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Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination

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DISCRIMINATORY INTENT AND IMPLICIT BIAS: TITLE VII LIABILITY FOR UNWITTING DISCRIMINATION

Abstract: Studies consistently show that African Americans face more employment scrutiny and negative employment actions than their white coworkers. Recognizing that much of the explicit racism of the twentieth century has given way to subtle and often unconscious discriminatory biases, this Note argues that current Title VII jurisprudence contains the tools and legal distinctions to provide legal redress for this implicit bias. Discriminatory intent, a requisite showing for plaintiffs bringing Title VII disparate treatment claims, should not be understood to require proof of a particular mental state. Instead, the current law should—and could—simply require that plaintiffs demonstrate a causal link between their membership in a protected class and the adverse employment action that they suffered. Discriminatory actions by employers produce costs for society at large and for individual workers. Employers must therefore pay for the harms they cause, even if the employer did so because of implicit biases. Without employer liability for implicit bias and its discriminatory effects, this Note argues that barriers to equal employment opportunities will persist and victims of discrimination will bear the costs of unfair decisions made by employers.

INTRODUCTION

In a 2014 study, fifty-three partners from twenty-two law firms evaluated the same legal memorandum written by a hypothetical third year associate.[1] Researchers told twenty-four of the partners believed that the writer was African American and twenty-nine of the partners thought that he was Caucasian.[2] Asked to score the memorandum on a scale from one to five, those who believed the writer to be Caucasian ranked it, on average, 4.1, while those who believed it to be written by an African American ranked it, on average, 3.2.[3] Moreover, there were significant differences between the qualitative comments

[1] ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS 2 (2014). Sixty partners agreed to complete the study, but only fifty-three of the sixty did. *Id.* Of the sixty, "23 were women, 37 were men, 21 were racial/ethnic minorities, and 39 were Caucasian." *Id.*

[2] *Id.* Partners were asked if they would participate in a study regarding the abilities of young lawyers, and they were giving information regarding the author. *Id.* All sixty were told that the author was Thomas Meyer, a third-year associate and a New York University graduate. *Id.* Half were told that he was African American and half were told that he was Caucasian. *Id.*

[3] *Id.* at 3. There was no correlation between the gender or race/ethnicity of the reviewer and the difference in scoring, though women tended to find more errors and provide more feedback overall. *Id.* at 4.

offered by those reviewing the African American author and those reviewing the Caucasian author.[4] The African American received feedback such as, "can't believe he went to NYU!" and "needs a lot of work."[5] The Caucasian received comments such as "generally good writer" and "good analytical skills."[6] Not only did evaluators rate the African American lower on more subjective writing criteria, they also found significantly more of the intentionally inserted grammar and spelling errors when they believed the writer to be African American.[7]

This particular study, though small, comports with other data suggesting that African Americans are subject to more scrutiny than their white coworkers.[8] This supports the oft-repeated adage that African Americans have to be twice as good to get the same recognition as their white counterparts.[9] Because of heightened scrutiny, the small mistakes of African American workers stand out when the same mistake by a white coworker would likely go unnoticed.[10] Thus, the common saying that African Americans have to be twice as good is not only rooted in experience, but also supported by empirical research.[11] This heightened scrutiny leads to lower evaluations, higher rates of termination, and ultimately higher unemployment rates for African Americans when compared to the white workforce.[12]

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[4] *Id.* at 3.

[5] *Id.*

[6] REEVES, *supra* note 1, at 3.

[7] *Id.* Twenty-two errors were purposefully inserted into the memorandum, including spelling errors and errors in case analysis. *Id.* Most startlingly, partners found only 2.9 out of seven spelling errors when they believed the author to be Caucasian, but 5.8 spelling errors when they believed the author to be African American. *See id.*

[8] *See, e.g.*, Gillian B. White, *Black Workers Really Do Need to Be Twice as Good*, ATLANTIC (Oct. 7, 2015), http://www.theatlantic.com/business/archive/2015/10/why-black-workers-really-do-need-to-be-twice-as-good/409276/ [https://perma.cc/K45D-5D25] (explaining how higher levels of scrutiny for black employees feed patterns of unemployment in the black community).

[9] *See id.* ("For decades, black parents have told their children that in order to succeed despite racial discrimination, they need to be 'twice as good': twice as smart, twice as dependable, twice as talented.").

[10] *Id.*

[11] *Id.*

[12] *See id.* (arguing that due to increased scrutiny from employers, black employees are fired for small mistakes that are not even noted when committed by white workers); *see also Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LABOR, http://www.bls.gov/web/empsit/cp*see*_e16.htm [https://perma.cc/3P7S-MGKN] (last visited Feb. 28, 2017) [hereinafter *Labor Force Statistics*] (showing recent U.S. unemployment rates by race). The unemployment rate of African Americans is generally about two percentage points higher than that of white Americans. White, *supra* note 8; *Labor Force Statistics*, *supra*; *see also* U.S. DEP'T OF LABOR, CHARTING THE LABOR MARKET IN 2006, at 47 (2007) (charting unemployment by race between 1970 and 2006, with African American unemployment rates always at least two full points higher than white unemployment rates). Additionally, during the last quarter of 2015, the unemployment rate among African Americans was more than twice that of white Americans—8.8% to 4.1%, respectively— suggesting that African Americans have struggled more than their white counterparts to recover from the 2008 economic

Some have connected the disparities in employment outcomes for African Americans to implicit bias.[13] Implicit biases are unconscious beliefs or emotions that an individual associates with members of a given group such as African Americans, the elderly, the disabled, or men.[14] These biases are thought to be absorbed unconsciously from social norms and cultural images.[15] Individuals can correct their implicit biases over time when made aware of them, but in general they are hard to identify or modify.[16] Several studies suggest that nearly everyone holds implicit biases, particularly regarding race and gender.[17] Because these biases are usually unknown even to those who act based on them, they are particularly difficult to identify, avoid, and correct.[18]

In order to redress widespread racial discrimination, the United States Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII"), which is the broadest federal statute that addresses employment discrimination.[19] Title VII prohibits discrimination in employment on the basis of race, color, religion, national origin, and sex.[20] It applies to many areas of employment, including hiring, firing, compensation, promotions, and "terms, conditions, or privileges of employment."[21] Title VII makes it illegal for any employer to

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recession. *Labor Force Statistics*, *supra*; *see also* White, *supra* note 8 (arguing that the generally higher unemployment rate among African Americans is due higher levels of employer scrutiny while on the job); Gillian B. White, *The Racial Gaps in America's Recovery*, ATLANTIC (Aug. 17, 2015), http://www.theatlantic.com/business/archive/2015/08/jobs-numbers-racial-gap-recovery/400685/ [https://perma.cc/TCC2-GS9L] [hereinafter "White, *Racial Gaps*"] (analyzing the recent statistics to show that the economic recovery has benefitted white workers more than African American workers).

[13] *E.g.*, White, *Racial Gaps*, *supra* note 12 (noting that the persistence of unemployment discrepancies based on race is due to structural racism and discrimination); *see also* CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 50–51 (2014) (detailing numerous studies that demonstrate the role of implicit bias in hiring, performance evaluations, perceptions of leadership, and other areas); Christopher Cerullo, *Everyone's a Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 141 (2013) (highlighting the role of implicit bias in hiring practices); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1129–30 (1999) (noting the claim that in the workplace, the major source of discrimination is implicit rather than explicit).

[14] *See* Cerullo, *supra* note 13, at 138–39 (explaining the nature of implicit bias and how they can inform decision-making processes).

[15] *Id.* at 138.

[16] *Id.*

[17] *See id.* Implicit biases are thought to be absorbed unconsciously from social norms and cultural images. *Id.* Individuals can correct their implicit biases over time when made aware of them. *Id.*

[18] *See id.* (noting, however, that implicit biases may be undermined when an individual interacts with a member of a given group who does not comport with the implicitly held bias).

[19] *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (noting that the purpose of Title VII of the Civil Rights Act of 1964 ("Title VII") includes dismantling employment practices that operate to make the explicit segregation of the past permanent); GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 1–2 (4th ed. 2004). Because of the breadth of the law, it was very controversial in Congress and was passed only after significant debate and compromise. *See* RUTHERGLEN, *supra*, at 2.

[20] *See* 42 U.S.C. § 2000e-2(a)(1) (2012); RUTHERGLEN, *supra* note 19, at 2.

[21] 42 U.S.C. § 2000e-2(a)(1); *see* THOMAS R. HAGGARD ET AL., UNDERSTANDING EMPLOYMENT DISCRIMINATION 4 (2d ed. 2008) (noting that Title VII covers "virtually every aspect of the employ-

make decisions about hiring, termination, promotion, compensation, or the distribution of other substantial employment benefits or burdens on the basis of one of these protected categories.[22]

Title VII has two main purposes.[23] The first goal of Title VII is "to eliminate those discriminatory practices and devices which have fostered racially-stratified job environments to the disadvantage of minority citizens" and to make employment opportunities equally available to all citizens regardless of race, religion, or sex.[24] Remedies that deter employers from discriminatory policies and decisions further the goal of eliminating discrimination in the workplace.[25] The second goal of the statute is to compensate victims of employment discrimination.[26] The U.S. Supreme Court has emphasized that, in addition to deterring discrimination on the part of employers, courts have a duty to make victims of discrimination whole.[27] Many remedies, such as awarding compensative damages and issuing injunctions, can achieve both purposes.[28]

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ment relationship"); RUTHERGLEN, *supra* note 19, at 2 (noting the wide breadth of Title VII). Not only does Title VII prohibit discrimination, it also prohibits retaliation against any employee who asserts his or her rights under Title VII. 42 U.S.C. § 2000e-(3)(a); *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 61–62 (2006) (noting that the language of the the anti-discrimination provision of Title VII indicates that it applies to a smaller subset of employer behavior than the anti-retaliation provision). The anti-retaliation provision of Title VII prohibits employers from "discriminat[ing] against any of his employees or applicants for employment" in retaliation for reporting, making a charge, or testifying regarding unlawful employment practices under Title VII." *Burlington*, 548 U.S. at 61–62.

[22] 42 U.S.C. § 2000e-(2)(a)(1); *see Burlington*, 548 U.S. at 61–62 (referring to 42 U.S.C. § 2000e-(2)(a) as the "core antidiscrimination provision").

[23] Selgas v. Am. Airlines, Inc., 104 F.3d 9, 12 (1st Cir. 1997) (noting that Title VII aims not only to end discriminatory practices but also to compensate victims of discriminatory practices).

[24] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). In 1973, in *McDonnell Douglas Corp. v. Green*, the U.S. Supreme Court noted that in making determinations under Title VII, the courts must balance the interests of employers and employees as well as the general population's interest in market efficiency and economic stability. *Id.* at 801. Regardless of these interests, however, the courts may never permit any kind of discrimination on the basis of race. *Id.*

[25] *Selgas*, 104 F.3d at 12 (noting that requiring an employer to hire, rehire, or promote a successful plaintiff both deters that employer from future discrimination and restores the plaintiff to the position he or she would have been in but for the discrimination).

[26] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (noting that, in addition to deterring employers from discrimination, Congress also intended Title VII to compensate victims, empowering the courts to offer injunctive relief in addition to monetary relief); *Selgas*, 104 F.3d at 12 (noting that injunctive relief and money damages prevent future discrimination and compensate for past discrimination).

[27] *Albemarle*, 422 U.S. at 418 (citing Louisiana v. United States, 380 U.S. 145, 154 (1965)). This duty extends to providing injunctive relief to ensure that the discrimination does not continue. *Id.*

[28] *Id.* (noting that the fact that Congress included injunctive relief demonstrated that Title VII was meant to protect victims of discrimination); *Selgas*, 104 F.3d at 13 (noting the fact that awarding backpay and other remedies serve both purposes of Title VII).

The dual purposes of Title VII are relevant not only to determining remedies, but also to allocating liability.[29] The stark unemployment rates and other evidence of continuing racial inequality raise the question of whether Title VII has made progress toward achieving its goal of eradicating racially-stratified employment.[30] The evidence of widespread implicit biases around race and its potential to influence employment decisions suggests that if Title VII is to achieve its purposes, it must address implicit bias in the workplace.[31] Even if it is unclear that establishing liability for implicit bias would be an effective deterrent to future discrimination, employer liability may still be necessary to compensate the victim if discrimination is established, as well as to chip away at structural racial inequalities.[32]

Perhaps the strongest argument for not assigning Title VII liability for implicit bias is that employers cannot be held responsible for widespread racial stereotypes, particularly when they do not knowingly discriminate on the basis of race.[33] This Note will address this argument by turning to a moral theory of responsibility—responsibility as accountability—which suggests that agents should provide compensation for harms they cause, even when this harm is unintentional.[34] Thus, this theory supports a strict liability-like approach to

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[29] *See* Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individuals Personally Liable for Their Illegal Discriminatory Actions*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 265, 270 (1999) (arguing that holding individuals, not simply employers, liable for discrimination is necessary to achieve the purposes of Title VII).

[30] *See* U.S. DEP'T OF LABOR, *supra* note 12, at 47 (charting unemployment by race between 1970 and 2006, with African American unemployment rates always at least two full percentage points higher than white unemployment rates); White, *supra* note 8 (explaining that African Americans receive significantly more workplace scrutiny than their white co-workers, leading to higher levels of discipline, termination, and unemployment); White, *Racial Gaps*, *supra* note 12 (noting the persistence of unemployment discrepancies based on race); *Labor Force Statistics*, *supra* note 12.

[31] *See* STAATS, *supra* note 13, at 50–51 (detailing numerous studies that demonstrate the role of implicit bias in hiring, performance evaluations, perceptions of leadership, and other areas); Cerullo, *supra* note 13, at 141 (highlighting the role of implicit bias in hiring practices); Wax, *supra* note 13, at 1129–30 (citing the claim that in the workplace, the major source of discrimination is implicit rather than explicit).

[32] *See* Gonos *supra* note 29, at 270 (arguing that the policy goals of Title VII must be considered when determining liability, not only when establishing remedies).

[33] *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 42–43 (2006) (arguing that the greatest hurdle to using current anti-discrimination law to address structural racism, including implicit bias, is that anti-discrimination law is fault-based, but structural racism does not assign blame or fault for discrimination); *see also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 503–04 (2010) (noting that one objection to addressing implicit bias in the law is that many people may only care about explicit biases because implicit biases are not purposeful). One scholar, Samuel Bagenstos, believes that Title VII cannot extend to cover implicit biases in part because there is no moral theory to undergird assigning liability when there is no blameworthy party. *See* Bagenstos, *supra*, at 42–43. This Note will provide an answer to that critique by providing a moral theory to explain liability without blameworthiness. *See infra* notes 287–335 and accompanying text (using a theory of responsibility as accountability to explain how employers can be held responsible for implicit bias).

[34] *See infra* notes 73–115 and accompanying text.

Title VII liability that focuses on the causal connection between race and employment harm rather than on faulty mental states.[35]

This Note focuses on implicit racial discrimination in particular, but it draws from Title VII theories and concepts that develop in cases about other classes protected by Title VII, and the conclusions of this Note are applicable across Title VII cases.[36] Part I of this Note explains implicit biases and how these unconsciously held beliefs can affect work employment decisions.[37] Part I also explains the moral theory of responsibility as accountability, in which agents must compensate for harms they unwittingly cause.[38] Part II discusses existing Title VII jurisprudence and demonstrates that, for many years, Title VII liability was regularly applied without finding a faulty mental state.[39] Part II also discusses the approach that some federal appellate courts have taken to address implicit bias.[40] Part III demonstrates how Title VII already possesses the tools to address implicit bias in the workplace, but that it must return to the causation-based model of "discriminatory intent" which dominated Title VII jurisprudence in the 1970s.[41] Without such a return to the causation-based model, Title VII will be unable to compensate victims for the harms of implicit bias which have infected the workplace.[42]

I. Implicit Bias and Moral Responsibility

Title VII forbids employers from knowingly failing to hire or promote an individual based on that individual's race.[43] It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race . . . ."[44] Title VII does not explicitly address the question of how to treat employers who make decisions on the basis of race without realizing that they are doing so.[45]

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[35] *See* Restatement (Third) of Torts: Physical & Emotional Harm ch. 4, Scope Note (Am. Law Inst. 2010) (explaining that strict liability holds defendants liable for causing harm regardless of an assignment of fault such as negligence or intentionality); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. Cin. L. Rev. 1183, 1185 (1992) (noting that the development of strict liability developed to address harms rather than to punish bad actors).

[36] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011) (discussing discrimination based on sex); Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (same); Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014) (discussing discrimination based on race, religion, and national origin).

[37] *See infra* notes 43–72 and accompanying text.

[38] *See infra* notes 73–115 and accompanying text.

[39] *See infra* notes 116–268 and accompanying text.

[40] *See infra* notes 269–286 and accompanying text.

[41] *See infra* notes 287–335 and accompanying text.

[42] *See infra* notes 287–335 and accompanying text.

[43] 42 U.S.C. § 2000e-2(a)(1) (2012).

