, one study found that participants whose boss pressured them into hiring a black applicant for the purpose of increasing the company’s ethnic diversity were more likely to engage in stereotyping behaviors in the future.
diversity later opposed affirmative action policies more strongly and evinced higher levels of anger, threat, and resentment toward blacks than before.  

Another study of the rebound effect instructed participants to look at a picture of a white skinhead and write about that person’s typical day for five minutes. Some participants were explicitly told to suppress their use of stereotypes while a control group received no such instruction. When asked to sit in a room with a skinhead, the participants who were told to suppress stereotypes were more likely to sit further away from the skinhead than were members of the control group. Next, the study required participants to either write about the typical day of a different photographed skinhead or to engage in a lexical exercise, which tested the speed with which participants recognized stereotypic words describing skinheads compared with distracter words and nonwords consisting of meaningless strings of letters. For these tasks, the researchers did not instruct any participants to suppress stereotypes. The study found that participants who had previously been told to suppress stereotypes were more likely to express stereotypes than the control participants, thus supporting the existence of the rebound effect.

Along with the dangers posed by the rebound effect, “legal coercion” also threatens to “crowd out” internal motivation and undermine a person’s sense of autonomy, competence, and relatedness in ways that reduce self-regulation. According to Bartlett, legal coercions can send a message that “the underlying [forced] norm does not reflect people’s actual commitments, but rather standards that people would not follow unless the law imposed them.” As a result, legal coercion can counteract the potentially positive effects of “social tuning,” where people assimilate to a perceived social norm in order to improve interactions with others who hold the norm. This may explain why one study found that showing a sexual harassment policy to men had the effect of activating rather than suppressing gender stereotypes. Apart from any rebound effect, emphasizing the sexual harassment policy may have led individual men to believe that few of their peers actually believed that it is

---

142. See Bartlett, supra note 116, at 1936. The negative response appeared in participants with a low internal motivation to avoid prejudice rather than in those who started with a high level of motivation to avoid prejudice. E. Ashby Plant & Patricia G. Devine, Responses to Other-Imposed Pro-Black Pressure: Acceptance or Backlash?, 37 J. EXPERIMENTAL SOC. PSYCHOL. 486, 498–99 (2001).

143. See Macrae et al., supra note 141, at 810.

144. Id. at 812.

145. See id. at 811, 813.

146. See Bartlett, supra note 116, at 1937.

147. Id. at 1939.


149. See Justine Eatenson Tinkler et al., Can Legal Interventions Change Beliefs? The Effect of Exposure to Sexual Harassment Policy on Men’s Gender Beliefs, 70 SOC. PSYCHOL. Q. 480, 491 (2007).
wrong to objectify and harass women, and that failing to comply with the policy would not result in social rejection by their peers.

Based on her understanding of how the law can impede the internalization of norms of equality, such as through the rebound effect and its effect on social tuning, Bartlett criticizes the Title VII proposals discussed above. She argues that McGinley’s proposal for a mandatory presumption against employers who use pretexts would foster “a perception of unfairness” and may drive people to act in more stereotyped ways due to anxiety of “being found guilty while innocent under these rules.”150 Similarly, Bartlett claims that Robinson’s proposal for a new category of liability based on “reasonable outsider” views would “associate Title VII with a conspicuous rule of favoritism and encourage defensive, stereotyped reactions.”151 With regards to the proposals advanced by Oppenheimer and Green, Bartlett believes that “surveillance regimes” would likewise push people into “defensive, resentful responses.”152

Given the difficulties of addressing implicit bias through traditional legal avenues, Bartlett argues that reform measures should seek to minimize implicit bias by avoiding the triggering of defensive processes that cause people to rebound, “disown responsibility for negative outcomes, and blame others.”153 Instead, she advocates measures that seek to “leverage people’s good intentions into a deeper commitment to a more inclusive, nondiscriminatory workplace” rather than using threat and confrontation, which may “inadvertently provoke shame, guilt, and resentment” and feed resistance.154

C. The Practical Problems of Professor Bartlett’s Structural Reform Proposals

Bartlett offers several structural suggestions to increase organizational accountability for diversity and discrimination: (1) spread accountability throughout the organization rather than holding one person or department responsible; (2) use in-house experts because they “have advantages over outside consultants in building institutional diversity goals”; (3) make sure that top management is “both diverse and committed to diversity”; and (4) use positive program incentives rather than legal compliance mechanisms, such as EEOC charges and lawsuits, because incentives are “more productive.”155

While Bartlett’s proposals are theoretically valuable, this Comment argues that they would fail in practice because they do not account for differences between the motivations of individuals and organizational entities, which may

---

150. See Bartlett, supra note 116, at 1958.
151. See id.
152. See id. at 1958–59.
153. Id. at 1939.
154. Id. at 1901.
155. Id. at 1970.
be governed by several different individuals with one or more shared goals. As discussed below, Bartlett’s proposals are supported by studies that address the internal motivations of individuals, but her proposals cannot be broadly effective because they fail to address the motives of organizational entities. Specifically, absent sufficient internal motivation, external pressures are necessary to drive organizational change. Bartlett’s proposals do not constitute viable solutions for addressing implicit bias in the context of employment discrimination because the EEOC is unable to provide the external pressure necessary to ensure their effectiveness.