[44] *Id.*

[45] *See id.*

This Part discusses how an employer, because of implicit bias, might unwittingly make an employment decision "because of race."[46] This Part also explains why the employer should still be held accountable for an employment decision made unwittingly because of race, even if the employer cannot be morally blamed for such a decision.[47] Section A describes the concept of implicit bias and how it manifests in employment decisions.[48] Section B describes how agents who make decisions based on implicit biases should be held accountable for such decisions even if they cannot be blamed for them.[49] Section B also describes how the model of accountability is analogous to strict liability in a torts context because it allocates liability based on the agent who caused the harm rather than based on a faulty or—in the language of moral theory—"blameworthy" mental state.[50]

A. The Social Science of Implicit Bias: Discrimination Without Intent

Knowingly harboring discriminatory attitudes or stereotypes about members of a race, gender, or other group is called explicit bias.[51] In comparison, social science research has revealed that often an individual may have discriminatory attitudes or stereotypes toward a group without being conscious of these attitudes—this is known as implicit bias.[52] Such is true even when the individual would not endorse discriminatory attitudes if they were made explicit.[53] Social science research suggests that individuals often make decisions that are based on racial or gender-based thinking that is unarticulated, even to the individual decision makers themselves.[54] Although many people honestly believe that people of different races and genders are equal and should be treated as such, they may still unconsciously harbor strong associations and

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[46] *See infra* notes 43–72 and accompanying text.

[47] *See infra* notes 73–111 and accompanying text.

[48] *See infra* notes 51–72 and accompanying text.

[49] *See infra* notes 73–111 and accompanying text.

[50] *See infra* notes 103–111 and accompanying text.

[51] Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 28 (2009) (summarizing many implicit bias tests and showing that implicit attitudes predict behavior better than self-reported explicit beliefs in some circumstances involving race); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012) (noting that explicit biases are known to the person who holds them, though he or she may conceal them in social settings to avoid breaking social norms); Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007) (summarizing findings from one study on race and implicit bias).

[52] Greenwald, *supra* note 51, at 28; Kang et al., *supra* note 51, at 1131–32 (listing several studies that corroborate the social science findings of implicit bias); Nosek, *supra* note 51, at 17.

[53] Kang et al., *supra* note 51, at 1131–33. Implicit biases are not discoverable by the individual alone, even during reflection. *Id.* Even people who upon deep reflection do not consciously hold discriminatory attitudes often have implicit biases. *Id.*

[54] *See* Kang & Lane, *supra* note 33, at 468–69 (noting the immense amount of evidence that suggests that race and ethnicity implicitly shape many decision-making processes).

stereotypes regarding race and gender that shape their thinking.[55] This unconscious thinking, in turn, may affect their behaviors, decisions, opinions, conceptions of other people, and many other facets of their lives.[56]

Several studies suggest that implicit bias is a society-wide phenomenon.[57] One example of such a study is the Implicit Association Test, which measures a subject's reaction time in associating a race with a good or bad quality.[58] Hundreds of peer-reviewed articles have repeated and examined these findings.[59] It is now widely accepted in the social science community that these tests established the pervasiveness of implicit biases and their significant impact on decision-making.[60] These studies demonstrate that even those people who self-report no bias still show strong preferences for people in socially favored groups, such as young people, heterosexual people, and those of European decent.[61] Moreover, even those who come from socially disfavored groups, such as elderly people, gay people, and African Americans, still show strong preferences for the socially favored groups.[62] These preferences arise at least in part because people associate favored groups with socially favored qualities.[63]

Implicit biases have also been shown to influence employment decisions.[64] At least one study demonstrated that employers are significantly less

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[55] *See id.* at 469. Those who believe themselves to be neutral about race and gender can only be aware of their conscious biases, and so few may claim immunity from implicit bias on the basis of race. *See id.* at 466 (stating that "[w]e are not perceptually, cognitively, or behaviorally colorblind").

[56] *See id.* at 470 (noting that it is unhelpful to ask a decision maker if he or she relied on race to make their decision when taking implicit bias into account). No individual person can account for how much of a given decision is dependent on these unconscious motivations. *See id.*

[57] *See* Robin Zheng, *Attributability, Accountability, and Implicit Bias*, *in* IMPLICIT BIAS AND PHILOSOPHY, VOLUME 2: MORAL RESPONSIBILITY, STRUCTURAL INJUSTICE, AND ETHICS 62, 62 (Michael Brownstein & Jennifer Saul eds., 2016) (noting studies involving sending out resumes with racialized names that indicate implicit bias); Cerullo, *supra* note 13, at 138–41 (explaining implicit measurement tests that measure reaction time when categorizing on the basis of race and other identifiers); Kang & Lane, *supra* note 33, at 472–73 (explaining implicit measurement tests that measure reaction time when categorizing on the basis of race and other identifiers).

[58] Kang & Lane, *supra* note 33, at 472–73. The test works by asking participants to make quick associations and then measuring the ability of a participant to associate a black face with a positive trait like safety versus a negative trait like crime. *Id.*

[59] *See id.* at 473 n.30 (noting that there are "hundreds" of peer-reviewed articles). For two examples of reviews of implicit bias tests, see Greenwald, *supra* note 51, at 28, and Nosek, *supra* note 51, at 17.

[60] *See* Kang & Lane, *supra* note 33, at 472–73. Implicit biases on the basis of race and gender are so pervasive that few may claim to be immune from their influence. *See id.* at 473 n.30.

[61] *Id.* at 476.

[62] *Id.*

[63] *See id.* at 476–77. For example, men were associated with tallness, mathematics, and careers. *Id.* at 477. Women were associated with being short, the arts, and family. *Id.*

[64] *See* STAATS, *supra* note 13, at 50–53 (detailing numerous studies that demonstrate the role of implicit bias in hiring, performance evaluations, perceptions of leadership, and other areas); Cerullo, *supra* note 13, at 141 (noting studies that show that names on resumes can influence hiring decisions

likely to interview people with "African American" names than traditional "white" names, even when their resumes show identical qualifications.[65] Several studies suggest that implicit bias plays a role in employment decisions including hiring and evaluation.[66] Moreover, as noted earlier, theorists have linked the consistently higher unemployment rates of African Americans in part to higher levels of scrutiny on the job, which can result from implicit bias.[67] In addition to these factors, changes in the structure of the workplace since Title VII was enacted leave more room for implicit biases to influence employment decisions.[68] Instead of the traditional jobs with a linear path to promotion and well-defined tasks, today's jobs require teamwork, the ability to adapt to new tasks, and fewer well-defined job trajectories.[69] In this new climate, more employment decisions are based on subjective rather than objective criteria because there are fewer rigid requirements and more individualized choices.[70] The use of subjective criteria and highly individualized decision making, as well as a lack of well-defined hierarchies, allows for implicit bias

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as well as studies that show that anonymous review often increases the chances of women or people of color being hired); Wax, *supra* note 13, at 1129–30 (citing the claim that in the workplace, the major source of discrimination is implicit rather than explicit). Moreover, these studies indicate that there are very practical ways to combat the effects of implicit bias in employment decisions. Cerullo, *supra* note 13, at 141.

[65] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (noting that African Americans with the same qualifications as whites need to send out 50% more applications to receive a call back than white applicants, and that having a white-sounding name offers the same advantages as having eight more years experience with an African American-sounding name); *see also* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005) (finding that evaluators for jobs favored male applicants for stereotypically masculine jobs but women for stereotypically feminine jobs).

[66] *See* STAATS, *supra* note 13, at 53 (detailing studies that show that implicit bias plays a negative role for people of color in workplace evaluations); White, *supra* note 8 (explaining how higher employment scrutiny for African Americans is a likely source of higher unemployment of African Americans).

[67] *See id.*

[68] *See* Cerullo, *supra* note 13, at 138–40 (noting a shift away from linear, hierarchically structured jobs toward those with fluid job descriptions and emphasis on working in teams); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 105–06 (2003) (describing a change in the workplace environment beginning in the 1980s, including "the flattening of hierarchies and blurring of job boundaries, the allocation of work on a team basis, and the adoption of more skill-based, individualistic, and flexible methods of evaluation").

[69] *See* Cerullo, *supra* note 13, at 138–40 (noting that the fluid modern employment environment means that more employment decisions are made quickly and without the procedures and structure of the older linear system); Green, *supra* note 68, at 101 (noting that with flattened hierarchies, employment decisions are less likely to be determined by one individual supervisor and more likely to be influenced by group dynamics).

[70] *See* Cerullo, *supra* note 13, at 138–40; Green, *supra* note 68, at 107.

to play a more significant role in employment decisions.[71] Rather than clear-cut policies that can be measured for their impact on women and people of color, most employment decisions are made individually without an articulated reason or measurable criteria.[72]

B. Accountability: A Theory of Responsibility Without Intent

Implicit biases cause tangible harms to African American workers, who suffer from higher unemployment rates that their white counterparts.[73] An accountability-based model of responsibility shows that employers are responsible for those harms even if they do not intend to cause them.[74] Therefore, employers should compensate those employees who were tangibly harmed by an employer's implicit bias.[75] This argument is built on a distinction that several moral philosophers make between two kinds of responsibility: responsibility as accountability and responsibility as attributability.[76]

Under responsibility as accountability, a moral agent is responsible for an event because he or she is the cause of that event in some way.[77] For example,

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[71] *See* Cerullo, *supra* note 13, at 138–40; Green, *supra* note 68, at 104, 107. When employers are forced to give objective reasons after taking time to consider the role of implicit bias, they tend to rely less on implicit biases and more on those objective factors. *See* Green, *supra* note 68, at 107.

[72] Cerullo, *supra* note 13, at 138–40; Green, *supra* note 68, at 107.

[73] Bertrand & Mullainathan, *supra* note 65, at 992 (explaining a study in which employers were less likely to offer interviews to prospective employees with African American-sounding names); *see also supra* notes 64–72 and accompanying text (discussing studies that have shown that applicants with African American-sounding names have a harder time getting hired).

[74] *See See* STAATS, *supra* note 13, at 50–53 (detailing numerous studies that demonstrate the role of implicit bias in hiring, performance evaluations, perceptions of leadership, and other areas); Cerullo, *supra* note 13, at 141 (noting studies that show that names on resumes can influence hiring decisions as well as studies that show anonymous review often increases the chances of women or people of color being hired); *supra* notes 51–72 and accompanying text (describing how implicit bias influences important employment decisions).

[75] Zheng, *supra* note 57, at 66. Robin Zheng notes the tension between wanting to only hold someone responsible for intended actions and wanting to achieve social justice goals that seem to require holding people responsible for implicit bias. *Id.* at 62. Zheng proposes a theory of responsibility that holds a person responsible for the negative consequences of unconsciously-motivated actions without holding the person morally blameworthy. *See id.* at 65–66.

[76] *Id.* at 63; *see also* Kieran Setiya, *Agency and Answerability: Selected Essays by Gary Watson*, 114 MIND 786, 789 (2005) (book review) (explaining Gary Watson's distinction between accountability and attributability); David Shoemaker, *Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility*, 121 ETHICS 602, 602 (2011) (noting the many philosophers who recently have made a distinction between "being responsible" and "being held responsible"). *See generally* John Martin Fischer & Neal A. Tognazzini, *The Physiognomy of Responsibility*, 82 PHIL. & PHENOMENOLOGICAL RES. 381 (2011) (discussing responsibility as attributability and responsibility as accountability in depth).

[77] Zheng, *supra* note 57, at 66–67; *see also* Fischer & Tognazzini, *supra* note 76, at 381; Setiya, *supra* note 76, at 789; Shoemaker, *supra* note 76, at 603. The term "agent" in the philosophical context means a person who acts with purpose or rationality, and is distinct from the legal concepts of agency. *See* Zheng, *supra* note 57, at 62 (using the term "agent" in the philosophical context).

when driving in bad weather, a driver might hit a patch of ice, causing him or her to collide with another vehicle and damage it, even when that driver is exercising the caution of a reasonable person.[78] On its own, this kind of responsibility does not require anyone to make a judgment about the nature of the agent himself or herself.[79] The driver of the car need not be negligent or reckless, nor would it be warranted to draw any inferences about his or her character from the incident.[80] Instead, under such a theory, the agent would simply be the cause of the vehicle damage without being morally blameworthy because he or she was neither negligent nor did they purposefully cause the damage to the other vehicle.[81] This kind of responsibility is analogous to the concept of strict liability, or liability without fault, in the tort setting.[82]

In contrast, responsibility as attributability means that an agent is responsible for an action because it is the result of the things that make the agent who he or she is—character, rational decision-making processes, values, ends, or commitments.[83] In this situation, the action is attributable to the agent because it flows from who he or she is—the very things that make him or her an agent in the first place.[84] Some moral philosophers argue that when an agent is only *accountable* for his or her action, but the action is not *attributable* to the agent, the person should not be held morally blameworthy.[85] Blameworthiness is only appropriate when the harmful action can be attributed to the person because it flowed from his or her knowing choice or character, but not when the harmful action was caused without malice or negligence.[86]

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[78] Zheng, *supra* note 57, at 63–64; *see also* Fischer & Tognazzini, *supra* note 76, at 398–402 (describing how one could be morally responsible, that is, accountable, without being morally blameworthy for a given action); Setiya, *supra* note 76, at 780 (describing responsibility as accountability as related to fairness rather than praise or blame).

[79] Zheng, *supra* note 57, at 63–64; *see also* Fischer & Tognazzini, *supra* note 76, at 381–417; Setiya, *supra* note 76, at 789.

[80] Zheng, *supra* note 57, at 63–64.

[81] *Id.*

[82] *Id.* at 74; *see also* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM ch. 4, Scope Note (AM. LAW INST. 2010) ("Strict liability is liability imposed without regard to the defendant's negligence or intent to cause harm. In a strict-liability case, the plaintiff need not prove the defendant's negligence or intent, and the defendant cannot escape liability by proving a lack of negligence or intent.")

[83] Zheng, *supra* note 57, at 64–65; *see also* Fischer & Tognazzini, *supra* note 76, at 384–85 (describing responsibility as attributability as related to whether or not one can attribute virtue or vice to the agent of an action); Setiya, *supra* note 76, at 789 (explaining that Watson's definition of responsibility as attributability relates to praise and blame because it is aretaic, that is, related to virtue and vice).

[84] Zheng, *supra* note 57, at 66; *see also* Fischer & Tognazzini, *supra* note 76, at 381–417; Setiya, *supra* note 76, at 789.

[85] Zheng, *supra* note 57, at 66. Zheng notes that if the hypothetical driver who hit a patch of ice that resulted in an accident were driving recklessly or was blameworthy in another way, further sanctions may be appropriate. *Id.*

[86] *Id.* at 65.

For example, imagine that Alma is visiting Zain, and Zain offers Alma a beer in his favorite beer mug from the new brewery around the corner.[87] Alma thanks Zain, feeling honored that he would let her use such an important piece of glassware.[88] During their conversation, an argument ensues, and Alma throws the mug on the ground in anger.[89] That is a blameworthy action because the very word "throws" implies conscious action.[90] Even if the action were taken in the heat of the moment, so to speak, Alma could be blamed for not having developed the character to manage her anger.[91] Moreover, it was *her* anger, and thus, this action is *attributable* to her.[92] Thus, she is blameworthy for that action.[93]

On the other hand, blameworthiness and moral sanction are not appropriate when one unintentionally or unknowingly harms another.[94] Now imagine instead that Alma knocks the mug over inadvertently while reaching to hug Zain, shattering it on the floor.[95] Assuming that she took the requisite care to avoid being negligent, it is hard to attribute the action of breaking the mug to Alma in the same way—she neither knowingly did it, nor is it a result of a character defect.[96] Though she would not be held responsible in the same way as if she had thrown the mug, it would be a shock if she failed to apologize and was indifferent to Zain's loss.[97] She is *accountable* for knocking over the glass, but the action is not *attributable* to her.[98] Zain would likely expect an apology and possibly for Alma replace the mug.[99] Just because someone is *accountable*, and thus should compensate for the harm, does not necessarily mean that the harm is *attributable* to her, and thus should be blamed or her character and values assessed.[100]

Responsibility as attributability finds articulation in the legal world in the concept of strict liability.[101] Strict liability occurs when the law assigns liability

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[87] *See id.* The next several footnotes and accompanying text include a hypothetical that illustrates the concepts of responsibility as accountability and responsibility as attributability as discussed in Zheng's work. *See id.*

[88] *See id.*

[89] *See id.*

[90] *See id.*

[91] *See id.*

[92] *See id.*

[93] *See id.*

[94] *See id.* at 65–66. Zheng notes that many ways of doing things, such as clumsily or intelligently, are appraisals, but not moral appraisals such as praise or blame. *See id.* at 64–65.

[95] *See id*. at 65–66.

[96] *See id.*

[97] *Id.*

[98] *See id.* If, of course, Alma was negligent, this falls somewhere in between, but we can likely attribute the negligence to her and find her morally blameworthy. *See id.*

[99] *See id.*

[100] *See id.*

[101] *Id.* at 74

for injury to a party without assigning fault to the liable actor.[102] The idea that people ought to pay for the consequences of their unintended actions arises out of the practical necessity of organizing a shared social life.[103] Just as driving an automobile always carries the potential of causing harm even in the best driving conditions, so too do most of the social interactions that are undertaken in a society.[104] Generally, when a harm arises but no party is to blame for the harm, our social norms and legal systems have allocated that cost to the actor who most directly caused the harm, even unwittingly.[105]

Strict products liability, one type of strict liability, is a legal theory designed to offset the costs that a given product may cause if it harms people or property.[106] This theory relies on allocating the costs that must be born by some member of society, either the consumer or the producer.[107] Because the manufacturer benefits by the profits obtained from introducing the product into the market, it should also have to account for the costs of the product in the market.[108] Those include the costs of the harms the product causes, even if the manufacturer did not act negligently in producing the product.[109] Strict liability allocates the costs of an injury to its cause, regardless of whether the actor who caused the harm acted intentionally, recklessly, or negligently.[110]

An accountability model of responsibility would suggest that the employer, rather than the employee or applicant, should bear the cost of the harm caused by implicit bias.[111] The justifications for applying strict liability in the product manufacturing sphere also apply to the employment sphere.[112] An employer is much like a manufacturer because it benefits from hiring an employ-

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[102] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM ch. 4, Scope Note (AM. LAW INST. 2010).

[103] Zheng, *supra* note 57, at 65–66 (arguing that responsibility understood as accountability is a matter of a solution to a social problem and a sharing of social burdens rather than as a moral concept).

[104] *See id.*

[105] Zheng, *supra* note 57, at 65–66 (arguing that the sharing of social burdens as a matter of practicality will usually require that the cause of the harm bear the cost of redressing it because the person who caused the action is in the best position to have prevented it and prevent it in the future); *see also* Wertheimer, *supra* note 35, at 1185 (noting that the development of strict liability developed to address harms rather than to punish bad actors).

[106] *See* Wertheimer, *supra* note 35, at 1185.

[107] *Id.*

[108] *Id.* at 1184–85.

[109] *Id.* Although strict liability also encourages manufacturers to minimize danger, this could also be achieved by a fault-based theory of liability like negligence. *Id.* 1185–86. Therefore, the primary reason for strict liability is cost-allocation, not minimizing danger. *Id.*

[110] *See* Wertheimer, *supra* note 35, at 1185–86 (suggesting that strict liability does not rest on economic factors alone, and allocates costs to manufacturers when both consumer and manufacturer are "innocent").

[111] *See id.* at 1185; Zheng, *supra* note 57, at 65.

[112] *See* STAATS, *supra* note 13, at 50–53 (detailing numerous ways in which employers make decisions based on implicit bias in the workplace); Wertheimer, *supra* note 35, at 1185 (explaining the reasoning for strict products liability, including remedying harms innocently caused).

ee, and, given the realities of implicit bias, it is likely that there will be some costs associated with implicit biases that harm protected groups.[113] That cost must be borne by someone, either the victim of the employment action based on implicit bias, or the employer.[114] Therefore, the employer, who is *accountable* for employment decisions based on implicit bias, should be held strictly liable for the harm caused to the worker.[115]

II. TITLE VII AND THE ROLE OF INTENT IN ESTABLISHING LIABILITY

As the text of Title VII articulates, it is unlawful for an employer to adversely affect an employee or applicant because of his or her race.[116] Title VII's requirement of a causal connection between a plaintiff's protected class and an adverse employment outcome is compatible with holding employers accountable for implicit biases that have tangible effects on African American workers.[117] Title VII prohibits discrimination based on two theories of discrimination: disparate treatment and disparate impact.[118] Disparate treatment is further divided into individual and systemic disparate treatment.[119] Individual and systemic disparate treatment cases both require a demonstration of discriminatory intent.[120] Disparate impact cases rely on a demonstration that an employ-

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[113] *See* STAATS, *supra* note 13, at 50–53 (noting how prevalent implicit bias in the workplace is); Wertheimer, *supra* note 35, at 1185 (explaining that strict liability is meant to assign liability to the cause of an innocent harm).

[114] *See* Wertheimer, *supra* note 35, at 1185.

[115] *See* STAATS, *supra* note 13, at 50–53 (detailing numerous ways in which employers make decisions based on implicit bias in the workplace); Wertheimer, *supra* note 35, at 1185 (explaining that when there are two innocent parties, the one who caused the harm and benefits from the action that caused the harm should pay for it); Zheng, *supra* note 57, at 65–66 (explaining responsibility as accountability).

[116] 42 U.S.C. § 2000e-(2)(a) (2012).

[117] *See infra* notes 130–268 and accompanying text (arguing that Title VII disparate treatment's discriminatory intent requirement is best understood as requiring an establishment of a causal link between the plaintiff's protected class and the adverse employment action).

[118] *See* RUTHERGLEN, *supra* note 19, at 7 (noting that disparate treatment occurs when there is an employment decision motivated by one of the protected categories under Title VII, but that disparate impact does not require that an employment decision be motivated by one of the protected categories).

[119] *See* HAGGARD ET AL., *supra* note 21, at 53–54; MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 107 (8th ed. 2012) (explaining how systemic disparate treatment differs from individual disparate treatment). Disparate treatment of groups is often proven in a different manner, by showing that there is a "pattern or practice" that results in "systemic discrimination" against a protected class. HAGGARD ET AL., *supra* note 21, at 54. If motivation or intent is not evident in systemic disparate treatment, it can be inferred by use of statistics showing how the practice disfavors members of the protected class. *Id.* at 94.

[120] RUTHERGLEN, *supra* note 19, at 7; *see* ZIMMER ET AL., *supra* note 119, at 107, 117 (discussing the methods for proving systemic disparate treatment). Systemic disparate treatment cases can be brought against an employer who has an announced policy of differential treatment, such as a policy against hiring women. ZIMMER ET AL., *supra* note 119, at 107. Alternatively, the plaintiffs may show that in fact the employer treats people of different races or genders differently even without an an-

ment practice that is facially neutral has a discriminatory effect on one of the protected groups.[121] Disparate impact is distinguished from both kinds of disparate treatment because it does not require showing of motive or intent to discriminate.[122]

This Part discusses the three approaches to establishing employer liability for discrimination under Title VII: individual disparate treatment, systemic disparate treatment, and disparate impact.[123] This Part also explains the approach some federal courts have taken to implicit bias.[124] Section A explains that although individual disparate treatment requires a showing of "discriminatory intent," "discriminatory intent" is not necessarily a faulty mental state.[125] Section B turns to the development of systemic disparate treatment, discussing how precedent set in the 1970s allowed for a finding of liability without a demonstration of a faulty mental state.[126] Recent precedent in systemic disparate treatment, however, seemingly retreats from this model of liability in favor of a faulty-mental state model.[127] Section C explains how disparate impact theory, which requires no discriminatory motive or intent, serves important policy goals of Title VII.[128] Section D explores several cases in which the courts have directly addressed implicit bias.[129]

A. "Discriminatory Intent" in Individual Disparate Treatment Cases

Plaintiffs may make out a case of individual disparate treatment by showing that their employer treated them differently because of their race or another

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nounced policy. *See id.* This might be done by showing that the employer only hires very few women despite no announced policy against it. *Id.*

[121] RUTHERGLEN, *supra* note 19, at 7 (noting that disparate impact does not require proof of intent).

[122] *See id.* The Civil Rights Act of 1991 codified the three prongs of a disparate impact case. *Id. See generally* 42 U.S.C. § 1981 *et seq.* (2012) (codifying the Civil Rights Act of 1991). This is a burden-shifting test that begins with the plaintiff-employee's showing that a particular employment practice has a discriminatory effect. RUTHERGLEN, *supra* note 19, at 7. The burden then shifts to the defendant-employer to show that the employment practice is "job related for the position in question and consistent with business necessity." *Id.* at 7–8 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000), which is identical to the most current version of the statute). The plaintiff-employee can still succeed in the suit if he or she can demonstrate the existence of "an alternative employment practice and the [defendant-employer] refuses to adopt such alternative employment practice." *Id.* Disparate impact is distinguished from systemic disparate treatment because disparate impact requires no showing, direct or indirect, of discriminatory intent or motivation. *See* HAGGARD ET AL., *supra* note 21, at 94; RUTHERGLEN, *supra* note 19, at 7.

[123] *See infra* notes 130–268 and accompanying text.

[124] *See infra* notes 269–286 and accompanying text.

[125] *See infra* notes 130–184 and accompanying text.

[126] *See infra* notes 185–240 and accompanying text.

[127] *See infra* notes 185–240 and accompanying text.

[128] *See infra* notes 241–268 and accompanying text.

[129] *See infra* notes 269–286 and accompanying text.

protected class.[130] These cases generally require a showing that the plaintiff suffered a tangible harm—called an adverse employment action—such as termination, demotion, or failure to hire or promote.[131] Additionally, scholars and the courts generally distinguish disparate treatment from disparate impact by noting that disparate treatment requires a showing of discriminatory intent or motive, whereas disparate impact requires no such showing of intent.[132] Although disparate treatment is often said to require discriminatory intent, there are diverging views on exactly what this requirement entails.[133] The theory that fits best with existing precedent as well as the text of Title VII is called the causation-based model.[134] This model does not require that there be a faulty or proscribed mental state, but instead focuses on the causal link between the

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[130] *See* HAGGARD ET AL., *supra* note 21, at 53. Disparate treatment of individuals is likely what most people imagine when they imagine employment discrimination. *Id.*

[131] *See* ZIMMER ET AL., *supra* note 119, at 63. There is wide disagreement among the circuits and the district courts about how adverse the employer's action must be in order to qualify as an adverse employment action. *See id.*; *see also* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1135 (1988) (discussing the fact that the circuits disagree on what constitutes an actionable decision from an employer). Although termination and failure to hire are certainly negative enough to be considered adverse employment actions, lesser actions such as failure to transfer are more difficult questions. *See* White, *supra*, at 1135–47 (discussing several cases that show that courts treat transfers, changes in job responsibilities, and other employment decisions inconsistently with respect to whether they constitute adverse employment actions).

[132] *See, e.g.*, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (noting that proof of discriminatory intent is necessary for a disparate treatment case, though the proof may be inferential); RUTHERGLEN, *supra* note 19, at 7 (explaining that the court allows fact finders to infer discrimination from certain kinds of statistics without a demonstration that a particular decision maker acted in a discriminatory manner); ZIMMER ET AL., *supra* note 119, at 191 (noting the use of statistics alone to prove disparate treatment in systemic cases). A woman could bring a claim of disparate treatment if she is not promoted when a man is and she can show that she was not promoted *because* she is a woman. HAGGARD ET AL., *supra* note 21, at 53. The Civil Rights Act of 1991, which modified Title VII to reverse some of the restrictions placed on Title VII by judicial decisions, codified the elements of disparate treatment. *See* RUTHERGLEN, *supra* note 19, at 3, 7. Title VII expressly provides that decisions motivated even in part by gender or race, when other factors also played a part in the decision, are impermissible. 42 U.S.C. § 2000e-2(m) (2012). The courts have used both "intent" and "motive" basically interchangeably. Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 914–15 (2005) (noting that the courts seem to use the terms interchangeably, but that intent is more common). Sometimes courts appear to use "motive" in a broader sense than "intent," allowing "motive" to include unconscious motivations. *See id.* There is, however, no clear set of definitions or consistent use. *See id.* at 915–16. Scholars, however, tend to prefer the use of the term "motive" because they believe the broader meaning is more consistent with the way the courts have used the motive/intent requirement. *See id.*

[133] *Compare* Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 45–46 (2011) (arguing that the "discriminatory intent" requirement is simply a showing that the plaintiff's membership in a protected class caused the adverse employment action), *with* Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1062 (2013) (arguing that intent requires that the employer had a proscribed mental state).

[134] Rich, *supra* note 133, at 45–46 (arguing that discriminatory intent is best understood on a causation-based model); *see infra* notes 138–184 and accompanying text (arguing that the causation-based model best explains both the text and case law on discriminatory intent).

plaintiff's race and the adverse employment action.[135] In contrast to the causation-based model of disparate treatment, the mental state model holds that the plaintiff must demonstrate that the employer had a proscribed mental state consistent with discrimination.[136] Understanding discriminatory intent as a mental state usually requires a demonstration that the employer purposefully or at least knowingly discriminated against the plaintiff-employee.[137]

The mental state model of discriminatory intent derives support from language used by the U.S. Supreme Court in 1989 in *Price Waterhouse v. Hopkins*.[138] In *Price Waterhouse*, the Court focused on sexist comments made by decision makers, holding that the plaintiff met the burden of demonstrating that her failure to be promoted to partner was motivated by her gender.[139] Several of the decision makers who voted on the denial of the partnership submitted

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[135] Rich, *supra* note 133, at 45–46 (noting that the text of Title VII does not mention intent and the Supreme Court has rarely required a finding of intention). When the Court first mentioned the intent requirement of disparate treatment, it did so to distinguish disparate treatment from disparate impact, which was likely an imprecise formulation. *Id.* at 46.

[136] *See* Girvan & Deason, *supra* note 133, at 1062–63 (arguing that disparate treatment requires that the employer's discriminatory action be purposeful, knowing, or reckless).

[137] *See id.* Erik J. Girvan and Grace Deason argue that the Supreme Court's 1973 case *McDonnell Douglas Corp. v. Green* is an example of the Court announcing a requirement of purposeful discrimination, and that the Court's 1989 case *Price Waterhouse v. Hopkins* is an example of the Court requiring only recklessness. *See id.* at 1063–64 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989), *superseded by statute*, 42 U.S.C. § 2000e-2(m) (2012), *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014) (finding summary judgment against plaintiff in a gender bias suit inappropriate when employers explicitly discussed the clothing, make-up, and unfeminine demeanor of the plaintiff); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973) (finding summary judgment appropriate against the plaintiff when there was a legitimate reason for his failure to be rehired, undercutting the inference of discriminatory motivation). With respect to recklessness, however, Girvan and Deason describe the Court's mixed-motive analysis, in which there is evidence of both permissible reasons for the employment action alongside evidence of proscribed mental states. *See* Girvan & Deason, *supra* note 133, at 1063–65.

[138] *See Price Waterhouse*, 490 U.S. at 251 (accepting direct evidence of sex-stereotype thinking by decision makers to be sufficient for discriminatory motive even when accompanied by non-discriminatory motives); Girvan & Deason, *supra* note 133, at 1063–64 (using *Price Waterhouse* as an example of a case where the defendant had the requisite proscribed mental state to meet the intent requirement).

[139] *Price Waterhouse*, 490 U.S. at 235–37, 241, 258 (holding that the language of Title VII permits finding of employer liability even if the discriminatory motivation was not the only motivation for the adverse employment action). The Court in *Price Waterhouse* did not conclusively resolve the issue of how important the discriminatory motive needed to be to the adverse employment decision in order to find employer liability. *See id.* (holding that it does not have to be the sole motivation, nor does it need to be the but-for cause); *see also* ZIMMER ET AL., *supra* note 119, at 76–77 (noting that the Court in *Price Waterhouse* did require that the discriminatory motivation have some effect on the adverse employment action, but it is unclear how much). In response to *Price Waterhouse*, Congress amended Title VII in 1991 to say that if there are mixed motives, the employer is liable no matter how small the illegitimate motive is. 42 U.S.C. § 2000e-2(m); ZIMMER ET AL., *supra* note 119, at 77. If the employer shows, however, that it would have made the same decision without the illegitimate reason, the "plaintiff's remedies are severely restricted." *see* 42 U.S.C. § 2000e-5(g)(2)(B); ZIMMER ET AL., *supra* note 119, at 77.

comments during the promotion process that suggested that they did not promote her because she failed to comport with gender norms.[140] Justice Brennan explained that by "motive" in a gender discrimination case, the Court meant that, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman."[141] Proponents of the mental state model of discriminatory intent rely on this language, supported by similar language in other Supreme Court cases, to show that discriminatory intent requires evidence of a faulty mental state.[142]

Although the common usage of both intent and motive invokes a mental state, many scholars argue that the intent requirement of disparate treatment actually refers to a demonstration that plaintiff's membership in a protected group *causes* the adverse employment action.[143] Under this causation-based theory, a supervisor's belief that women are unfit for sales work would be the causal link

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[140] *Price Waterhouse*, 490 U.S. at 235–36 (noting that several partners who voted both for and against the promotion of the plaintiff made critical comments that she did not wear makeup or feminine clothing, that she used foul language, and that she was aggressive). The employer, however, argued that it was not the plaintiff's failure to be feminine that caused her termination. *Id.* at 236. Rather, the employer argued that the plaintiff was denied partnership because she was difficult to get along with and treated her support staff badly. *Id.* A social psychologist expert witness testified for the plaintiff that the overly sex-based comments and other workplace behavior suggested that stereotypical thinking tainted even the sex-neutral evaluations of the plaintiff. *Id.* at 235–36. The Court concluded that even if the plaintiff's personality was a contributing factor, so too was the sex stereotyping. *Id.* at 258. Furthermore, the Court noted the possibility, without deciding on its validity, that even if the plaintiff was genuinely disliked for her personality, this dislike may have been because of expectations based sex stereotypes, and that personality may not have been clearly distinguishable from these sex-based expectations. *Id.*

[141] *Id.* at 250. Justice Brennan went on to write, "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.*

[142] *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) ("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job related action.") (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986 (1988)); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

[143] 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) (noting that the intent requirement is merely a requirement that the plaintiff demonstrate that it is his or her membership in a protected class that caused the adverse employment action); Rich, *supra* note 133, at 45–46 (noting that several scholars and the Supreme Court have noted that the intent requirement does not necessarily require any particular mental state); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 289 (1997) (arguing that in racial disparate treatment cases, intent simply requires that the plaintiff demonstrate that his or her race caused the disparate treatment). A discriminatory mental state would, under this theory, be but one way of demonstrating that causal link. Rich, *supra* note 133, at 46 (noting that demonstrating a discriminatory mental state is a sufficient but not necessary way to prove intent).

between his or her rejection of a woman applicant and her gender.[144] Explicit mental states, such as believing that women are unfit for sales positions, are a sufficient but not necessary pathway to demonstrating "intentional discrimination."[145] The causation-based theory means that a plaintiff must show only that his or her membership in one of the protected classes is the cause of an adverse action such as termination or failure to promote.[146] The "intentional discrimination" requirement does not mean that a plaintiff must show that the employer has any discriminatory animus, conscious stereotype, or other mental or emotional state.[147]

This concept of causation-based intentional discrimination is buttressed by the circumstantial method of meeting the intentional discrimination requirement of a disparate treatment case.[148] In 1973, in *McDonnell Douglas*

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[144] *See* Rich, *supra* note 133, at 46. The causation-based theory of intent comes from the statutory language of Title VII, which outlaws negative employment consequences "because of" the prohibited categories. *See* 42 U.S.C. § 2000e-(2)(a); Rich, *supra* note 133, at 45. The introduction of the idea of intent by the courts seems to be a way of balancing the purposes of Title VII with the concern about the court's interference in the day-to-day business decisions of employers. *See* Rich, *supra* note 133, at 46–48. The courts also often mention discriminatory intent when distinguishing between legitimate reasons for an employment decision and proscribed reasons. *See* Bartlett, *supra* note 143, at 1922. In these cases, the proscribed reasons are those caused by the employee's membership in the protected group. *See id.* The courts also often mention discriminatory intent when distinguishing between disparate treatment and disparate impact, the latter of which only requires showing that a protected class has been affected disproportionally by a facially neutral policy. *See id.*

[145] *See* Bartlett, *supra* note 143, at 1922; Rich, *supra* note 133, at 46. This theory is strengthened because a showing of discriminatory animus allows a plaintiff to recover punitive damages in addition to compensatory damages. Bartlett, *supra* note 143, at 1923. This implies that animus is not necessary for a finding of liability alone. *Id.*

[146] *See Teamsters*, 431 U.S. at 335 n.15 (noting that this simply requires showing that a person was treated differently because of their membership in a protected class); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1387 n.56 (2010) (stating that disparate treatment and its "intentional discrimination" requirement can be met either by an employer's illicit motivation or simply by a demonstration that parties were treated differently based on race or another protected class); Rich, *supra* note 133, at 45–46. Disparate treatment can be established by showing either improper motivation or by showing that in fact the plaintiff was treated differently because of membership in a protected class. *See* Primus, *supra*, at 1387 n.56.