Bartlett supports her proposals with studies that address the internal motivations of individuals.156 For instance, she relies on studies showing that increased accountability among individuals correlates with higher levels of diversity. One study of corporate affirmative action and diversity policies found that structures establishing responsibility to promote diversity in affirmative action plans, diversity committees, or diversity staff led to “significant increases in managerial diversity.”157 She notes that such accountability mechanisms can motivate people to be self-critical and careful in making nondiscriminatory decisions because they know that their judgments will be “checked against the assessments of others whom they respect.”158 In contrast, diversity training and measures aimed at educating individuals were not followed by increases in diversity, while mentoring and networking programs produced only modest gains.159 Studies also support Bartlett’s argument that positive feedback is more effective than negative feedback in reducing bias.160 For instance, studies have shown that positive feedback reduces race or gender stereotyping while negative feedback increases it.161 To have maximum benefit, positive feedback should be genuine, based on an individual’s actual effort.162

156. See id.
158. See Bartlett, supra note 116, at 1963.
159. See Kalev et al., supra note 157, at 590.
161. See Lisa Sinclair & Ziva Kunda, Motivated Stereotyping of Women: She’s Fine If She Praised Me but Incompetent If She Criticized Me, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1329, 1332–33 (2000) (explaining results of a study where participants were more likely to discredit and poorly rate female instructors who gave them low grades than male instructors who had done the same); Sinclair & Kunda, supra note 57, at 887–94 (describing studies where participants were more likely to disparage black managers or doctors than white ones after simulated exercises in which the participants received negative feedback from the black managers or doctors); Fein & Spencer, supra note 58, at 32–37 (detailing similar studies showing that participants were less likely to “derogate members of stereotyped groups” after a self-affirmation exercise, but more likely to stereotype a target after receiving negative feedback, such as low scores on a fake intelligence test).
and delivered in a way that reinforces the purpose and value of the desired performance.\textsuperscript{163}

Although Bartlett’s proposals may be effective in some contexts, they fail to address the differences between what motivates individuals and what motivates organizational entities.\textsuperscript{164} If all employers fully and diligently implemented Bartlett’s proposals, the structural reforms would likely be effective at “leverag[ing] people’s good intentions” to create “a more inclusive, nondiscriminatory workplace.”\textsuperscript{165} Yet Bartlett’s proposals contain no mechanisms to ensure that all, or even most, employers would adopt these proposals or implement them diligently\textsuperscript{166} rather than just insulating themselves from liability with the “mere existence of an antidiscrimination policy.”\textsuperscript{167} After all, employers face financial and organizational limitations that are likely to inhibit their abilities to implement such measures. Bartlett warns against structural reforms that simply perpetuate existing patterns and result in “symbolic responses” that do not further equality and inclusion,\textsuperscript{168} but her proposals would not prevent such a result because they fail to incentivize organizational leaders to take effective action.\textsuperscript{169}

Organizational leaders who lack sufficient motivation to implement change in their organizations will only respond to “external pressures”\textsuperscript{170} such as EEOC charges or lawsuits, which are arguably the most effective forms of external pressure existing today. Therefore, the effectiveness of Bartlett’s structural reform proposals are constrained by the limitations of the EEOC. As currently constituted, the EEOC is unable to provide the incentives necessary to compel otherwise unmotivated organizational leaders to implement change. First, the EEOC’s budget and policies can change drastically from year to year based on factors such as the current president’s political party and the state of the economy.\textsuperscript{171} Second, even in years when its budget is less constrained, the

\begin{itemize}
  \item \textsuperscript{163} See id. at 238.
  \item \textsuperscript{164} See William T. Bielby, Accentuate the Positive: Are Good Intentions an Effective Way to Minimize Systemic Workplace Bias?, 95 Va. L. Rev. Brief 117, 118, 124 (2010) (noting that “it is unclear how one can incentivize internally motivated change in organizations that lack the kind of nondiscriminatory leadership that Professor Bartlett identifies as critical”).
  \item \textsuperscript{165} See Bartlett, supra note 116, at 1901.
  \item \textsuperscript{166} See Bielby, supra note 164, at 121.
  \item \textsuperscript{167} See Hart, supra note 70, at 1647 (suggesting that conscious efforts must be made to tie employer training and prevention programs to “other organizational practices designed to minimize the negative impact of stereotyping and bias in employment decisions”).
  \item \textsuperscript{168} See Bartlett, supra note 116, at 1969.
  \item \textsuperscript{169} See Bielby, supra note 164, at 120–21 (“For many organizations, it is neither economical nor feasible to coordinate activities around a strong uniform culture with widely and deeply shared norms.”).
  \item \textsuperscript{170} See id. at 124.
  \item \textsuperscript{171} Gary Fields, EEOC to Downgrade 8 Offices, Drawing Enforcement Worries, WALL ST. J., June 23, 2005, at B2 (reporting that EEOC deputy general counsel said “in the current budget environment, with Iraq, with homeland security taking top priority in Congress, the EEOC has to ‘work smarter with less’”).
\end{itemize}
EEOC’s backlog of individual discrimination cases hampers its ability to combat systemic discrimination.\(^\text{172}\) Finally, these budgetary constraints and the heavy caseload suggest that the EEOC lacks the resources necessary to develop effective program incentives that would motivate employers to adopt or improve accountability mechanisms. Consequently, Bartlett’s insights, though theoretically valuable, do not constitute a viable proposal for addressing implicit bias in the context of employment discrimination.

IV. SYSTEMIC DISCRIMINATION CAUSED BY IMPLICIT BIAS AS SOCIAL POLLUTION

Since our legal system is ill equipped to remedy systemic discrimination caused by implicit bias, advocates for equity and inclusion should explore preventative measures that guard against the harms of systemic discrimination. Instead of devising reform proposals that focus on changing existing laws,\(^\text{173}\) social justice advocates should seek to “convince judges and the broader political community” that organizations should be “held responsible for structural problems” that contribute to inequality “when they are not taking sufficient steps to counteract those problems.”\(^\text{174}\)

The terms “implicit bias,” “institutional racism” and “systemic discrimination” are each too limited to fully capture the complex mechanisms that produce racial, gender, and other forms of inequality.\(^\text{175}\) The concept of implicit bias fails to “address how institutional arrangements and ongoing practices interact with longstanding, persistent patterns of . . . inequality.”\(^\text{176}\) Similarly, both systemic discrimination and institutional racism suggest that disparities are “too pervasive to be quantified or remedied.”\(^\text{177}\) A new term is needed to highlight that “disparities are in fact created and maintained by contemporary public practices,”\(^\text{178}\) and yet are not so endemic that they cannot be quantified and remedied.

A. Using the Concept of Environmental Pollution to Introduce the Concept of Social Pollution

This Comment proposes using the common understanding of environmental pollution\(^\text{179}\) to introduce the concept of “social pollution” as

---

\(^{172}\) See Vogel, EEOC Confronts Growing Backlog, Dwindling Staff, WASH. POST, Feb. 3, 2009, at A13 (reporting that in 2009, the EEOC had a backlog of 73,951 cases).