[147] *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 64–65 (1st Cir. 1999) (holding that when the difference in treatment between the sole African American employee and the remaining white employees was extremely drastic, discriminatory motive could be inferred without any evidence of the mental state of the supervisor); Bartlett, *supra* note 143, at 1922 (explaining the requirement for motive or intent in these cases is best understood as a requirement for causation); Rich, *supra* note 133, at 46 (arguing that it is best to understand the discriminatory intent requirement as a requirement for causation).

[148] *See* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1352 (2015) (holding that a plaintiff can prove discrimination under the Pregnancy Discrimination Act following the Title VII inferential method of proving disparate treatment); *Teamsters*, 431 U.S. at 335 n.15 (using "intent" to distinguish between treatment and impact cases, but noting that intent or motivation can be inferred from "the mere fact of differences in treatment"); *McDonnell Douglas*, 411 U.S. at 802, 804 (establishing the three-part burden-shifting test for circumstantial proof in a Title VII case); *Eastman Kodak*, 183 F.3d at 61 (holding that a plaintiff had produced sufficient evidence of discriminatory motive despite offer-

Corp. v. Green, the Supreme Court considered an employer's decision to not rehire an African American employee when his white coworkers were rehired after a layoff.[149] The Court articulated a test that plaintiffs could use to make an individual disparate treatment claim without offering direct evidence of an employer's mental state.[150] The case sets up an inferential test that allows a fact finder to rule out typical permissible reasons for an adverse employment action.[151] In *McDonnell Douglas*, the Court explained that the plaintiff could build prima facie case for discriminatory intent by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[152]

The particulars of the test change slightly depending on the facts of a case, so, for instance, any protected class may be referenced, or the plaintiff may show that he or she was performing the job adequately, but was still terminated.[153] In proving the prima facie case, a plaintiff has a "legally mandato-

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ing no evidence of the mental state of her supervisor or the person who made the final decision to terminate her employment).

[149] *McDonnell Douglas*, 411 U.S. at 802.

[150] *Id.* The Court established a three-part burden-shifting test to evaluate circumstantial evidence of discrimination. *Id.* at 802, 804. The burden-shifting test, however, is only used at the summary judgment phase, and is not to be given to juries as part of jury instructions. *See* RUTHERGLEN, *supra* note 19, at 16. For a critical discussion of the inapplicability of burden-shifting tests to discrimination cases, see generally Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279 (2010).

[151] *See McDonnell Douglas*, 411 U.S. at 802 (noting that if a plaintiff makes a prima facie case, then the employer must respond with a legitimate reason for the termination and the plaintiff may attempt to show that this reason was pretextual). Somewhat confusingly, the *McDonnell Douglas* test can refer to the four-part circumstantial test that establishes the prima facie case or the burden-shifting structure in which the plaintiff and the defendant have different evidentiary burdens as a case progresses. *See* ZIMMER ET AL., *supra* note 119, at 20; *see also* Nana Gyimah-Brempong et al., *Title VII of the Civil Rights Act of 1964*, 4 GEO. J. GENDER & L. 563, 596–97 (2002) (explaining the burden-shifting test). In the burden-shifting test, once a plaintiff demonstrates each of the elements of this test by a preponderance of the evidence, a defendant-employer may offer evidence of a legitimate, non-discriminatory reason for the adverse employment action. Gyimah-Brempong et al., *supra*, at 596–97. The plaintiff may then respond with evidence that the proffered reason was pretextual. *Id.* at 597.

[152] *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* prima facie case is meant to eliminate the most common non-discriminatory reasons that someone would be denied a job or otherwise treated adversely. *See Burdine*, 450 U.S. at 254 (explaining the burden-shifting test); ZIMMER ET AL., *supra* note 119, at 21. Once the legal reasons for the adverse treatment are eliminated, such as failing to hire someone because she is not qualified, it becomes more likely that discrimination was at play. ZIMMER ET AL., *supra* note 119, at 21.

[153] *See* Autumn George, Comment, *"Adverse Employment Action"—How Much Harm Must Be Shown to Sustain a Claim of Discrimination Under Title VII?*, 60 MERCER L. REV. 1075, 1076 (2009) (broadening the four prongs of the test to include different employment settings and protected classes).

ry, rebuttable presumption" that his or her employer discriminated against him or her with the requisite discriminatory motive.[154] After the plaintiff has made out a prima facie case, the employer may rebut the presumption of discriminatory motive by offering evidence of a non-discriminatory reason for the decision.[155] Finally, the plaintiff may offer evidence that the proffered reason is in fact pretextual.[156] This three-part, burden-shifting framework allows a plaintiff to establish the requisite intent without ever referring to a mental state.[157]

The *McDonnell Douglas* test allows the fact finder to eliminate other plausible causes of termination and infer that the plaintiff's membership in a protected class was the true cause of the adverse employment action.[158] When this three-part test was applied to the facts of *McDonnell Douglas*, the Court held that the defendants had offered a potentially valid reason for failing to rehire the plaintiff when his white co-workers were rehired after a short layoff.[159] The Supreme Court remanded the case to the district court with in-

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[154] *See Burdine*, 450 U.S. at 254 n.7 (explaining the mechanics of the *McDonnell Douglas* test); ZIMMER ET AL., *supra* note 119, at 22–23 (explaining that, somewhat contradictorily, this presumption is not *necessarily* sufficient on its own for the plaintiff to prove his or her case). Because the defendant virtually always can produce a legitimate, non-discriminatory reason, the strong language of the rebuttable presumption rarely assists the plaintiff. ZIMMER ET AL., *supra* note 119, at 22–23.

[155] *McDonnell Douglas*, 411 U.S. at 802 (noting that once the plaintiff established that he was qualified and applied to the job, and that the employer did not hire him, the burden shifted to the defendant to explain its decision not to rehire the plaintiff); ZIMMER ET AL., *supra* note 119, at 23 (explaining that nearly all employers can offer *some* non-discriminatory reason for an employment decision, noting that few cases actually turn on this step in the burden-shifting structure). It is important to note that though the employer must offer evidence of a non-discriminatory reason, it has only the burden of production and not persuasion, which remains always with the plaintiff. ZIMMER ET AL., *supra* note 119, at 23.

[156] *McDonnell Douglas*, 411 U.S. at 804 (remanding to the lower court to allow the plaintiff to offer evidence that the defendant's stated reason was pretext covering a proscribed reason); ZIMMER ET AL., *supra* note 119, at 22–24 (noting that the first two steps are relatively easy to satisfy, leaving the bulk of the fact-finding for the pretext step). It is somewhat unclear whether simple proof of pretext is sufficient on its own for the fact finder to infer that discriminatory motive was the real reason for the adverse decision. *See* ZIMMER ET AL., *supra* note 119, at 25 (noting that a fact finder must also conclude that the pretext was a cover of a discriminatory motive, but that this may be inferred by the nature of the pretext and the other evidence offered at the prima facie stage, or by other evidence of an employer's motive).

[157] *See McDonnell Douglas*, 411 U.S. at 802–04 (describing the steps for proving a circumstantial case without mentioning the need for proof of the employer's mental state); ZIMMER ET AL., *supra* note 119, at 25 (describing the process of elimination of legitimate reasons, allowing for an inference that the true reason was impermissible, but not requiring any finding about the mental state of the employer).

[158] *See McDonnell Douglas*, 411 U.S. at 804 (holding that a defendant may rebuff the prima facie case by offering a non-discriminatory reason for its adverse employment decision); ZIMMER ET AL., *supra* note 119, at 25 (arguing that *McDonnell Douglas* should be understood as a process of elimination of possible legitimate reasons for the adverse employment action, such as the plaintiff being unqualified or less qualified than the candidate who was hired instead).

[159] *See McDonnell Douglas*, 411 U.S. at 804. Though the plaintiff made a prima facie case, the employer offered a valid reason for the failure to rehire: the plaintiff had participated in unlawful demonstrations against the employer months before. *Id.*

structions to allow the plaintiff the opportunity to demonstrate that this reason was pretextual and that it was not the cause of the failure to rehire.[160] Without such a finding of pretext, the plaintiff's actions, not his race, were the cause of the adverse employment action.[161]

Although evidence of malice or animus toward a gender or race may bolster the conclusion that the employer intended to discriminate, it is legally sufficient to eliminate all of the proposed non-discriminatory causes that would otherwise explain the differential treatment.[162] One example of this elimination process method of proving discriminatory intent comes from a case involving no direct evidence of the employer's mental state.[163] In 1999, in *Thomas v. Eastman Kodak Company*, the U.S. Court of Appeals for the First Circuit overturned a summary judgment in favor of an employer when the plaintiff-employee had offered evidence that the proffered reason for her termination was pretextual.[164] The plaintiff, an African American woman, was terminated based on three years of poor performance evaluations.[165] There was, however, evidence that her supervisor was evaluating her much more harshly than her colleagues, who were all white.[166] No evidence was given that the supervisor made any racially derogatory comments or otherwise indicated that she held conscious, stereotypical beliefs about any race.[167] The court held that evidence

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[160] *See id.* at 807 (remanding for further consideration that would allow the plaintiff to offer proof that the defendant's reason was pretextual because it had hired back other non-African American employees who were fired for illegal protesting).

[161] *See id.* at 804, 807 (noting the possibility of demonstrating that other employees had participated in similar protests and yet had been hired back which would mean that the plaintiff was not hired back because of his race).

[162] *See Eastman Kodak*, 183 F.3d at 61 (holding that because very little discrimination is explicit, plaintiffs must often resort to proving discrimination through the circumstances of their differential treatment); Cerullo, *supra* note 13, at 153 (noting that the First Circuit signaled that no "invidious intent to discriminate" is necessary).

[163] *See id.*

[164] *Id.* at 64; *see* Cerullo, *supra* note 13, at 153 (noting that the court determined that even bias that is unconscious is still prohibited by Title VII). The plaintiff received high praise from supervisors, co-workers, and customers for ten years, and she received several awards for her high quality work, but then a new supervisor took over and began harshly reviewing her. *See Eastman Kodak*, 183 F.3d at 43–45.

[165] *Eastman Kodak*, 183 F.3d at 45–46. The court looked not only at the proffered reasons for termination, but at the entire employment context. *See id.*; Cerullo, *supra* note 13, at 153 (noting that the First Circuit discussed the evaluation process, the plaintiff's years of excellent reviews, and the fact that the plaintiff was the only African American employee in much greater depth than the district court).

[166] *See Eastman Kodak*, 183 F.3d at 45–46. Moreover, the plaintiff's supervisor treated her much more poorly than her co-workers on a regular basis, damaging her relationships with clients, scheduling conflicts with training sessions, and mistreating her in office meetings. *Id.* at 45.

[167] *Id.* at 45 (noting that the plaintiff's main complaint was that she received poor evaluations, which did not mention race). The court instead pointed to the fact that the plaintiff was the only African American and that she was the only employee who was evaluated more harshly and treated differ-

of the supervisor's uniquely harsh treatment of the plaintiff, the only African American employee, was sufficient for a jury to find discriminatory motivation despite the absence of explicit evidence of the mental state of the supervisor.[168] Instead, these circumstances allowed for the inference that the plaintiff's race was the cause of the termination, regardless of whether the supervisor was aware of her own reasons for mistreating the plaintiff.[169]

A recent Supreme Court case suggested that the causation-based model best captures the intent requirement of individual disparate treatment.[170] In 2016, in *Green v. Brennan*, the Supreme Court held that, for purposes of timeliness, the cause of action in a constructive discharge case begins to accrue when the plaintiff resigns, rather than at the point that the defendant-employer last committed an allegedly discriminatory act.[171] Constructive discharge occurs when "working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign" and when the employee does indeed resign.[172] Justice Sotomayor, writing for the majority, reasoned that the cause of action in a constructive discharge case may only accrue when the employee actually resigns because the "matter alleged to be discriminatory" under Title VII should be interpreted to include all of the elements of the cause of action.[173] In a constructive discharge claim, the actual resignation is an element of the cause of action itself.[174] Therefore, the limitations only begin running when the employee actually resigns.[175]

The key to this decision was that the majority refused to isolate "matter alleged to be discriminatory" to a single action by an employer, but instead examined the structure of the employment situation.[176] The discrimination was

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ently than the other co-workers. *Id.* at 62–64. In fact, the court noted explicitly cognitive biases are prohibited by Title VII. *Id.* at 59.

[168] *Id.* at 61, 64 (noting that the fact that there was no direct evidence of discrimination was irrelevant because discrimination is rarely explicit).

[169] *See id.* The First Circuit noted that the Supreme Court had recognized the possibility of liability for unconscious discrimination, and in such cases, there would be no evidence of the mental state of the employer or supervisor. *See id.* at 59–61.

[170] *See* Green v. Brennan, 136 S. Ct. 1769, 1774 (2016) (focusing on the causal connection between the employer's actions and the harm caused—forced termination—without regard for when the employer acted with a discriminatory mental state).

[171] *Id.* (holding that, for statute of limitations purposes, the elements of constructive discharge include not only the actions taken by the employer that made remaining employment intolerable for the plaintiff, but also the plaintiff's act of resignation).

[172] *Id.* at 1776–77 (quoting Pa. State Police v. Suders, 542 U.S. 129, 141 (2004)).

[173] *Id.* at 1776.

[174] *Id.* at 1774. In Green's case, the employee was put on forced leave and notified that when he returned, he would either be sent to work several hundred miles away in a small town or he would have to resign. *Id.* He resigned when he returned from his leave. *Id.* at 1774–75. If the Court held that the time began to accrue when he was notified of his situation, then he would not meet the forty-five-day deadline, but if the time accrued when he returned and resigned, then he would. *Id.*

[175] *Id.* at 1774.

[176] *Id.* at 1776.

not found in the mind of the employer, but in the entirety of the situation.[177] This is made clearest by the majority's rejection of the reasoning of Justice Alito's concurrence, which articulates a version of the mental state model of intent.[178] Justice Alito argued, contrary to the majority, that "an act done with discriminatory intent" is the anchor for the statute of limitations, not whatever effect it might have into the future.[179] Justice Alito argued that the discriminatory act is simply whatever the employer did to make the employee resign, following the reasoning of the decision below from the U.S. Court of Appeals for the Tenth Circuit.[180] Thus, the intent, for Justice Alito, is not the causal link between the adverse action and the plaintiff's protected class.[181] Instead, it is a discriminatory mental state.[182] In rejecting the concurrence's version of intent and constructive discharge, the majority affirmed that the intent required in Title VII cases is simply the causal connection between the protected action and an adverse employment action.[183] The mental state is not necessarily relevant; instead, the ability to infer that the protected class is the cause of the adverse employment action is all that "discriminatory intent" requires.[184]

B. Systemic Disparate Treatment and Inferring Intent

Systemic disparate treatment cases focus on patterns and practices that treat employees differently based on one of the prohibited classes listed in Title VII.[185] Rather than examining the treatment of an individual employee, systemic disparate treatment analysis examines whether an employer has an announced or implicit policy of discrimination against people of a protected

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[177] *Id.*

[178] *Id.* at 1782–83 (Alito, J., concurring); *see* Rich, *supra* note 133, at 46 (demonstrating that a mental state-based concept of intention is only one way of fulfilling the intent requirement).

[179] *Green*, 136 S. Ct. at 1782 (Alito, J., concurring).

[180] *Id.*; *see also* Green v. Donahoe, 760 F.3d 1135, 1145 (10th Cir. 2014), *vacated and remanded sub nom. Green*, 136 S. Ct. 1769 (holding that the limitations period began to run when the employer did the last act that can be considered discriminatory, not when the employee resigned). The Tenth Circuit's opinion, overturned by the Supreme Court, is a perfect example of the mental state-required version of intent because it locates the wrong-doing in the action of the employer, not in the relationship between the adverse action and the protected class. *See Donahoe*, 760 F.3d at 1145; *see* Rich, *supra* note 133, at 46 (demonstrating that a mental state-based concept of intention is only one way of fulfilling the intent requirement).

[181] *Green*, 136 S. Ct. at 1782–83 (Alito, J., concurring).

[182] *Id.* This is further demonstrated by Justice Alito's reason for the concurrence. *Id.* If the employer, in so mistreating his or her employee, did so with the intention not only to discriminate but also to coerce the employee into resigning, then the resignation becomes the intention of the employer. *Id.* In such a case, the resignation would then be the event that begins the clock for purposes of timeliness. *Id.*

[183] *Id.* at 1776 (majority opinion).

[184] *See id.* (allowing for the possibility of discrimination without regard to mental states).

[185] *See* ZIMMER ET AL., *supra* note 119, at 107, 117.

class.[186] An employer may be found liable for systemic disparate treatment when it has an explicit policy disfavoring a protected class, for example, refusing to hire men as airline attendants.[187] Systemic disparate treatment cases rarely implicate a single manager or employer as a source of discrimination in contrast to individual disparate treatment cases.[188] Rather, in systemic disparate treatment cases, there are often many decision makers whose particular actions cannot necessarily be examined for telltale signs of discriminatory animus.[189] This raises a question of whether liability in systemic disparate treatment cases is based on the behavior of several individual decision makers or the practices and policies of an employer as its own entity, distinct from the individuals who make individual decisions in the name of the employer.[190]

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[186] *Id.* at 107. When there is an explicit policy of differential treatment, the employer has a chance to offer a legitimate reason for the discriminatory practice. *See* City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 716 (1978) (noting that the defendant's proffered reason for the explicit differential treatment was not supported by Title VII); ZIMMER ET AL., *supra* note 119, at 112 (explaining that Title VII allows for an affirmative defense of "bona fide occupational qualification," which allows businesses to discriminate if there is a genuine necessity based on the requirements of the job). Absent such evidence, the employer will be found liable for discrimination. *See Manhart*, 435 U.S. at 716–18 (holding that the fact that women on average live longer than men is not a sufficient reason to justify taking a higher percentage from women's paychecks for a pension plan); ZIMMER ET AL., *supra* note 119, at 112.

[187] Wilson v. Sw. Airlines Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981) (holding Southwest airlines liable for discrimination against men for its explicit policy of only hiring women as flight attendants and ticket agents). Employers may have explicit policies favoring one of the sexes if they can show that being of a certain sex is a "bona fide occupational qualification," but this is meant to be a very narrow exception. *See id.*

[188] *Compare* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011) (noting the difficulty in proving discrimination in a nationwide company without pointing to a specific policy), *and* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977) (noting that the hiring process was completed by several different school principals), *and Teamsters*, 431 U.S. at 337 (citing the employment of thousands of workers), *with Eastman Kodak*, 183 F.3d at 61 (implicating a single supervisor). In *Eastman Kodak*, it was possible to infer that the plaintiff's supervisor had discriminatory motives for her bad evaluations of the plaintiff, and there was only one individual to blame. *Eastman Kodak*, 183 F.3d at 61.

[189] *See Dukes*, 564 U.S. at 350 (requiring a finding of discrimination from many supervisors across a nationwide department store chain); *Hazelwood*, 433 U.S. at 307 (implying discrimination from statistics, not the actions of a single supervisor); *Teamsters*, 431 U.S. at 337 (implying discrimination from statistics, not the actions of a single supervisor).

[190] *See* Tristin K. Green, *The Future of Systemic Disparate Treatment Law*, 32 BERKELEY J. EMP. & LAB. L. 395, 397–98 (2011) (explaining that three possible views of systemic treatment theory: policy-required, principle-agent, and contextualist); *see also* Jason R. Bent, *Hidden Priors: Toward a Unifying Theory of Systemic Disparate Treatment Law*, 91 DENV. U. L. REV. 807, 809–10 (2014) (noting the tension between "methodological theories" and "contextualist theories" of systemic disparate treatment). One scholar, Tristin Green, advocates for a contextualist view which attributes discrimination to the contexts created in the workplace over a policy-required view, that only attributes liability if there is a discernible policy. *See* Green, *supra*, at 398; *see also* Bent, *supra*, at 809–10 (arguing that both "methodological theories" and "contextualist theories" fail to properly engage the arguments of one another and therefore offer no coherent theoretical guidance to courts).

Beginning with the landmark systemic disparate treatment U.S. Supreme Court cases in the 1970s, *International Brotherhood of Teamsters v. United States* and *Hazelwood School District v. United States*, plaintiffs could demonstrate liability through statistical evidence alone when circumstances suggested that there were patterns and practices of discrimination across a large industry or employer.[191] Much like circumstantial proof of individual disparate treatment, systemic disparate treatment cases often required that the fact finder infer that there was race-based discrimination when there were no other reasonable explanations for the employment disadvantages of a protected group.[192] This common practice of finding discrimination based on statistical disparities was undercut by a 2011 gender-discrimination case, *Wal-Mart Stores, Inc. v. Dukes*, in which the Supreme Court seemed to imply that plaintiffs in systemic disparate treatment cases would have to trace their discrimination back to a common source, either a supervisor or a policy.[193]

1. The *Teamsters*/*Hazelwood* Approach: Infer Intent from Statistics

For many years, in systemic disparate treatment cases, it was typical to use statistical data to show that the employer's "standard operating procedure" was discriminatory and that this procedure was "the regular rather than the unusual practice."[194] The key assumption that underlies the statistical approach to proving systemic disparate treatment is that if there is no racial or gendered discrimination, over time, the employees in a given industry or workplace will come to match the demographics of the available labor force.[195] When the

[191] *Hazelwood*, 433 U.S. at 313 (holding that statistics demonstrating a gross disparity between the percentage of minority employees and minorities in the labor pool could be sufficient for a finding of systemic disparate treatment upon remand); *Teamsters*, 431 U.S. at 337–38, 342–43 (finding liability for systemic disparate treatment based on statistical evidence); ZIMMER ET AL., *supra* note 119, at 107 (explaining that systemic disparate treatment cases were often made primarily on the basis of statistical evidence); Green, *supra* note 190, at 401 (noting that, following the enactment of Title VII, most "formal, facially discriminatory employment policies" ceased, but discrimination in the form of implicit policies and practices continues).

[192] ZIMMER ET AL., *supra* note 119, at 107, 117; *see also Hazelwood*, 433 U.S. at 313 (holding that statistics demonstrating a gross disparity between the percentage of minority employees and minorities in the labor pool could be sufficient for a finding of systemic disparate treatment upon remand); *Teamsters*, 431 U.S. at 337–38, 342–43 (holding that statistical evidence of a lack of racial diversity, racially-stratified job tiers, and forty particular instances of discrimination were sufficient to infer that there was systemic disparate treatment with the requisite motive to discriminate).

[193] *See Dukes*, 564 U.S. at 352 (holding that there was no common question of law regarding systemic disparate treatment in Wal-Mart stores despite statistical evidence of gross gender disparities in promotion and pay).

[194] *Hazelwood*, 433 U.S. at 307 (internal quotation marks omitted) (quoting *Teamsters*, 431 U.S. at 336).

[195] *Teamsters*, 431 U.S. at 340 n.20 (explaining that the use of statistical evidence does not force an employer into a quota system but rather reflects a presumption that a workforce will resemble the applicant pool normally); Green, *supra* note 190, at 402–03 (explaining the role of statistics in proving

workplace demographics do not match the demographics of the available labor force, a court may draw the inference that this disparity is due to discrimination.[196] This inference requires no finding of a particular policy nor of a particular agent who directed discriminatory practices.[197] The statistical method of proving intent is also consistent with a causation-based intent.[198] Rather than inquiring into the content of the mind of any particular decision maker, this method focuses on demonstrating a correlation between race or sex and some employment disadvantage.[199] Such an approach to proving discrimination is agnostic about the mental states of individual decision makers.[200] They may have conscious animus or unconscious biases, or they may be consciously or unconsciously reproducing the environment of the workplace they occupy.[201]

The two cases that established this methodology of proving systemic disparate treatment are illustrative of the causation-based intent model.[202] In both

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disparate treatment). Data that demonstrate that the demographics of the employees differ by a statistically significant amount from the demographics of the labor pool is evidence of an employer's discriminatory intent. *Id.*

[196] Green, *supra* note 190, at 403 (explaining that courts make the rebuttable inference of discrimination when the labor pool and the workers do not resemble one another); *see also Hazelwood*, 433 U.S. at 307; *Teamsters*, 431 U.S. at 340 n.20. If the difference is statistically significant, this means that it is unlikely to be based on chance, so there must be some other reason for the difference. *See Teamsters*, 431 U.S. at 340 n.20 (explaining that the use of statistical evidence does not force an employer into a quota system but rather reflects a presumption that a workforce will resemble the applicant pool normally); Green, *supra* note 190, at 403 (noting that the Supreme Court in *Teamsters* held that statistically significant disparities between the workforce and the applicants was indicative of discrimination). One can then infer that the reason for the difference in the workforce is discriminatory practices by the employer. Green, *supra* note 190, at 403.

[197] Green, *supra* note 190, at 403 (explaining that all that is required for this finding is statistically significant disparities).

[198] *See Hazelwood*, 433 U.S. at 313 (holding that statistics demonstrating a gross disparity between the percentage of minority employees and minorities in the labor pool could be sufficient for a finding of systemic disparate treatment); *Teamsters*, 431 U.S. at 340 n.20 (holding that statistics alone can demonstrate systemic disparate treatment); Rich, *supra* note 133, at 45–46 (noting that many scholars and much case law suggests that intent is really a requirement that the plaintiff demonstrate that it was his or her membership in a protected class that caused the adverse employment action).

[199] *See Hazelwood*, 433 U.S. at 313 (holding that statistics demonstrating a gross disparity between the percentage of minority employees and minorities in the labor pool could be sufficient for a finding of systemic disparate treatment by simply showing a correlation between race and failure to be hired); *Teamsters*, 431 U.S. at 340 n.20 (noting that statistical evidence alone can prove a case of systemic disparate treatment).

[200] *See Hazelwood*, 433 U.S. at 313 (holding that it is possible to find liability based on correlation alone, and ignoring the mental states of the decision makers); *Teamsters*, 431 U.S. at 340 (relying on statistical evidence to find liability with no mention of the mental states of employers).

[201] *See Hazelwood*, 433 U.S. at 313 (giving no evidence for why exactly the racial disparities existed); *Teamsters*, 431 U.S. at 340 (same).

[202] *See Hazelwood*, 433 U.S. at 313 (holding that statistics demonstrating a gross disparity between the percentage of minority employees and minorities in the labor pool could be sufficient for a finding of systemic disparate treatment by simply showing a correlation between race and failure to be hired); *Teamsters*, 431 U.S. at 337–38, 342–43 (holding that the correlation between race and the distribution of jobs demonstrated disparate treatment); Rich, *supra* note 133, at 45–46 (arguing that

cases, the Supreme Could held that intent can be inferred from statistical evidence alone when that evidence shows that there is a correlation between membership in a protected group and failure to hire or failure to promote.[203] In 1977, in *International Brotherhood of Teamsters v. United States*, the Court held that statistical evidence of pervasive disparities between the numbers of white employees and minority employees in a trucking company was sufficient to infer racial discrimination.[204] The Court held that statistics, while not irrefutable, can be sufficient proof of discrimination.[205] Notably, in *Teamsters*, the discriminatory intent was not attributed to any individual person, supervisor, or manager.[206] Instead, the statistics merely demonstrated that the race of the employee had a causal relationship with the type of job that he or she could at-

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both scholars and the courts have recognized that the discriminatory intent requirement does not necessarily require conscious discriminatory animus but simply a showing of causal connection between the protected class and the employment decision).

[203] *See Hazelwood*, 433 U.S. at 313; *Teamsters*, 431 U.S. at 337–38, 342–43; Rich, *supra* note 133, at 45 (noting that many scholars, and at some points the Supreme Court, have not characterized intent as a mental state for purposes of Title VII).

[204] *Teamsters*, 431 U.S. at 337–38, 342–34 (relying on statistical evidence that the disparity between the number of African American and Hispanic employees in the relevant labor pool and the workforce was statistically significant to allow for a finding of intentional discrimination). As the Court noted, "As of March 31, 1971, shortly after the Government filed its complaint alleging systemwide discrimination, the company had 6,472 employees. Of these, 314 (5%) were Negroes and 257 (4%) were Spanish-surnamed Americans." *Id.* at 337. Additionally, the Department of Justice, who brought the claim against the company, introduced evidence of forty separate instances of discrimination, including ignoring hiring and promotional requests from minorities, refusing to transfer them to more desirable positions, and giving them misleading information about the hiring or promotional processes. *Id.* at 338. Because driving trucks does not require advanced special skills, the statistics measured the percentage of minority employees compared to the percentage of minorities in the general population and found that minorities were drastically underrepresented. *See id.* at 330, 340 n.20 (describing line drivers compared to local drivers); *see also Hazelwood*, 433 U.S. at 308 n.13 (distinguishing the teaching jobs in *Hazelwood*, which required specialized training, to the driving jobs in *Teamsters*, which required little specialized training). Moreover, the best positions within the company, "line drivers," were occupied almost exclusively by white employees, while minority employees were concentrated in the lower paying, less desirable "serviceman" positions. *Teamsters*, 431 U.S. at 337–38 ("A great majority of the Negroes (83%) and Spanish-surnamed Americans (78%) who did work for the company held the lower paying city operations and serviceman jobs, whereas only 39% of the nonminority employees held jobs in those categories."). Moreover, in the better paying line driver jobs, only 0.4% were African American, who were hired after the lawsuit was filed, and 0.3% were people with Spanish surnames. *Id.* at 337.

[205] *Teamsters*, 431 U.S. at 339–40 (holding that statistical evidence is sufficient to make a prima facie case that, unrebutted, can survive summary judgment). Systemic disparate treatment litigation requires a finding of discriminatory motive, but this motive can be inferred from a showing of statistically significant underrepresentation of a particular racial group or gender. *Id.* at 335 n.14 (noting that discriminatory intent need not be proven directly).

[206] *Id.* at 336 (holding that the discrimination was found in the "company's standard operating procedure"); *see also* Green, *supra* note 190, at 403 (noting that the Court allowed for an inference of discrimination in cases in which the difference between the number of black employees in the relevant job pool and the actual number of black employees is statistically significant).

tain.[207] Also in 1977, in *Hazelwood School District v. United States*, the Court reaffirmed *Teamsters,* and held that statistically significant underrepresentation of a protected group is sufficient evidence of discriminatory intent.[208]

2. The *Dukes* Approach: A Supervisor or Policy Provides Intent

A recent case, however, is more consistent with the mental state theory of intent.[209] In 2011, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that the plaintiffs, who were women employees of Wal-Mart, could not show that Wal-Mart had a pattern of discrimination against women despite statistical evidence that women were unevenly concentrated in lower paying jobs and denied raises.[210] This case was ostensibly about class certification, but the decision not to certify the class of women Wal-Mart employees was based on the argument that there was no common question of law for each member of the class.[211] Writing for the plurality, Justice Scalia held that evidence showing statistically significant differences between promotions of men and women was insufficient to show a common question of law because there was no single employment policy or single supervisor responsible for the failure to promote members of the class.[212] The Court rejected the plaintiffs' allegation that

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[207] *Teamsters*, 431 U.S at 336 (finding discrimination in the "company's standard operating procedure"); *see also* Green, *supra* note 190, at 403 (noting that discrimination was found on the basis of statistics alone under the presumption that without discrimination, the workforce would match the candidate pool).

[208] *See Hazelwood*, 433 U.S at 307–08 (noting that statistical evidence showing a statistically significant lack of minority workers could alone prove the prima facie case against the employer).

[209] *See Dukes*, 564 U.S. at 352 (holding that without a discriminatory policy or evidence of a particular supervisor's discrimination, there was no common legal question to unite the claims of the plaintiffs); Rich, *supra* note 133, at 46 (explaining the causation-based model of discriminatory intent).

[210] *See Dukes*, 564 U.S. at 352 (holding that the plaintiffs failed to show that there is significant proof of an explicit policy that adversely affected them, which is one way to show that they had a common question of law); *see also* Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 456 (2011) (noting that the Court's decision in *Dukes* was based on a view of discriminatory treatment as a matter of a group of individual acts of discrimination rather than patterns and practices of discrimination).

[211] *See Dukes*, 564 U.S. at 350 (noting that the plaintiffs could show a common question if they were discriminated against by the same supervisor).