\(^{173}\) See supra Part III.B.

\(^{174}\) See Bagenstos, supra note 3, at 4 (“In the end, social and not legal change is what will be necessary to eliminate structural workplace inequalities.”).

\(^{175}\) Johnson, supra note 102, at 383–84.

\(^{176}\) Id. at 383.

\(^{177}\) Id. at 384.

\(^{178}\) Id. at 385–86.

\(^{179}\) See Nagle, supra note 30, at 49 (explaining how the “commonplace understanding of environmental pollution provides a helpful foundation for considering other kinds of pollution”).
encompassing systemic discrimination caused by implicit bias. Because environmental pollution \(^{180}\) shares several similarities with systemic discrimination caused by implicit bias, environmental statutes are an attractive model for discrimination reform proposals. Like air and water pollution, “discharge” from numerous sources collectively produces systemic discrimination caused by implicit bias. As in the environmental context, the number and diversity of these sources make it difficult to regulate and effectively contain the pollution without a comprehensive national mandate. In both contexts, simply naming a “responsible” party is unlikely to secure redress because it is not always clear what should be done to the party. For instance, power plants that emit air pollutants cannot be uniformly fined or shut down because they also provide socially desirable services. Both environmental pollution and social pollution are side effects of larger economic and political structures that often serve legitimate social purposes. Consequently, concerns that strict standards or high penalties might damage legitimate public or private interests encumber efforts to regulate environmental and social pollution.

Furthermore, social pollution, like environmental pollution, creates harms that not only affect individuals but also endanger the nation’s success. If environmental pollution continues unchecked, our nation’s natural resources could become so depleted that future generations will be unable to grow food or enjoy clean air and water. Similarly, a failure to effectively control social pollution of discrimination could endanger our nation’s productivity and the public’s safety and health. Discrimination destroys lives, wastes social capital, and fuels costly lawsuits.\(^{181}\)

### B. Social Values That Justify Regulating Social Pollution

An examination of social values used to justify the regulation of environmental pollution can help to identify social values that justify the regulation of social pollution.

Environmentalists from various schools of thought have identified values that justify protecting the environment: (1) under an anthropocentric view, the belief that human welfare depends on a clean and healthy ecosystem; (2) under an ecocentric view, the belief that ecology is important in itself; and (3) under a theocentric view, the belief that people have spiritual or religious responsibilities to be good stewards of natural resources.\(^{182}\)

---

180. See id. (“In environmental law, practitioners often maintain that any harmful addition to the natural environment constitutes pollution.”).

181. See, e.g., Larry Gordon, *Job Bias Lawsuits Cost Cal State $7.6 Million*, L.A. TIMES, Dec. 12, 2007, at B6 (stating that the California State University system “spent $5.3 million in outside legal fees to defend itself against employment discrimination lawsuits and $2.3 million to settle such cases” over five years).

Similarly, advocates for elimination of social pollution can be motivated by analogous value systems: (1) under an anthropocentric view, the belief that equity and inclusion are important to human welfare and the nation’s economy; (2) under a social justice view, the belief that equity and inclusion are important as basic civil rights; and (3) under a theocentric view, the belief that people have spiritual or religious responsibilities to treat others with fairness and respect.

Environmental statutes that serve both anthropocentric and ecocentric purposes, and achieve a balance between addressing both economic concerns and desires to protect the environment, are most likely to be passed. Likewise, reforms that address social pollution should serve both anthropocentric and social justice purposes, thus balancing economic concerns with desires to ensure fair treatment for all. For example, reforms that address employment discrimination might achieve this balance by using the “business case for diversity” to explain why reform measures are needed.

C. A New Term to Mark a Shift in Paradigm

There is one important way in which the effects of environmental pollution differ from social pollution. The relationships between people and their environment is fundamentally different from the relationships that human beings have with one another. Every person deserves respect and compassion from other individuals. While some strongly believe that animals, trees, rivers, and rocks also deserve to be treated with respect and compassion, society has higher expectations regarding the extent and quality of one’s treatment of other human beings.

With this difference in mind, some might argue that the preventative approach applied in the environmental context is inappropriate in the discrimination context because it lets the “guilty” discriminator off easy. Yet


186. See, e.g., Ezer v. Fuchsloch, 99 Cal. App. 3d 849, 863–64 (1979) (quoting Christopher Stone to assert the idea that environmental entities, which may have some rights, do not deserve the same rights as human beings); Anita Bernstein, Treating Sexual Harassment with Respect, 111 HARV. L. REV. 445, 452 (1997) (defining respect of other people as a “recognition of a person’s inherent worth,” and stating that recognition respect is “owed to all persons”).
this criticism appears less significant when the paradigm is one of problem solving and the goal is to find a workable solution in an imperfect world. Confrontation and assigning blame are important and effective when combating certain problems such as in the criminal law context. However, such measures arguably fail to yield the desired results of securing relief and remedies for those harmed by systemic discrimination caused by implicit bias. Illuminating how a perpetrator has unconsciously discriminated may provide victims of discrimination with a sense of righteousness, but it does little to give them relief for the harm suffered.

If advocates want results that benefit subordinated groups more than they want to win arguments and trials, they should change their paradigm and seek reforms that are more likely to be politically feasible in the United States. Using the concept “social pollution” to encompass systemic discrimination caused by implicit bias is more likely to garner public support than proposals focused on assigning blame and liability. Furthermore, the concept can help combat the notion that such discrimination is too pervasive to be remedied. Of course, advocates of equity and inclusion should and likely will continue to pursue remedies through traditional legal avenues.