[212] *See id.* at 352–56 (noting that the plaintiff's expert witness concluded that there were statistically significant disparities between men and women in managerial positions in Wal-Mart locations across the nation). Justice Scalia's holding rejected the argument from the plaintiffs that the wide discretion given to local supervisors to determine pay and promotions with little guidance or oversight results in disparate treatment of women. *Id.* at 344, 356. In both *Teamsters* and *Hazelwood*, the Supreme Court noted that statistical evidence, if drastic enough, could support an inference of discriminatory motivation on its own. *Hazelwood*, 433 U.S. at 307–08; *Teamsters*, 431 U.S. at 339. In her opinion, which dissented in part from the majority's decision, Justice Ruth Bader Ginsburg highlighted the seemingly drastic statistics: women make up 70% of the hourly wage earners but only 33% of the management. *Dukes*, 564 U.S. at 370 (Ginsburg, J., concurring in part and dissenting in part). Moreover, "[t]he higher one looks in the organization the lower the percentage of women," "[wom-

the "corporate culture" caused supervisors to act on implicit biases, thus widely discriminating against women in promotion and pay decisions.[213]

Two cases that follow *Dukes* illustrate that this new approach to systemic disparate treatment also includes a shift from causation-based intent to mental state-based intent.[214] In 2015, in *Brown v. Nucor Corp.*, the U.S. Court of Appeals for the Fourth Circuit held that African American employees could be certified as a class—notwithstanding the ruling in *Dukes*—because complaints of discrimination were directed at the general manager in addition to lower-level supervisors.[215] Like *Dukes*, this case turned on whether a group of aggrieved employees required the court to address a common legal question.[216] Unlike *Dukes*, however, the plaintiffs alleged that in addition to a hostile work environment perpetuated by other employees and supervisors, workers at the plant were subject to the same general manager who ignored several complaints.[217] Finding a common legal question of discrimination in *one* plant subject to the control of *one* general manager comports with the understanding of intention as a mental state of individual actors.[218] The Fourth Circuit also found significant the many examples of the use of racial epithets and other derogatory actions directed at the plaintiffs' race.[219] This further supports the the-

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en]are paid less than men in every region," and "the salary gap widens over time even for men and women hired into the same jobs at the same time." *Id.* at 369 (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 155 (N.D. Cal. 2004)). *Dukes* actually turned on whether the large number of plaintiffs who were employees of Wal-Mart stores around the country could be certified as a class. *Id.* at 342 (majority opinion). Without the more than 1.5 million women employees having the same supervisor, Justice Scalia held that they must demonstrate that their treatment was caused by a company-wide policy in order to fulfill the commonality requirement of Federal Rule of Civil Procedure 23(a)(2). *Id.* at 342, 349.

[213] *Dukes*, 564 U.S. at 349. Instead, Justice Scalia's position would require that the plaintiffs demonstrate that there is either an explicit policy of discrimination or that policymakers in the company consciously adopted a policy, for example a policy of discretion for the managers, with the purpose of discriminating against women. *Id.*; *see also* Green, *supra* note 190, at 409 (noting that Justice Scalia's requirements resulted in a de facto requirement that Wal-Mart executives issued a promotions policy "with the purpose of keeping women down").

[214] Brown v. Nucor Corp., 785 F.3d 895, 910 (4th Cir. 2015) (distinguishing the facts from *Dukes* by focusing on the bad actions of the top management in the analysis of employer liability); Davis v. Cintas Corp., 717 F.3d 476, 489 (6th Cir. 2013) (failing to find a common question of law where plaintiffs could not point to any particular bad actor).

[215] *Brown*, 785 F.3d at 910 (emphasizing the hostile work environment as well as the failure of management to address it).

[216] *See Dukes*, 564 U.S. at 349 (noting that the issue is whether a common question of law can be found with so many plaintiffs under different supervisors); *Brown,* 785 F.3d at 898 (noting the small work environment and the control of one general manager).

[217] *See Brown*, 785 F.3d. at 910 (noting the hostile environment and the control and participation of one general manager).

[218] *Id.* (emphasizing the role of the individual players in this hostile work environment); Rich, *supra* note 133, at 45–46 (arguing against understanding discriminatory intent as referring to cognitive states).

[219] *Brown*, 785 F.3d at 899. The court gave a long list of the activities that made up the hostile environment claim and supported the disparate treatment analysis. *Id.* Constant use of racial epithets,

ory of intentional discrimination as a mental state that is often expressed by discriminatory statements or racist actions.[220]

In contrast, in 2013, in *Davis v. Cintas Corp.*, the U.S. Court of Appeals for the Sixth Circuit upheld a decision to deny class certification because several different people across the defendant company were responsible for the hiring decisions at issue.[221] Following *Dukes*, the Sixth Circuit reasoned that the plaintiffs' statistical evidence of disparities in promotion of women was insufficient to create a common legal question even when paired with anecdotal evidence of sexist comments and sociological analysis.[222] In keeping with the mental state-based concept of intent, the Sixth Circuit failed to find a common question of law because the requisite intent to discriminate could not be located in the minds of specific decision makers.[223] There remains a tension between the foundational systemic disparate treatment cases, *Teamsters* and *Hazelwood*, which rely on causation-based models of intention, and the direction suggested by *Dukes* that appears to require a mental state-based model of intention.[224]

3. Contextualist Model of Discriminatory Intent in Systemic Disparate Treatment

Some scholars argue that liability in systemic disparate treatment cases should only attach when an ascertainable individual discriminates.[225] These scholars subscribe to one of two theories: policy-required or principle-agent

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hanging nooses, "KKK hoods," monkey noises and gestures, derogatory statements about the mental abilities of African Americans, and other instances of racial harassment convinced the Fourth Circuit that the statistical differences between white and African American workers were intentional. *Id.* at 899, 910.

[220] *Id.*; Rich, *supra* note 133, at 45–46.

[221] *Davis*, 717 F.3d at 489 (holding that the large number of plaintiffs could not show a common question of law because they were too spread out over times and places).

[222] *Id.* at 488 (holding that, following *Dukes*, the "sociological, statistical, and anecdotal evidence" is insufficient for a demonstration of commonality because the claim of systemic disparate treatment does not identify a specific source of discrimination that affected the entire company); *see also Dukes*, 564 U.S. at 356 (rejecting sociological evidence of sex discrimination as a possible grounds for a common question of law for a large class of women employees).

[223] *See Davis*, 717 F.3d at 488 (requiring plaintiffs in a large systemic disparate treatment case to point to a common practice employed by all decision makers in a company in order to establish liability) (citing *Dukes,* 564 U.S. at 356).

[224] *Compare Hazelwood*, 433 U.S. at 307–08 (allowing for a finding of intentional discrimination with statistical evidence alone), *and Teamsters*, 431 U.S. at 336 (allowing for a finding of intentional discrimination with only statistical evidence), *with Dukes*, 564 U.S. at 352 (finding evidence of statistically significant disparities between the labor pool and the employees insufficient to find intentional discrimination), *and Davis*, 717 F.3d at 489 (holding that evidence of statically-significant disparities were insufficient to find intentional discrimination), *and Brown*, 785 F.3d at 910 (relying on anecdotal evidence of racial discrimination to bolster statistical evidence of discrimination).

[225] *See* Green, *supra* note 190, at 398 (explaining how policy-required and principle-agent views, held by several scholars, focus on the wrongdoing of individuals).

theory.[226] Still other scholars assert that liability can be found even when there is no one individual to whom the discriminatorily acts can all be traced.[227] These scholars ascribe to the contextualist theory of liability.[228] The policy-required theory attaches liability when a policy allows for discrimination and the person who proliferated the policy is the source of the discrimination.[229] Alternatively, in a principle-agent theory, scholars instead focus on institutional leaders who are liable for failing to sufficiently police the lower-level decision makers.[230] The policy-required and principle-agent views are both versions of the mental state theory of intentional discrimination because both try to locate the intention in the mind of a policy maker or the top decision makers.[231] These two models can each find articulation in the *Dukes* approach to systemic disparate treatment: because there was no common supervisor (principle agent) responsible for all the employment decisions, the plaintiffs would have had to find a single policy (policy required) that prevented their promotion or salary increase.[232]

In contrast, a contextualist model focuses on whether the institutional structure and culture produced the discrimination without tracing the discriminatory actions to a single actor.[233] Significant social science evidence suggests that the institutions to which individuals belong heavily influence their behavior, and thus, the structure may over-determine the individual actions of decision makers.[234] In such a case, contextualists would argue that there is no individual person who caused the discriminatory actions.[235] The contextualist theory of employer liability tracks the *Teamsters/Hazelwood* approach because it does not require the assignment of blame to a single individual.[236]

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[226] *Id.* at 397–98 (explaining the difference between the principle-agent view and the policy-required view).

[227] *Id.* at 439.

[228] *Id.*

[229] *Id.* (noting that one way of explaining how an individual could be responsible for systemic discrimination is by creating a discriminatory policy that others must follow).

[230] *Id.* This principle-agent view is often discussed as negligence or deliberate indifference because some agent for the employer must be found to have failed to fulfill a duty to ensure a discrimination-free environment. *Id.*

[231] *See id.* at 398 (explaining how policy-required and principle-agent views focus on the wrongdoing of individuals); Rich, *supra* note 133, at 45–46 (explaining the mental state concept of discriminatory intent).

[232] *Dukes*, 564 U.S. at 352–56.

[233] Green, *supra* note 190, at 439. This is not a form of vicarious liability because the employee entity itself encouraged discrimination through implicit or explicit policies, even if no individual can be found responsible for choosing or promoting the polices and practices. *Id.*

[234] *Id.* at 435–37. This model is used in a variety of legal contexts, including understanding why some companies are more likely to break a variety of regulations and why some police departments struggle to curtail the misconduct of individual officers. *See id.*

[235] *See id.*

[236] *Id.* at 439, 444.

The claim by the *Dukes* plaintiffs that corporate culture was the cause of the statistical differences is a type of contextualist claim.[237] If the Court in *Dukes* would have allowed a fact finder to consider corporate culture as the cause of the disparate placement and pay of women workers at Wal-Mart, this would have shown a common legal question of whether Wal-Mart as an entity caused the disparities through this culture.[238] In rejecting this claim, the Court searched in vain for an individual person or persons who would be the source of the discrimination, refusing to allow certification, and thus liability, without finding one.[239] This attitude represents a departure from the Court's approach in *Teamsters* and *Hazelwood*, which focused on whether the employing entity caused the adverse actions through its implicit or explicit policies and did not search for blameworthy individuals.[240]

C. Disparate Impact Does Not Require Discriminatory Intent

Disparate impact discrimination law focuses on the effects that an employment practice has on applicants or employees, and the reason or motivation for the employment practice is irrelevant.[241] To bring a claim under a disparate impact theory, plaintiffs must show that a neutral employment practice disproportionately burdens one protected class and that employment practice is

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[237] *See id.* at 439 (explaining that institutional cultures can influence members' behavior negatively).

[238] *See Dukes*, 564 U.S. at 352 (requiring the plaintiffs to demonstrate that there is either an explicit policy of discrimination or that policymakers in the company consciously adopted a policy, for example a policy of discretion for the managers with the purpose of discriminating against women); *see also* Green, *supra* note 190, at 397 (arguing that the majority opinion in *Dukes* represents a "policy required" view of systemic disparate treatment liability, which, if adopted beyond that case, would mark a radical departure from existing systemic disparate treatment liability).

[239] *See Dukes*, 564 U.S. at 352. Instead, a contextualist view would argue that if the institutional practices themselves cause discriminatory decision making within an organization, then finding a faulty practice or agent is unnecessary. Green, *supra* note 190, at 398.

[240] *See Dukes*, 564 U.S. at 349 (failing to find a pattern and practice of discrimination on the basis of statistics); *Hazelwood*, 433 U.S. at 307–08 (noting that statistical disparities alone make a prima facie case); *Teamsters*, 431 U.S. at 339 (noting that unrebutted statistical disparities support a finding of systemic disparate treatment alone).

[241] MICHAEL EVAN GOLD, AN INTRODUCTION TO THE LAW OF EMPLOYMENT DISCRIMINATION 18 (2d ed. 2001) (noting that it is the effects of the employment practice that are at issue in disparate impact cases). There are three stages or prongs in a disparate impact case. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); HAGGARD ET AL., *supra* note 21, at 97; RUTHERGLEN, *supra* note 19, at 28. In the first prong, the employee-plaintiff must show that "a respondent [employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the plaintiff-employee succeeds in prong one, the employer-defendant must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* If the employer-defendant meets this burden of proof, the plaintiff-employee's claim will fail unless she can show that there was an "alternative employment practice and the respondent refuses to adopt such alternative employment practice." *Id.* § 2000e-2(k)(1)(A)(ii). The Supreme Court established the three prong burden-shifting test used in disparate impact cases in two key cases in the 1970s, and the test was later codified in a 1991 amendment to Title VII. HAGGARD ET AL., *supra* note 21, at 97.

not a business necessity.[242] Implicit bias claims are not properly addressed under disparate impact because claims of implicit bias would not be relying on a neutral employment practice.[243] Still, a discussion of disparate impact is helpful here because this theory demonstrates that the Court has been willing to completely do away with any intent requirement in order to advance the purposes of Title VII.[244]

Under this disparate impact, if equal numbers of men and women apply for a job, and the application includes an aptitude test, a "neutral" employment practice, one should expect that very similar numbers of men and women would be hired based on how they do on the aptitude test.[245] If many more men are hired than women, however, that effect will raise a potential claim of disparate impact regardless of the intent of the employer.[246]

Disparate impact is one of the most controversial aspects of Title VII because it can leave employers liable for forces outside their control, such as whether one race has less educational opportunity.[247] In 1971, in *Griggs v. Duke Power Co*., the Supreme Court introduced the theory of disparate impact in a relatively short opinion.[248] In *Griggs*, the Court examined the hiring and promo-

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[242] RUTHERGLEN, *supra* note 19, at 28; *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (reciting the elements of a disparate impact claim).

[243] RUTHERGLEN, *supra* note 19, at 28 (describing the elements of a disparate impact claim, which do not leave room for the implicit biases of an employer or supervisors).

[244] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that employment practices that are "neutral in terms of intent" violate Title VII because they are obstacles to a racially-stratified workplace).

[245] *See* GOLD, *supra* note 241, at 18–19.

[246] *See id.* at 19.

[247] RUTHERGLEN, *supra* note 19, at 28–29 (discussing how disparate impact, like affirmative action, is one of the most controversial aspects of Title VII because it does not punish bad behavior); *see also Griggs,* 401 U.S. at 428 (holding defendant liable when a policy of requiring a high school diploma had a disparate impact on African American employees). One purpose of disparate impact is that it is meant to eliminate supposedly neutral employment practices that hide the employer's discriminatory purpose. *See* RUTHERGLEN, *supra* note 19, at 29 (positing the possibility that disparate impact was merely meant to slightly augment disparate treatment by ferreting out well-hidden purposeful discrimination). Another possible purpose is that disparate impact is truly meant to disallow employers from using any employment practice that has a disparate impact on a protected group without a justification. *See id.* (positing the possibility that disparate impact theory is a significant addition to Title VII liability that is meant to discourage employers from using devices that are not closely related to the job regardless of motivation or intent). Both potential purposes for disparate impact can be supported by the opinion in *Griggs*. *See* RUTHERGLEN, *supra* note 19, at 29. Though both purposes are found in *Griggs,* the Court did not elaborate on the methodology for making a disparate impact case nor how to balance employer interests with this method. *Id.*

[248] *See Griggs*, 401 U.S. at 428 (discussing the novelty of the question of whether Title VII could apply to company policy requiring high school diplomas and high scores on intelligence tests to gain access to certain jobs); *see also* RUTHERGLEN, *supra* note 19, at 28–29 (noting that *Griggs* introduced this very controversial theory with little discussion of how it was meant to operate). Before Title VII was passed, Duke Power Company ("Duke") required that employees be hired directly into all but the lowest paying department, the Labor Department, and that most employees transferred into the higher paying departments have high school diplomas. *Griggs*, 401 U.S. at 428. After Title VII was enacted,

tion practices of Duke Power Company ("Duke"), which required a high school diploma and a certain score on a generalized intelligence test for employment in positions that had been explicitly reserved for white employees before Title VII was enacted.[249] The Court rejected the focus on the subjective intentions of the employer and instead focused on the effects of a practice and whether the practice was driven by business necessity.[250] Chief Justice Burger, writing for a unanimous Court, articulated the purpose of Title VII: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[251] The Court held that the degree requirement and the use of the exams violated Title VII.[252] The Court reasoned that these employment practices in effect excluded African Americans from the better paying positions in the company.[253] Furthermore, the tests did not predict how a potential employee would actually perform at his or her desired job.[254]

Chief Justice Burger explicitly rejected the argument that because there was no demonstrable intent to discriminate, Title VII did not apply to Duke's employment practices.[255] This explicit refutation of motivation or intent places the opinion in line with a key purpose of Title VII—disparate impact is meant to disallow employers from using any employment practice that has a disparate impact on a protected group.[256] Affirming the decision to not require intent, the

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Duke required all workers hired or transferred to the better paying departments to have a high school diploma, except those white employees who were already working in the Labor Department. *Id.* Duke also required a passing score on two standardized general intelligence tests for any transfers or hiring into the better departments. *Id.* at 428. Eventually, passing these exams was sufficient for a transfer to the higher paying departments even without a high school diploma, though a passing score "approximated the national median for high school graduates." *Id.* Importantly, these standardized tests did not measure any skills or characteristics related to the duties of an employee at the lower ranks of the higher paying departments. *Id.* at 431

[249] *Griggs*, 401 U.S. at 427–28.

[250] *Id.* at 431. The lower courts had found that the Duke's requirements for working in the better paying and more prestigious jobs, including passing an exam and having a high school diploma, did not violate Title VII because Duke had replaced the previous race requirements with race-neutral requirements, and there was no clear evidence that the new tests were intended to discriminate against African Americans. *Id.* at 428.

[251] *Id.* at 430. The decision was unanimous, but Justice Brennan did not take part in the decision. *Id.* at 424.

[252] *Id.* at 436 (noting that testing itself is not forbidden by Title VII, but that testing that is not relevant to the job and has a discriminatory effect is forbidden).

[253] *Id.* at 432 (noting that regardless of good intentions, "built-in headwinds" are forbidden by Title VII).

[254] *Id.* at 431 (noting that white employees who did not meet the requirements who had entered the jobs before the requirements went into place performed well at the jobs).

[255] *Id.* at 432 (noting that the company had taken affirmative steps to assist minority workers, cutting against any possible presumption of intentional discrimination).

[256] *See id.*; RUTHERGLEN, *supra* note 19, at 29. To further explain the justification of a focus on effects rather than motivation, Chief Justice Burger explained that one must account for the social positions of individuals when designing employment selection procedures. *Griggs*, 401 U.S. at 430.

Court emphasized that the purpose of Title VII was not to punish the wrongdoing of employers, but to compensate for and ultimately remove unequal employment outcomes.[257] In 1975, in *Albemarle Paper Co. v. Moody*, the Supreme Court reaffirmed the approach of disparate impact taken by the court in *Griggs*, holding that a lack of bad faith intentions on the part of the employer was not relevant for recovery under Title VII.[258] *Albemarle* also established the burden-shifting test for proving disparate impact, which mirrors the test for demonstrating a discriminatory motive or intention circumstantially from the *McDonnell Douglas* test.[259]

The fact that African Americans faired worse on the exam is directly related to their race because of the inferior education they received in segregated schools. *Id.* Though the opinion explicitly notes that there was no evidence of discriminatory intent, the particular facts of the case raise the possibility of pretext. *Id.* at 427–28, 432. Just when Duke made its better paying jobs open to all races immediately following the enactment of Title VII, it added both a high school degree requirement to transfer from the Labor Department and required the two exams to be hired or transferred to the better paying jobs. *Id.* at 427–28. Even after the high school degree requirement was added, Duke continued to promote some white employees who were already in the Labor Department to the better paying jobs in other departments despite their lack of high school degree. *Id.* at 427. In the opening of its opinion, the Court highlights the fact that the tests replaced explicitly racial barriers. *Id.* at 426; *see also* HAGGARD ET AL., *supra* note 21, at 96 (arguing that *Griggs* was really decided on the basis of the intent of the employer despite the Court denying that was the case). Additionally, Duke recognized that the exams were not related to the actual performance of the jobs, nor were they intended to be. *Griggs*, 401 U.S. at 431. Finally, employees who had been promoted before these new requirements performed their jobs well despite lacking a high school degree and thus, likely the ability to pass the exams. *Id.* at 431–32. Taking all these facts together, some scholars have inferred that this case came out in favor of the employees because the Court wanted "to prevent pretextual discrimination by shifting part of the burden of proof onto the defendant." RUTHERGLEN, *supra* note 19, at 29.

[257] *See Griggs*, 401 U.S. at 430; RUTHERGLEN, *supra* note 19, at 29–30 (suggesting that the Court meant to endorse the view that Title VII is not only meant to remove discriminatory motivation, but also the effects of discrimination).

[258] Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (emphasizing the fact that making victims whole is a central purpose of Title VII). *Albemarle*, like *Griggs*, involved standardized general intelligence exams that had the effect of keeping African Americans in the lower-paying, lower-skilled jobs, which were explicitly the only jobs available to African Americans before Title VII passed. *See id.* at 410–11. The employer, responding to the ruling in *Griggs*, hired a psychologist to attempt to "validate" the exams, that is, to show that they did in fact test job-related skills. *See id.* at 411. Validation is the process through which an employer demonstrates that a given selection device, such as a test, measures traits that are sufficiently related to job performance. *See* Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979). An employment device that has a discriminatory effect must be shown to do more than merely relate to a job. *Blake*, 595 F.2d at 1377 (quoting Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977)). It has to be essential to the business itself or necessary for safety in the business. *See id.* In *Albemarle*, the Court found the methodology of the validation of the testing to be inadequate on a number of grounds. *Albemarle*, 422 U.S. at 431. Among other reasons, the validation study focused on the skills needed to succeed at the highest-ranking jobs, not the jobs to which most of the plaintiffs were applying. *Id.* Additionally, the validation study compared results on the two tests to subjective measures of job success rather than objective measures of job success. *Id.* at 432–35. Another major failing of the validation study was that it did not include any non-white members in the study. *Id.*

[259] *Albemarle*, 422 U.S. at 426 ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices,

Though *Griggs* and *Albemarle* continue to be the primary source of the standards for disparate impact, the Supreme Court's 2009 decision in *Ricci v. DeStefano* severely limited the role of disparate impact claims.[260] In *Ricci*, the Court weakened the ability of plaintiffs to bring disparate impact cases by prioritizing disparate treatment over disparate impact.[261] In that opinion, the Court held that City of New Haven was liable for disparate treatment of white firefighters when they threw out the results of a promotional exam that they believed would have a disparate impact on African American firefighters.[262] Justice Kennedy, who penned the narrow majority opinion, held that disparate treatment was the primary target of Title VII, not disparate impact.[263] In making this distinction, Justice Kennedy characterized the intent requirement of disparate treatment as a mental state.[264] In order to resolve the apparent conflict between the disparate impact and disparate treatment provisions of Title

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without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'") (quoting *Green*, 411 U.S. at 801). This test begins with a showing by the plaintiff that there is an employment device, such as an exam or weight requirement, that has a disparate impact on a protected group of people. *Id.* The second prong shifts the burden to the employer to demonstrate that employment device is a business necessity that is related to an important part of job performance. *Id.* The third prong allows the plaintiff-employee to show that there was an available alternative practice that would have met the employer's business need without having the same discriminatory impact, and that the employer chose not to adopt it. *Id.* If the plaintiff established this third prong, it would be evidence of pretext, much like the *McDonnell Douglas* test establishes the possibility of inferring pretext from circumstantial facts. *See id.*; Gyimah-Brempong et al., *supra* note 151, at 596–97 (explaining *McDonnell Douglas* test).

[260] *Ricci*, 557 U.S. at 593 (holding that the scope of disparate impact must be narrowed to avoid conflicts with disparate treatment).

[261] Barry Goldstein & Patrick O. Patterson, Ricci v. Destefano*: Does It Herald an "Evil Day," or Does It Lack "Staying Power"?*, 40 U. MEM. L. REV. 705, 708 (2010) (noting that the Court in *Ricci* seemed to favor disparate treatment over disparate impact and took the unusual course of granting summary judgment to the plaintiffs rather than remanding to lower court for a fact determination).

[262] *Ricci*, 557 U.S. at 593. In the New Haven Fire Department, the city issued a promotional exam, but found that the results disproportionately favored white officers and a conflict ensued. *Id.* at 562. Some threatened a to sue the city if the tests were used, while others threatened to sue if the tests were thrown out. *Id.* Fearing liability under Title VII's disparate impact theory, the city decided not to use the exams to determine promotions. *Id.* at 562–63. Some white and Hispanic officers who would have likely been promoted if the exam were used sued the City of New Haven under a disparate treatment claim under Title VII. *Id.* They argued that they were not promoted, and thus discriminated against, because of they were white or Hispanic. *Id.* at 563.

[263] *See Id.* at 577–78 (noting both that disparate treatment was the primary target of Title VII and that disparate impact was not originally explicitly mentioned in the statute); Goldstein & Patterson, *supra* note 261, at 737–78 (arguing that the Court's characterization in *Ricci* of the original purposes of Title VII ignores the important case developments beginning with *Griggs* and *Albemarle*).

[264] *See Ricci*, 557 U.S. at 577, 579 (noting the intention requirement of disparate treatment while asserting that the typical violation of Title VII is when an employer makes a decision based on race). Justice Kennedy focused on the fact that the fire department consciously made a decision to throw out the tests because of the race of those who scored the highest. *See id.*

VII, the Court endeavored to interpret the statute to avoid the conflict.[265] Thus, if an employer were faced with the choice between explicitly treating employees differently based on race or enacting a neutral policy that would have a disparate impact, it should choose the neutral policy despite its disparate impact.[266] The majority came to this conclusion because it reasoned that making employment decisions based on race is the principle wrong that Title VII set out to eliminate.[267] In so doing, the majority radically limited the possible claims that one could bring under disparate impact to avoid any conflict with disparate treatment claims.[268]

D. Implicit Bias in the Courts

The courts have not taken a consistent stance when asked to address the question of whether implicit bias constitutes intent to discriminate for individual or systemic disparate treatment cases under Title VII.[269] Moreover, the willingness of a particular court to entertain implicit bias is often correlated to whether or not that court requires a mental state demonstration to meet the "intent" requirement.[270] Justice Scalia's majority opinion in *Dukes* focused on the lack of a discriminatory policy rather than entertaining the possibility that implicit bias was the cause of drastic differences in employment circumstances

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[265] *Id.* at 580. In reaching this conclusion, the Court reasoned that the City would not have actually been liable under a disparate impact claim because the test was job-related and consistent with business necessity and there was no equally valid and less discriminatory alternative. *Id.* at 587.

[266] *Id.* at 583.

[267] *Id.* (holding that if an employer makes a decision based on race that adversely affects employees, it will be liable for disparate treatment unless it can show that it had a "strong basis in evidence" to believe that it would be liable under a disparate impact model).

[268] *Id.* at 583. The Court formulated a new rule for employers who found themselves in the City of New Haven's shoes, requiring that "an employer must have a strong basis in evidence" that it will be held liable for disparate impact to defend against a disparate treatment case such as the *Ricci* case. *Id.* This "strong basis in evidence" standard makes employers more easily liable under disparate treatment standards and less liable under disparate impact cases. *See id.* Moreover, this case implicitly eases the defendant-employer's burden of business necessity. *See id.* There was little evidence to support a finding that the test in this case was job-related, yet the Court nonetheless asserted that it clearly passed this test. Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 160 (2010) (noting that the Court reached a decisive conclusion without remanding to lower courts, and yet did not even begin to inquire into whether or not the test met the business necessity prong of a disparate impact case).

[269] Cerullo*, supra* note 13, at 146 (noting that there are nearly equal numbers of courts that recognize implicit bias as those that do not).

[270] *See, e.g.*, *Dukes*, 564 U.S. at 356–57 (holding that the fact that women were statistically underrepresented was not enough to infer that bias caused the underrepresentation because there was no specific policy that pointed to bias); *id.* at 370–73 (Ginsburg, J., concurring in part and dissenting in part) (arguing that Wal-Mart's policy of giving supervisors wide discretion for employment decisions allowed for a "potential to produce disparate effects" because of "biases of which they are unaware"); *Eastman Kodak Co.*, 183 F.3d at 58 (holding that the requirement that discrimination be "because of race" could be met if differential treatment was based on conscious bias or "unthinking stereotypes or bias").

for men and women at Wal-Mart stores.[271] The plaintiffs' claim was plausible because without clear criteria and enforcement measures, the pervasiveness of implicit gender bias could easily account for the vast statistical underrepresentation of women in the upper level employment positions as well as their consistently lower pay.[272]

In contrast to the majority decision, Justice Ginsburg noted in her dissent in *Dukes* that implicit bias can play a role in employment decisions because all people, including supervisors, are likely to have implicit biases.[273] Justice Ginsburg followed the *Teamsters* and *Hazelwood* analysis and placed tremendous weight on the statistical information that showed that women were severely underrepresented in higher paying managerial positions.[274] Because Wal-Mart's policy gave wide, unchecked discretion over pay and promotional decisions to lower level supervisors, implicit bias could easily play a large role in employment decisions, and Justice Ginsburg argued that this policy provided the common question of law necessary to grant class certification.[275]

In 1999, in *Eastman Kodak Company*, the U.S. Court of Appeals for the First Circuit took a different approach when the exact nature of the discrimination toward the African American plaintiff was unknown.[276] In that case, the First Circuit held that the fact of discriminatory motivation could be inferred from the disparate treatment of the plaintiff.[277] In analyzing the claim, the court noted that the discrimination alleged was subtle—the employer did not directly lie about its reasons for terminating her.[278] Rather, the plaintiff argues that she

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[271] *Dukes*, 564 U.S. at 356 (holding that there must be some unifying policy beyond allowing for discretion). This does not account for the fact that allowing for subjective criteria, otherwise known as "supervisor discretion," is known by social scientists to lead to more implicit bias-motivated decisions. *See* Green, *supra* note 68, at 107.

[272] *See Dukes*, 564 U.S. at 370–73 (Ginsburg, J., concurring in part and dissenting in part) (arguing that Wal-Mart's policy of giving supervisors wide discretion for employment decisions allowed for a "potential to produce disparate effects" because of "biases of which they are unaware"); Kang et al., *supra* note 51, at 1153–59 (explaining a number of studies that demonstrate how implicit bias can play a role at different stages of employment decision-making).

[273] *Dukes*, 564 U.S. at 370 (Ginsburg, J., concurring in part and dissenting in part) ("The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal–Mart's company culture."). This is especially true in a climate where gender bias is common, as evidence suggested was the case in many Wal-Mart stores. *Id.*

[274] *Id.* (noting that women were concentrated in the lower rungs of the business, with only 30% in managerial positions).

[275] *Id.* at 372 (noting that the very fact of granting wide discretion is a policy that can be interrogated and found to be a violation of Title VII).

[276] *Eastman Kodak Co*., 183 F.3d at 64. The First Circuit held that a plaintiff need not have a "smoking gun" of evidence, such as an explicit racist comment or epithet, to establish intent. *See id.* Indeed, the supervisor need not be aware of their intent. *See id.*

[277] *See id.* (noting the uniquely harsh treatment that the supervisor visited upon the plaintiff).

[278] *Id.* at 58. Here the court held that the circumstances offered the inferential proof necessary to fulfill the *McDonnell Douglas* test. *Id.*

was evaluated more harshly than her white peers because of her race.[279] The court concluded that it may have been a conscious discriminatory intent or an unconscious bias that motivated the discrimination.[280] Regardless, the First Circuit held that either is sufficient to support a finding of discriminatory motivation because either is discrimination "because of race."[281]

In a similar case, in 2014, in *Ahmed v. Johnson*, the First Circuit held that the plaintiff had sufficient evidence of discriminatory motive to survive summary judgment for disparate treatment based on race, religion, and national origin.[282] Though the plaintiff offered no evidence of racially based comments, the court followed the *Eastman Kodak* precedent and suggested that even cognitive biases, unknown to the decision maker, are sufficient for a finding of discriminatory motive.[283] Moreover, the court emphasized that the *McDonnell Douglas* framework of circumstantial inference is sufficient without any evidence of a decision maker's state of mind.[284] Much like the court in *Eastman Kodak,* the *Ahmed* court relied on the inferential structure of the *McDonnell Douglas* framework and remained agnostic about the particular mental states of the decision makers.[285] This inferential structure is more illustrative of the causation-based intent model because it simply connects the plaintiff's membership in a protected group to the adverse employment action that he or she suffered.[286]

III. Responsibility as Accountability: Allocating Burdens of Unwitting Harmful Behavior

Title VII seeks not only to deter employers from committing discriminatory acts, but also to compensate victims who have been harmed by employ-

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[279] *See id.* (noting that explicit discrimination is uncommon).

[280] *Id.* The First Circuit held that intent simply means that the plaintiff suffered an adverse employment action because of her race, and nothing more. *Id.*

[281] *Id.* at 59. Here, the court noted that even the Supreme Court has recognized that implicit bias fulfills the intent requirement under disparate treatment. *Id.*

[282] Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014) (noting the infrequency of overt discrimination and the subsequent need for inferential evidence in the context of Title VII).

[283] *Id.* (noting that the plaintiff offered sufficient evidence of discrimination by demonstrating that the defendant had a pattern of overlooking Muslim and African American employees for the particular promotion at issue).

[284] *Id.* (noting the unrebutted evidence that there had been no African American, Arab American, nor known Muslims promoted to the deportation office of the Immigration and Customs Enforcement office in Boston).

[285] *See id.*; *see also Green*, 411 U.S. 792, 800 (introducing the inferential proof structure for disparate treatment cases); *Eastman Kodak Co.*, 183 F.3d at 64 (holding that it was proper to infer discrimination despite lack of direct evidence or stray comments evidencing racial animus).

[286] *See Ahmed*, 752 F.3d at 503 (explaining that it was the pattern of failing to hire African Americans and Muslims that indicates that Title VII had been violated, not evidence of animus); Rich, *supra* note 133, at 45–46 (explaining causation-based theory of intent).

ment discrimination.[287] A causation-based model of "intentional discrimination," which focuses on causation rather than a mental state, like the strict liability model in products liability, is best suited to achieve this goal.[288] To remove barriers to equal employment, which is one of the central goals of Title VII, the law cannot insist upon locating discrimination in the minds of particular actors.[289] Section A argues that interpreting the "discriminatory intent" requirement of disparate treatment in individual cases through the causation-based theory will best allow for the compensation of victims of racism, a primary purpose of Title VII.[290] Section B argues that the contextualist model of discriminatory intent in systemic disparate treatment is necessary if we are to dismantle obstacles to equal employment, the second key purpose of Title VII.[291] Section C argues that disparate impact plays a key role in dismantling racially-stratified workforces, and so it should be treated as an equally essential theory of liability alongside individual and systemic disparate treatment.[292]

A. Accountability and Individual Disparate Treatment: Compensating Victims of Implicit Bias

As demonstrated by the U.S. Court of Appeals for the First Circuit's decision in 1999 in *Thomas v. Eastman Kodak Company*, it is difficult to determine if the differential treatment of minorities and those in disfavored protected classes is unconscious or purposeful.[293] The effects of actions, however, might point strongly toward the existence of unarticulated biases, whether or not the actor is aware of these biases or not.[294] In cases such as these, there are still good reasons to hold the employer liable for the discrimination based on *ac-*

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[287] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (noting the centrality of the Title VII purpose of compensating victims of discrimination); Selgas v. Am. Airlines, Inc., 104 F.3d 9, 12 (1st Cir. 1997) (noting that compensating victims is an important part of Title VII's purpose).