V. ENVIRONMENTAL STATUTES AS MODELS FOR REGULATING SOCIAL POLLUTION

On January 28, 1969, one of Union Oil Company’s offshore wells started to spill thousands of gallons of oil per hour into the Santa Barbara Channel off the coast of Summerland, California.\(^\text{187}\) Over the next week, oil spread across 800 square miles of ocean, contaminating Santa Barbara Harbor and killing thousands of birds, seals, and other marine mammals.\(^\text{188}\) Subsequent investigations revealed that the spill might have been prevented if federal regulators had not waived safety requirements mandating that well shafts be lined with hardened casings.\(^\text{189}\)

Along with Rachel Carson’s influential book *Silent Spring*,\(^\text{190}\) environmental disasters like the Santa Barbara oil spill raised public awareness about the need to protect the environment through regulation of public and private activities. During the 1970s, the legislative and executive branches responded by launching a new environmental movement. In 1970, Congress passed the National Environmental Policy Act (NEPA)\(^\text{191}\) and the Clean Air Act (CAA).\(^\text{192}\) Shortly after, Congress passed the Clean Water Act (CWA)\(^\text{193}\) in

\(^{187}\) California v. Norton, 311 F.3d 1162, 1165–66 (9th Cir. 2002).

\(^{188}\) Id. at 1166.

\(^{189}\) Id.

\(^{190}\) RACHEL CARSON, SILENT SPRING (1962).


This Part explores potential regulatory proposals for addressing social pollution by using NEPA, EPA policies, and the CAA as points of departure. These proposals are meant to supplement and not replace existing efforts by the EEOC and private litigants to combat discrimination, which serve important purposes despite being ineffective at addressing implicit bias.

A. A Declaration of Purpose and Policy

This Section starts with a comparison of the declarations of purposes and policies in NEPA, the CAA, and the CWA. This comparison reveals that the legislative purposes underlying NEPA and the CAA are quite similar while the legislative impulse behind the CWA is notably different due to its greater focus on specific goals. Using the language in these statutes as models, this Section proposes a draft statement of purpose and policy for new legislative or regulatory proposals addressing social pollution.

When passing NEPA, Congress declared a national policy aimed at “encourag[ing] productive and enjoyable harmony between man and his environment” and “promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” This national policy recognized “the profound impact of man’s activity on the interrelations of all components of the natural environment” and the “critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.” Furthermore, Congress declared that the federal government would “use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations of Americans.”

The declaration of purpose in the CAA is similar to that in NEPA. In the CAA, Congress declared that “the growth in the amount and complexity of air pollution . . . has resulted in mounting dangers to the public health and welfare.” Both NEPA and the CAA recognize the “impact” and “danger”
posed by human activities. Additionally, both frame the need to protect the environment in terms of the practical goals of promoting human “health and welfare” and the nation’s “productive” potential. In particular, the CAA seeks “to protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”

The language in the CWA differs in significant ways from that in NEPA and the CAA. First, unlike NEPA and the CAA, the CWA does not explicitly recognize the “impact” or “danger” of water pollution; instead, it conveys an implicit understanding that water pollution is a problem that the federal government must regulate. The CWA’s stated objective—“to restore and maintain the chemical, physical, and biological integrity of the nation’s waters,”—implicitly acknowledges that water pollution exists since pure and unpolluted waters would not need to be restored. Second, unlike the declarations of “purpose” found in NEPA and the CAA, the CWA contains declarations of “goals.” In particular, the CWA calls for the elimination of the “discharge of pollutants into the navigable waters” by 1985 and the achievement of an “interim goal of water quality which provides for the protection and propagation of fish . . . and provides for recreation” by July 1, 1983. This difference between the CWA and the CAA can be partly attributed to the fact that it was easier in the 1970s to identify a finite number of entities causing significant water pollution, whereas “numerous [and] diverse mobile or stationary sources” cause air pollution. Similarly, NEPA’s broad application to any “proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment” differs from the CWA’s narrower focus on eliminating discharge of pollutants into navigable waters.

200. NEPA, 42 U.S.C. § 4331(a) (noting Congress’s recognition of “the profound impact of man’s activity on . . . the natural environment”); CAA, 42 U.S.C. § 7401(a)(2) (noting that “urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare”).

201. NEPA, 42 U.S.C. § 4331(b)(2) (stating the goal of “assur[ing] for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings”); CAA, 42 U.S.C. § 7401(b)(1) (stating the goal of “promot[ing] the public health and welfare and the productive capacity of [the nation’s] population”).


203. See NEPA, 42 U.S.C. § 4331(a) (stating “recognizing the profound impact”); CAA, 42 U.S.C. § 7401(a)(2) (stating “resulted in mounting dangers to the public health and welfare”).


205. See NEPA, 42 U.S.C. § 4331 (titling the section “Congressional declaration of national environmental policy”); CAA, 42 U.S.C. § 7401 (titling the section “Congressional findings and declaration of purpose”); CWA, 33 U.S.C. § 1251 (titling the section “Congressional declaration of goals and policy”).


209. See 33 U.S.C. § 1251(a)(1) (“It is the national goal that the discharge of pollutants into
A statute addressing the social pollution of systemic discrimination caused by implicit bias should use declarations of purpose and policy that resemble the language in NEPA and the CAA. A declaration of specific goals, like the declaration in the CWA, would be inappropriate for social pollution due to the difficulty in quantifying the impacts of systemic discrimination and thus setting measurable goals. A social pollution statute should also apply broadly, like NEPA, instead of having a narrow focus like the CWA given that a vast number of potential sources might contribute to systemic discrimination. However, a statute addressing social pollution should depart from the NEPA and CAA models by acknowledging that the fundamental rights of humans to dignity and respect rise above any business or productive considerations.

One potential formulation for a declaration of purpose and policy for a social pollution statute is as follows:

Congressional Declaration of National Equity Policy. The purpose of this Chapter is to declare a national policy that will encourage productive and enjoyable harmony among the diverse people of the United States and to promote efforts that will increase equity and inclusion in our society in ways that affirm an individual’s fundamental right to dignity and respect. Congress recognizes the complexity of systemic discrimination and implicit bias and further recognizes the critical importance of restoring and maintaining social harmony to the public health and welfare and to the productive capacity of our Nation’s people. The Congress thus declares that it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, and to create and maintain conditions under which diverse people can exist in productive harmony.

At a minimum, the language proposed above can serve as a starting point for conversations regarding the value of equity and a more harmonious society.

B. An Equity Impact Assessment Modeled After NEPA’s Environmental Impact Statement

The idea of equity review—a process by which an organization or agency can evaluate the impacts of its actions or policies on overall equity within the organization—could be introduced into decision-making processes through the use of an Equity Impact Assessment. Requirements to conduct equity reviews could be crafted broadly to cover all major federal actions and private activities that require federal funding or approval, or it could be crafted narrowly to cover only employment decisions.

---

210. See, e.g., NEPA, 42 U.S.C. § 4332(2)(C) (applying to any “proposals for legislation and
NEPA’s Environmental Impact Statement (EIS) requirement is a helpful model for implementing equity review. NEPA serves two practical purposes: (1) “to inject environmental considerations” into a federal agency’s decision-making processes, and (2) to ensure that stakeholders can actively participate in decision making by requiring agencies to publicly disclose relevant information. To accomplish these purposes, NEPA requires federal agencies to include with their “proposals for legislation and other major [f]ederal actions significantly affecting the quality of the human environment,” a comprehensive assessment of the proposal’s potential environmental harm. Specifically, the agency must address the following factors with respect to its proposal: (1) the environmental impact of the action, (2) any adverse environmental impacts that cannot be avoided, (3) alternatives to the proposed action, (4) the relationship between “local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity,” and (5) “any irreversible and irretrievable commitments of resources.”

The NEPA process for environmental review consists of three steps. First, the agency making the proposal determines if the proposed action falls within a categorical exclusion (i.e., those activities that the agency has determined have no significant impact on the environment). If the action is not categorically excluded, then the agency must prepare a written Environmental Assessment to determine if there will be a significant environmental impact. If the agency concludes there will be no significant impact, it issues a Finding of No Significant Impact. However, if the Environmental Assessment determines there will be significant impact, the agency must issue an EIS and conduct a more detailed evaluation of the proposed action. The public and other agencies can provide input during the preparation of an EIS and also comment on the draft EIS.

Although NEPA is sometimes criticized for being a purely procedural statute, its simple requirement of an EIS has profoundly changed the other major [f]ederal actions significantly affecting the quality of the human environment”).

216. Id.
217. Id.
218. Id.
219. See Bradley C. Karkkainen, Whither NEPA?, 12 N.Y.U. ENVTL. L.J. 333, 342 (2004) (“Legalists charge that although NEPA was intended to have substantive as well as procedural
processes of environmental planning and decision making within the federal government and those private entities seeking federal approval or funds for projects.\textsuperscript{220} NEPA’s environmental review has been perceived as so effective that several states and dozens of countries around the world have copied it.\textsuperscript{221}

An Equity Impact Assessment for implicit bias modeled after NEPA’s EIS should include a detailed statement by the responsible official on: (1) the social and equity impact of the proposed action or policy,\textsuperscript{222} (2) any disparate impact on subordinated groups that cannot be avoided, (3) alternatives to the proposed action, and (4) the governmental or other legitimate purpose served by choosing the proposed action over other alternatives. The Equity Impact Assessment should also have a “justification requirement,” which would ensure that the responsible person explicitly identifies reasons justifying any disparate impacts on subordinated groups.

An Equity Impact Assessment for implicit bias could inject equity considerations into a federal agency’s decision-making processes and provide the public with better information and greater opportunities to participate in policy making. An Equity Impact Assessment is well suited for addressing implicit bias because it avoids controversial discussions regarding discriminatory intent and instead focuses on foreseeable impacts and potential alternatives to the proposed action. This approach is more likely to be politically attractive. Further, instead of burdening those harmed by discrimination with the task of proving discriminatory intent, an Equity Impact Assessment would place the responsibility on decision makers to avoid taking unjustifiable actions that have disparate impacts on subordinated groups.

A statute requiring Equity Impact Assessments should learn from NEPA’s mistakes as well as from its successes. Although NEPA’s EIS ideally serves as a planning and decision-making tool, NEPA has been criticized as a burden that subjects agencies to expensive legal attacks for failing to complete or properly complete an EIS.\textsuperscript{223} Under the Administrative Procedure Act (APA), concerned parties can challenge agency decisions made during a NEPA process for being

\begin{itemize}
  \item \textsuperscript{220} See, e.g., James L. Connaughton, Modernizing the National Environmental Policy Act: Back to the Future, 12 N.Y.U. Envtl. L.J. 1, 5 (2003) (stating that every major private organization that does a merger or expands its facilities performs environmental review).
  \item \textsuperscript{221} Id. at 4; see, e.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000–21178 (West 2012); Washington State Environmental Policy Act, WASH. REV. CODE ANN. § 43.21C.010 (West 2012); New York’s State Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2012).
  \item \textsuperscript{222} A proposed action can include the adoption of a policy to give local managers wide discretion to make hiring and promotion decisions, where the exercise of the manager’s discretion may appear to be “inaction” on the part of the organization. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548, 2553 (2011).
  \item \textsuperscript{223} See Karkkainen, supra note 219, at 340–42; Connaughton, supra note 220, at 10.
\end{itemize}
arbitrary and capricious.\textsuperscript{224} Efforts should be made to craft an Equity Impact Assessment that maximizes its potential benefits as a planning tool without burdening federal agencies with unnecessary procedural requirements and subjecting them to frivolous legal challenges.

In addition, the process must guard itself from the implicit bias of participants. Standing alone, requiring that a diverse group of people participate in the process does not guarantee that a diversity of viewpoints will be expressed, heard, and considered.\textsuperscript{225} Thus, it may be necessary to give representatives from the proposal’s most impacted and disadvantaged groups elevated status as participants in the drafting process. For example, if a local transportation agency is considering cutting certain routes in its bus system to save costs, representatives from poor communities of color that will be impacted by the changes should be allowed to directly draft a section of the Equity Impact Assessment instead of simply being permitted to submit written comments to public officials performing their Title VI\textsuperscript{226} obligations.\textsuperscript{227} Whatever the specific details, equity review should resemble an ongoing conversation that allows for decisions to be modified as conditions and variables change.

NEPA has also been criticized for failing to place sufficient substantive requirements on federal agencies, and consequently, for making it difficult to successfully challenge an EIS if the agency followed proper procedure.\textsuperscript{228} Although it would be tempting to include substantive requirements in an initial statutory proposal for Equity Impact Assessment, advocates may find it politically necessary to omit substantive requirements in order to ensure passage of the bill.

\textsuperscript{224} Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006) (directing courts to “hold unlawful and set aside agency action” if found to be “arbitrary, capricious, [or] an abuse of discretion”). NEPA does not include a statutory provision authorizing private parties to challenge agency decisions in federal court, but subsequent cases have found that the APA authorizes judicial review of NEPA decisions. See Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971).

\textsuperscript{225} See, e.g., Robinson, \textit{supra} note 24, at 1173 (discussing how including black attorneys in interviewing teams does not always “make a difference” because the black attorneys may have “internalized the firms norms and may be just as averse to the black [job applicant],” may be “too risk averse to try to change the dynamic,” or may be “in the minority” numerically, such that “their views” do not prevail).

\textsuperscript{226} See 42 U.S.C. § 2000d (2006) (“No person . . . shall, on the ground of race, color, or national origin . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

\textsuperscript{227} See Johnson, \textit{supra} note 102, at 414 & n.175 (discussing the limited administrative enforcement of Title VI, but noting that several federal agencies have initiated rulemaking or adopted regulations providing guidance on Title VI rules and requirements applicable to recipients of federal funding).

\textsuperscript{228} See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (“NEPA does not require a fully developed plan detailing what steps \textit{will} be taken to mitigate adverse environmental impacts and does not require a ‘worst case analysis.’”).
A statute that seeks to address social pollution should appear politically neutral and considerate of business interests in order to increase its chances of passing. As discussed above, omitting substantive requirements and focusing on prevention would make a proposal more politically attractive. In addition, advocates should emphasize an Equity Impact Assessment’s potential to increase organizational efficiency through greater social harmony in the workforce, and to reduce costly lawsuits through proactive conflict prevention. Further, by focusing on improving the decision-making process rather than on securing advantages for certain groups, an Equity Impact Assessment would defuse the tension and resistance often associated with affirmative action or remedial measures.229

A statute could introduce the Equity Impact Assessment by itself or as part of a package of reforms. Although this Comment continues to explore other reform proposals, the Equity Impact Assessment should be the first reform proposed because it is the most politically feasible and potentially effective of all the proposals discussed here. Once the Equity Impact Assessment is in place, it can act as a wedge to allow the introduction of other reforms.

C. EEOC Reforms Modeled After the EPA’s Audit Policy

The EEOC acknowledges that “[p]reventing employment discrimination from occurring in the workplace . . . is preferable to remedying the consequences of discrimination.”230 However, despite offering outreach and training programs, there is no evidence that the EEOC has effectively facilitated the prevention of employment discrimination. In 2008, the EEOC started the E-RACE (Eradicating Racism and Colorism from Employment) initiative. One of E-RACE’s five goals is to “[e]ngage the public, employers, and stakeholders to promote voluntary compliance to eradicate race and color discrimination.”231 Strategies include trainings, public meetings, and collaborations with various groups.232 However, there is no mechanism that incentivizes employers to adopt and enforce these antidiscrimination strategies voluntarily.233

EEOC policy and procedures should be reformed to resemble the Environmental Protection Agency’s (EPA) Audit Policy, also known as

232. Id.
233. Id. (relying on general efforts to “[c]ollaborate with [b]usiness and [a]dvocacy [c]ommunities to [i]ncrease [v]oluntary [c]ompliance”).
“Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.”

The EPA’s Audit Policy incentivizes participating entities to implement certain measures. Among others, these incentives include reductions in civil penalties under environmental laws and assurance of no criminal prosecution for entities that meet applicable conditions. The EPA identifies nine conditions for penalty mitigation and requires participants to satisfy the last eight in order to qualify: (1) systemic discovery of the violation through an environmental audit or implementation of a compliance management system, (2) voluntary discovery, (3) prompt disclosure, (4) independent discovery and disclosure before the EPA or another regulator discovers the violation, (5) correction and remediation within sixty days, (6) implementation of measures to prevent recurrence, (7) no repeat violations, (8) absence of certain types of violations that make a participant categorically ineligible, and (9) cooperation with the EPA.

In an informal survey of fifty participating entities, twenty-one indicated they did not know if they would have disclosed a violation without the Audit Policy as an incentive to do so, and five indicated they would not have disclosed a violation in the absence of the Audit Policy.

The EPA combines the Audit Policy with technical assistance and tools that together give organizations both incentives and the basic capacity to change existing practices in ways that prevent environmental pollution. For example, the EPA has helped federal agencies and several states adopt Environmental Management Systems (EMS) designed to reduce environmental impacts and improve efficiency. An EMS is “an integrated system” created by a regulated organization, which “monitors [the organization’s] compliance with regulations” and “examines production and management processes within the entity to reduce waste and pollution and to increase production efficiency.”

---


236. *EPA’s Audit Policy*, supra note 234.

237. Id. (noting that violations that make participants ineligible include those that “result in serious actual harm, [and] those that may have presented an imminent and substantial endangerment”).


239. *Pollution Prevention (P2)*, U.S. Env. Prot. Agency http://www.epa.gov/p2/tools/p2tools.htm (last visited June 3, 2012) (providing a range of tools such as calculator spreadsheets, software, and case studies).

Since not all regulated entities can be trusted to self-regulate and adopt an EMS, threats of fines, penalties, and criminal sanctions are still used. These threats are necessary to “assure that regulated entities implement effective EMSs and that they are actually using their EMSs to reduce pollution.”

The EEOC should adopt a new audit policy based on the EPA’s policy that incentivizes employers to voluntarily discover, disclose, correct, and prevent social pollution. The nine conditions in the EPA’s Audit Policy could be reduced to five in an EEOC version: (1) systemic discovery of the violation through an equity audit or implementation of a compliance management system, (2) implementation of measures to prevent recurrence, (3) no repeat violations, (4) absence of certain types of violations, such as those that result in serious bodily harm, and (5) cooperation with the EEOC. The EEOC should provide technical assistance and tools that give employers the basic capacity to change existing practices in ways that prevent social pollution.

Ideally, the EEOC would incentivize compliance by offering a reduced maximum limit for compensatory and punitive damages that could be awarded against complying entities, or some other financial incentive that would make employers less wary of self-reporting a violation that could result in an award of damages. Unfortunately, it is unclear whether or not the EEOC could alter the limit on damages by itself. The EPA is authorized to take civil enforcement actions against private entities without involving a judicial court, as well as to bring civil and criminal actions against violators. In contrast, the EEOC cannot bring civil enforcement actions against nonfederal entities without involving a court and cannot bring criminal actions against violators under any circumstances. Thus, to effectively achieve the EEOC’s goal of promoting voluntary compliance, other appropriate incentives may be necessary.

242. Id. at 667.
243. See EPA's Audit Policy, supra note 234.
244. Remedies for Employment Discrimination, U.S. EQUAL EMP’T OPP. COMM’N, http://www.eeoc.gov/employers/remedies.cfm (last visited June 3, 2012) (listing the limits on compensatory and punitive damages a person can recover as follows: $50,000 for employers with 15–100 employees, $100,000 for employers with 101–200 employees, $200,000 for employers with 201–500 employees, $300,000 for employers with over 500 employees).
247. Identifying better incentives for an EEOC Audit Policy is beyond the scope of this Comment, but further research in this area would benefit the EEOC’s goals.
D. Regulatory Innovations Modeled After the CAA’s State Implementation Plan Requirement

While this Comment has explored employment discrimination more thoroughly than other types of discrimination, this last Section discusses systemic discrimination in other contexts. Social pollution operates in complex ways to create interlocking disparities in our healthcare, child welfare, criminal justice, and educational systems. Although some agencies have promulgated disparate-impact regulations under Title VII, private individuals cannot sue to enforce these regulations. Therefore, further regulatory reform is necessary to adequately address social pollution. After a brief overview of disparities observed in the healthcare, education, and juvenile justice systems, this Section introduces the Disproportionate Minority Contact (DMC) requirement in the juvenile justice system as an example of a step in the right direction. Finally, this Section builds on the DMC idea and uses the CAA’s State Implementation Plan requirement as a model for regulatory innovations in numerous public institutions.

Disparities in access to healthcare, as well as in treatment received, are associated with socioeconomic and racial differences. In 2003, the Institute of Medicine published a study finding disparities in the quality and types of health services received by different racial and ethnic minorities. The study identified and analyzed two causes for the disparities: (1) discrimination at the individual patient-provider level, and (2) the operation of the healthcare system and the legal and regulatory climate in which health systems function. While disparities were evidently associated with socioeconomic differences, racial and ethnic disparities remained even after adjustments were made for socioeconomic differences and other healthcare access issues. For example, according to the study, African American HIV patients were less likely than white patients to receive antiretroviral therapy and protease inhibitors, regardless of their age, gender, education, CD4 count, and insurance.

248. See Johnson, supra note 102, at 375, 394 (“Disparities in a wide variety of social indicators exist, yet the causal mechanisms that produce these disparities are not immediately apparent.”).


250. See Alexander v. Sandoval, 532 U.S. 275, 293 (2001); Johnson, supra note 102, at 392–33 (“[T]he theory underlying Title VI disparate impact has never been well articulated by administrative agencies or . . . courts,” and because of this “lack of clarity, some courts appeared reluctant to use Title VI to require public actors to remedy racial disparities that they did not cause.”).


252. Id. at 4.

253. Id. at 5.
coverage. Furthermore, the study found that these differences in quality of HIV care were associated with a higher mortality rate among racial and ethnic minorities.

As another example, disparities in educational achievement are associated with socioeconomic and racial differences, with the magnitude of education disparities changing over time. Racial and socioeconomic achievement gaps in education narrowed in the 1970s and early 1980s, but began to widen in the 1990s. Some believe that the educational and social policies of the 1970s—such as school desegregation, antipoverty legislation, and affirmative action—were responsible for narrowing the achievement gap during that period due to a parallel narrowing effect on the racial gap in “socioeconomic and family conditions.” Since the late 1980s, educational and social policies have become more focused on academic testing and excellence than equity. Paradoxically, while a desire to further narrow the achievement gap partly motivated this shift, the increased focus on educational accountability actually stabilized and widened the achievement gap. From 1971 to around 1986, the test score gap between whites and blacks on National Assessment of Educational Progress (NAEP) and SAT tests narrowed, but then the gap stabilized and started to grow after 1986. While test scores between “Hispanic” and white students did not narrow as much as between white and black students, this gap also began to grow after the mid-1980s.

As a final example, racial disparities plague the juvenile justice system. The 1999 National Report on Juvenile Offenders and Victims found

---

254. Id.
255. Id.
258. See Jennifer C. Braceras, Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests, 55 VAND. L. REV. 1111, 1123–25 (2002) (describing a return in the 1980s to a focus on “high stakes tests” and “educational accountability regimes”); Lee, supra note 257, at 6–7 (“The strict standards-based reform [] that swept the country after the 1983 A Nation at Risk report has not shown similar benefits on achievement gaps” as did civil rights and anti-poverty efforts.).
259. See Braceras, supra note 258, at 1124–25.
261. Id. at 4.
“substantial evidence of widespread disparity in juvenile case processing.”\textsuperscript{263} In 1996, black juveniles were twice as likely to be referred to juvenile court than white juveniles, and they also had substantially higher custody rates than other groups.\textsuperscript{264} Overall, racial minorities accounted for 70 percent of all juveniles held in custody for a violent offense,\textsuperscript{265} and on average, racial minorities were committed to residential placements for two to three weeks longer than whites.\textsuperscript{266}

Congress responded to the disparities in the juvenile justice system with an innovative solution that provides a step in the right direction for addressing social pollution.\textsuperscript{267} The 2002 Juvenile Justice and Delinquency Prevention Act (JJDP) requires states participating in the Formula Grants Program to design systems that reduce the disproportionate number of minority youth who come in contact with the justice system.\textsuperscript{268} This Disproportionate Minority Contact (DMC) requirement forces states to “become conscious of racial harm”\textsuperscript{269} through an ongoing five-step process: (1) identification of the extent to which DMC exists, (2) assessment of reasons why DMC exists, (3) development and implementation of intervention strategies if necessary, (4) evaluation of the effectiveness of intervention, and (5) monitoring of DMC trends and adjustment of intervention strategies as needed.\textsuperscript{270}

Interestingly, the DMC resembles NEPA’s EIS requirement because it “leads public institutions to assess how public practices contribute to racial inequality, not for the purpose of allocating blame or as a condition of intervention but rather to understand the nature of the problem.”\textsuperscript{271} However,
The DMC system differs from NEPA because it does not create a private right of action for judicial enforcement.272 The State Implementation Plan (SIP) requirement in the CAA273 should be used as a model for regulatory innovation that builds on the DMC regime. The CAA requires the EPA to issue National Ambient Air Quality Standards (NAAQS) for air pollutants deemed harmful to public health and the environment.274 There are two types of NAAQS: primary standards designed to protect public health (e.g., the health of children and the elderly) and secondary standards set to protect public welfare (e.g., decreased visibility and damage to crops).275 The EPA has issued NAAQS for six criteria pollutants including sulfur dioxide and lead.276 Each state is required to submit to the EPA an SIP that “provides for implementation, maintenance, and enforcement” of the established pollutant standards.277 Among other things, each SIP must meet the following requirements: (1) include enforceable emission limitations and control measures or incentives, (2) provide for the establishment of appropriate monitoring systems that analyze ambient air quality data, (3) provide for participation by local governments affected by the plan, and (4) provide assurance that the state has adequate funds and authority to enforce the SIP.278 If the EPA finds that a state failed to submit an adequate SIP, then the EPA Administrator is authorized to enforce a Federal Implementation Plan (FIP) prescribing federal rules to achieve the necessary requirements.279

An equity-focused State Implementation Plan ("equity SIP"), modeled after the CAA’s SIP system, should be used to regulate social pollution in various government entities, such as federal and state departments responsible for health, education, and criminal justice. For example, the U.S. Department of Health and Human Services (HHS) should require states receiving federal funding or providing HHS-funded services to implement an equity SIP designed to reduce racial and ethnic disparities. Like the CAA’s SIP system described above, HHS should promulgate two sets of social pollution standards to address discrimination: (1) at the individual patient-provider level and (2) at the operational system-wide level.280 These standards should not be rigid quotas, but rather qualitative measures. Each state would then be responsible for creating an SIP that provides for implementation, maintenance, and

272. Id. at 415.
279. 42 U.S.C. § 7410(c)(1).
enforcement of the established healthcare standards. At a minimum, the equity SIP should (1) include enforceable control measures or incentives, (2) provide for establishment of appropriate monitoring systems that analyze disparities in healthcare, (3) provide for participation by local governments affected by the plan, and (4) provide assurance that the state has adequate funds and authority to enforce the standards. If HHS finds that a state has failed to submit an adequate plan, the HHS secretary should be authorized to enforce an FIP.

Social pollution regulation utilizing an equity SIP has several advantages. First, the SIP system goes beyond identification and monitoring of the problem to provide states with a goal of meeting national standards. Second, it allows federal agencies to enforce an FIP if a state fails to submit and implement an adequate SIP. Finally, it explicitly addresses two distinct causes of social pollution: intentional discrimination or implicit bias at the individual level, and operational factors at the systemic level.

The CAA’s SIP requirement provides an excellent model for how the federal government can regulate and prevent social pollution from numerous and diverse sources. Standing alone, implementing regulatory innovations in state and federal agencies will not be sufficient to adequately address widespread social pollution, but it may provide the momentum needed to begin reducing disparities across all sectors of society.

CONCLUSION

Implicit bias and systemic discrimination can be more problematic than explicit discrimination, which draws as much attention as shooting a gun. For example, if Wal-Mart had explicitly stated a preference for promoting white male employees instead of merely adopting a policy granting local managers wide discretion, the public would have been more outraged and a court would have provided Betty Dukes with a remedy.

If The Help had featured women of color working as maids and nannies in affluent homes today instead of in the 1960s, the book would likely have found less commercial success. Most people find it difficult to think about, much less enjoy reading about, the problems of implicit bias and systemic discrimination. Instead of a publicly enacted law that explicitly discriminates

283. See Campbell Robertson, A Maid Sees Herself in a Novel, and Objects, N.Y. TIMES, Feb. 18, 2011, at C25 (discussing Abline Cooper, a black maid who worked for the brother of author Kathryn Stockett for twelve years, who has sued Stockett for using her name and likeness in the book); Blackmon & McWhirter, supra note 7 (noting Abline Cooper “contends she was embarrassed by passages that describe ‘Aibileen’ speaking in a thick ethnic vernacular and at one point comparing her skin color to that of a cockroach”); François, supra note 6 (criticizing The Help for failing to address the “contemporary issue” of abuse of domestic workers, noting that 95 percent of domestic workers are women of color or foreign-born women and citing a 2009 study by the UCLA Institute for Research on Labor and Employment).
against racial minorities, the story would have featured complex systemic discrimination, wealth disparities, and other inequalities that are harder to challenge. Instead of an antagonist everyone loves to hate, there would have only been policies and practices that allow people’s implicit biases to create systemic discrimination. Such a story is less likely to receive as much social or political attention.

Classifying systemic discrimination caused by implicit bias as “social pollution” helps combat the notion that such discrimination is too pervasive to be remedied. By using NEPA, CAA, and EPA policies as models, advocates for equity and inclusion can propose regulatory reform measures that prevent and reduce the harms of systemic discrimination caused by implicit bias. These regulatory reforms can serve to spread the idea that organizations and agencies should be held responsible for structural features that contribute to inequality. By embracing a problem-solving paradigm, social justice advocates can work with public agencies and the private sector to regulate social pollution and increase equity and inclusion in America’s diverse society.

284. See STOCKETT, supra note 5, at 8–9 (introducing the “Home Help Health Sanitation Initiative” which “requires every white home to have a separate bathroom for the colored help”).

285. See id. at 423 (Hilly Holbrook becomes progressively vile as the story unfolds, and she reaches her worst near the end of the story when she ominously says: “You tell those Nigras they better keep one eye over their shoulders. They better watch out for what’s coming to them.”).