[288] *See Albemarle*, 422 U.S. at 418; Rich, *supra* note 133, at 46–48 (noting that the touchstone of discriminatory intent is that the race caused the adverse employment discrimination regardless of the mental state of the employer); Wertheimer, *supra* note 35, at 1185 (noting that the fact that a product caused a harm is the touchstone of strict liability, and that mental states are irrelevant).

[289] *See* Rich, *supra* note 133, at 45–46.

[290] See *infra* notes 293–312 and accompanying text.

[291] See *infra* notes 313–330 and accompanying text.

[292] See *infra* notes 331–335 and accompanying text.

[293] *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 61 (1st Cir. 1999) (noting the necessity of circumstantial proof in Title VII cases because of how rare it is to find explicit, directly evident discrimination).

[294] *See* Zheng, *supra* note 57, at 75 (describing many microagressions as actions taken because of implicit bias that are out of the conscious control of the actor); *see also* ZIMMER ET AL., *supra* note 119, at 9–10 (arguing that even implicit bias tests cannot differentiate between those persons who simply report having no conscious bias because they are loathe to admit it even on an anonymous test from those who genuinely hold no conscious biases).

countability but not based on *attribution*.[295] Returning to the dual purposes of Title VII, holding an employer liable for discriminatory treatment, even if perpetrated unwittingly, is necessary.[296] One of the key purposes of Title VII is to compensate victims of racism, and victims of implicit bias are no less harmed than victims of conscious racism.[297] Just as in the vignette used earlier, Zain should not have to pay to replace his favorite beer mug that Alma broke, so too should the victims of discrimination be made whole regardless of whether the discrimination was consciously or unconsciously carried out.[298]

Perhaps the strongest objection to such a set of employment policies is that Title VII must balance the goals of eliminating employment discrimination with the important goal of maintaining employer independence.[299] This objection is repeated frequently by courts, which emphasize that they "do not sit as 'super-personnel departments.'"[300] Carefully defining the "discriminatory intent" requirement to mean causation, a broader category than just an intentional mental state, would encourage employers to undertake precautions against implicit bias.[301] Though some may argue that it is not possible to deter actions that no one intended, making employers liable for unconscious discrimination will encourage them to take steps to mitigate the possibility of implicit bias influencing employment decisions.[302] In the strict products liability field, there is some debate about whether or not manufacturers prevent more harm because of the strict lia-

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[295] *See* Zheng, *supra* note 57, at 65–66 (explaining that allocating social costs of harms based on their causes is a necessary part of living in a society).

[296] *See Albemarle*, 422 U.S. at 418 (noting the centrality of the Title VII purpose of compensating victims of discrimination); Brown v. Nucor Corp., 785 F.3d 895, 910 (4th Cir. 2015) (distinguishing the facts from *Dukes* by focusing on the bad actions of the top management in the analysis of employer liability); Davis v. Cintas Corp., 717 F.3d 476, 489 (6th Cir. 2013) (failing to find a common question of law where plaintiffs could not point to any particular bad actor); *Selgas*, 104 F.3d at 12 (emphasizing the clear importance of Title VII's purpose of making victims of discrimination whole).

[297] *Albemarle*, 422 U.S. at 418; Zheng, *supra* note 57, at 74. "After all, from the victim's perspective the damage is done whether anyone is attributively responsible for it or not: harm is harm, and she is owed compensation, apology, and redress." Zheng, *supra* note 57, at 74.

[298] *See Albemarle*, 422 U.S. at 418; *Selgas*, 104 F.3d at 12; Zheng, *supra* note 57, at 65–66.

[299] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) (noting that courts are not qualified to be making personnel choices and should refrain from imposing on employer decisions unless absolutely necessary); Rich, *supra* note 133, at 57 (noting that the courts have been hesitant to interfere with the workings of employers).

[300] Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 (2004) (noting that hundreds of lower courts repeat the refrain that they "do not sit as 'super-personnel departments'") (quoting Russell v. TG Mo. Corp., 340 F.3d 735, 746 (8th Cir. 2003)). This concern permeates Title VII jurisprudence. *See id.*

[301] *See* Michelle R. Gomez, *The Next Generation of Disparate Treatment: A Merger of Law and Social Science*, 32 REV. LITIGATION 553, 580 (2013) (explaining how programs designed to decrease the influence of implicit bias might be rewarded by offering employers who take them up as affirmative defenses to Title VII suits); Rich, *supra* note 133, at 45–46 (explaining the causation-based theory of the intent requirement as broader than a mental state).

[302] *See* Cerullo, *supra* note 13, at 141 (noting procedural mechanisms for mitigating implicit bias).

bility model as opposed to a negligence model.[303] Because implicit bias is so prevalent, making it clear to employers that they will be held liable for implicit bias is akin to requiring manufacturers to guard against foreseeable risks, as strict products liability does.[304] One example of such a precaution was demonstrated by one study of eleven orchestras between 1970 and 1996, which showed that implementing blind auditions for orchestra positions improved a woman applicant's chance of being hired by up to twenty-five percent.[305] Considering the resume studies that demonstrate that people with non-white-appearing names receive unfair bias, companies could initially choose pools of applicants by reviewing resumes without names or addresses, eliminating at least some of the role of race and gender in initial appraisals of qualifications.[306]

Motivating these kinds of procedural changes requires liability for even unconsciously motivated individual disparate treatment.[307] This is required to compensate victims who have suffered employment harms because of their race, which is one of the two essential purposes of Title VII.[308] This follows the important policy rational for strict liability in products liability cases: liability is assigned regardless of fault in order to ensure that the victims of harm

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[303] Wertheimer, *supra* note 35, at 1185.

[304] *See* STAATS, *supra* note 13, at 50–53 (detailing numerous studies that demonstrate the role of implicit bias in hiring, performance evaluations, perceptions of leadership, and other areas); Cerullo, *supra* note 13, at 141 (noting studies that show that names on resumes can influence hiring decisions as well as studies that show anonymous review often increase the chances of women or people of color being hired); Wax, *supra* note 13, at 1129–30 (citing the claim that in the workplace, the major source of discrimination is implicit rather than explicit); Wertheimer, *supra* note 35, at 1185 (noting that in strict products liability, the manufacturer will be liable if the plaintiff is harmed while using the product in a foreseeable way, even if that is not the way the manufacturer intended that the product be used). Studies also suggest that minor alterations in hiring practices that correct for implicit biases have been successful at increasing the hiring of women and minorities. Cerullo, *supra* note 13, at 141.

[305] Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 734–37 (2000). Drawing conclusions from this study and studies of other orchestras, researchers concluded that "the screen increases-by 50 percent-the probability that a woman will be advanced from certain preliminary rounds and increases by several-fold the likelihood that a woman will be selected in the final round." *Id.* at 738.

[306] *See* Bertrand & Mullainathan, *supra* note 65, at 992 (explaining the extreme disadvantages that those with African American sounding names face on the job market).

[307] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011); *Albemarle*, 422 U.S. at 418 (noting that the purpose is both to compensate harm for victims of discrimination and to end discrimination); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (noting the purpose of Title VII includes dismantling "artificial, arbitrary, and unnecessary barriers" to employment); *Brown*, 785 F.3d at 910 (distinguishing the facts from *Dukes* by focusing on the bad actions of the top management in the analysis of employer liability); *Davis*, 717 F.3d at 489 (failing to find a common question of law where plaintiffs could not point to any particular bad actor).

[308] *Albemarle*, 422 U.S. at 418 (noting the centrality of the Title VII purpose of compensating victims of discrimination); *Selgas*, 104 F.3d at 12 (noting that compensating victims is an important part of Title VII's purpose).

caused by the manufactured item are compensated.[309] Reading the "discriminatory intent" requirement to cover implicit bias does not mean, however, that employers would be forced take up any particular policy.[310] Clarifying that discriminatory intent only requires a causal nexus between the protected class and the adverse action would not force the introduction of these regulatory mechanisms directly from the government onto unwilling employers.[311] Instead, employers who adopt such policies would have strong defenses in Title VII suits, and employers who genuinely wish to have representative employees and a discrimination-free workplace could opt to implement positive measures to reduce the role of implicit bias in their businesses.[312]

B. Accountability in Systemic Disparate Treatment

If Title VII is to achieve its intended purpose of "eliminat[ing] those discriminatory practices and devices which have fostered racially-stratified job environments to the disadvantage of minority citizens," then robust liability based on systemic disparate treatment is required.[313] Not only do systemic disparate treatment cases affect many individuals at once, but they also target the very structural employment barriers that Title VII was created to destroy.[314] Implicit biases, those widespread and shared negative stereotypes that invisibly sort employees by race, fit the mold of the kind of structural impediments to equal employment that Title VII was enacted to abolish.[315] Because these implicit biases are widespread, it is impossible to systematically root them out by locating individual bad actors.[316] Much like the patterns and practices of the

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[309] *See* Wertheimer, *supra* note 35, at 1185 (explaining that strict liability is appropriate in a products manufacture setting because manufacturers reap the profit of introducing products into the market and should therefore bear the costs if the products cause harm).

[310] Gomez, *supra* note 301, at 580 (giving the example of a legal scheme that would encourage rather than require affirmative actions by employers to address implicit bias).

[311] *See id.*

[312] *See id.* Michelle Gomez argues that employers who employ significant attempts to mitigate the force of implicit biases in their employment practices should be rewarded. *See id.* One way of rewarding such actions would be to allow an affirmative defense to employment discrimination claims based on implicit bias by a showing of these significant steps. *See id.* Gomez further suggests that there should be an amendment to Title VII that would allow for this affirmative defense. *See id.*

[313] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973); *see also* Hart, *supra* note 210, at 455–56 (noting that much discrimination takes place in a systemic way that goes unnoticed and offers victims little chance of fighting back under Title VII).

[314] *See* Hart, *supra* note 210, at 456 (arguing that failure to see systemic disparate treatment cases on an institutional rather than individual level will leave many victims without remedy).

[315] *See Green*, 411 U.S. at 800 (describing the purpose of Title VII as ending racially-stratified workplaces); STAATS, *supra* note 13, at 50–53 (explaining the huge impact implicit bias can have in many aspects of the workplace); Hart, *supra* note 210, at 456 (explaining that ending race based divisions in labor requires a systemic approach).

[316] *See* STAATS, *supra* note 13, at 50–53 (explaining the prevalence of implicit biases and their effects in many aspects of employment).

Teamsters and *Hazelwood* cases, implicit biases act like cultural norms that operate to keep protected classes segregated.[317]

In the debate between whether to base systemic disparate treatment on individualistic or contextualist theories of liability, both theories rely too heavily on a notion of responsibility as attributability.[318] The debate centers around whether or not the action of discrimination is attributable to an individual or an institutional entity.[319] The worries expressed by those who favor the individualistic model often focus on the problem of attributing an intention to discriminate to an entity instead of to an individual.[320] In the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes,* Justice Scalia could only find the employer responsible if there was a policy of discrimination that could pin the discrimination on a person or a group of individuals.[321] In looking for a policy, Justice Scalia was searching for an action that was consciously undertaken so that he could attribute discrimination to Wal-Mart.[322] This method of searching for a discriminatory mental state was reinforced by the U.S. Court of Appeals for the Fourth Circuit in 2015 in *Brown v. Nucor Corp*. and the U.S. Court of Appeals for the Sixth Circuit in 2013 in *Davis v. Cintas Corp.*, both of which premised the finding of a common legal question on the ability to locate the discriminatory motive in a single responsible actor.[323] Moreover, even contextualist theories explain why "corporate cultures" and other social norms are

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[317] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977) (relying on statistics to show that race was the cause of the failure to be hired); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (relying on statistics for proof of a causal relationship between race and failure to be promoted or hired into better paying jobs); STAATS, *supra* note 13, at 50–53 (explaining the prevalence of implicit biases and their effects in many aspects of employment).

[318] *See* Bent, *supra* note 190, at 809–10 (noting the tension between "methodological theories" and "contextualist theories" of systemic disparate treatment); Green, *supra* note 190, at 397 (advocating for a contextualist view); Zheng, *supra* note 57, at 65–66 (explaining the concept of responsibility as attributability, noting that it is tied to character, virtue, and blameworthiness).

[319] *See* Bent, *supra* note 190, at 809–10 (noting the tension between "methodological theories" and "contextualist theories" of systemic disparate treatment); Green, *supra* note 190, at 397 (describing the contextualist theory as capturing the reality of workplaces that operate according to their own unspoken norms).

[320] *See* Bent, *supra* note 190, at 834–35 (arguing that Justice Scalia's *Dukes* opinion reflects the methodological theory which focuses on the individual wrongdoing of supervisors or employers, requiring a policy to show that the class of women shared a common source of discrimination).

[321] *See Dukes*, 564 U.S. at 356; Bent, *supra* note 190, at 834–35 (noting that the majority opinion in *Dukes* is consistent with the methodological approach to systemic disparate treatment).

[322] *See Dukes*, 564 U.S. at 356 (requiring that there be a policy that would demonstrate that the class of women was discriminated against in the same way); Zheng, *supra* note 57, at 65–66 (explaining that one way an action is attributable to a person is that the action is a product of deliberation).

[323] *Brown*, 785 F.3d at 910 (focusing the liability on the general manager who knew about and participated in the racial harassment); *Davis*, 717 F.3d at 489 (finding no common question of law to unite the claims of the plaintiffs).

attributable to an entity, and thus the discriminatory actions that result from these corporate cultures are arguably attributable to the entity.[324]

Two 1977 cases from the Supreme Court, *International Brotherhood of Teamsters v. United States* and *Hazelwood School District v. United States*, however, took no position about the mental states of employers.[325] Rather than determining whether individuals or corporate cultures were attributively responsible for the discrimination, *Teamsters* and *Hazelwood* focus on solving the problem that was clearly demonstrated by the stark employment statistics.[326] The employment statistics showed that there were persistent barriers and workplaces maintained stratified by race.[327] Where barriers to equal employment remain, dismantling these barriers does not require locating an actor with a discriminatory mental state or assigning blame to a corporate entity.[328] Instead, like the Court in *Teamsters* and *Hazelwood*, courts today should simply inquire into whether employees' or applicants' race or gender caused an adverse employment action.[329] Moreover, these decisions allowed for the compensation of the victims of discrimination, and like Alma paying for Zain's broken beer mug, they allowed for victims to be made whole.[330]

C. Accountability and Disparate Impact

Title VII already includes a theory of liability without a faulty mental state: disparate impact requires only that employers are accountable for dis-

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[324] *See* Zheng, *supra* note 57, at 64–66 (describing responsibility as attributability); Green, *supra* note 190, at 439 (arguing for a contextualist understanding of liability that would understand the employer as an entity as responsible for wrongdoing because of the values and practices of the entity).

[325] *Hazelwood*, 433 U.S. at 307 (relying on statistics to show that race was the cause of the failure to be hired); *Teamsters*, 431 U.S. at 336 (relying on statistics for proof of a causal relationship between race and failure to be promoted or hired into better paying jobs).

[326] *See Hazelwood*, 433 U.S. at 307 (focusing on the statistics showing differential opportunities for African Americans rather than a mental state of the employer); *Teamsters*, 431 U.S. at 336 (focusing on the statistically-demonstrated differential job opportunities for non-white workers); Zheng, *supra* note 57, at 65–66 (explaining that accountability models of responsibility focus on compensating for harms rather than assigning blame).

[327] *See Hazelwood*, 433 U.S. at 307; *Teamsters*, 431 U.S. at 336.

[328] *See* Rich, *supra* note 133, at 45–46.

[329] *See Hazelwood*, 433 U.S. at 307 (focusing on the statistics showing differential opportunities for African Americans rather than a mental state of the employer); *Teamsters*, 431 U.S. at 336 (focusing on the statistically demonstrated differential job opportunities for non-white workers); Zheng, *supra* note 57, at 65–66 (explaining that accountability models of responsibility focus on compensating for harms rather than assigning blame, and arguing that the sharing of social burdens as a matter of practicality will usually require that the cause of the harm bear the cost of redressing it because the person who caused the action is in the best position to have prevented it and prevent it in the future); Wertheimer, *supra* note 35, at 1185 (noting that the development of strict liability developed to address harms rather than to punish bad actors).

[330] *See Hazelwood*, 433 U.S. at 307; *Teamsters*, 431 U.S. at 336; Zheng, *supra* note 57, at 65–66.

criminatory acts, not that the acts are attributable to them.[331] By allocating liability based on the results of an employer's action, disparate impact not only deters employers from using potentially discriminatory policies, but it also compensates those employees who have fallen victim to unwitting discrimination.[332] Disparate impact litigation on its own, however, is insufficient to fully achieve the dual purposes of Title VII.[333] Because of the nature of implicit bias, there continue to be instances of unwitting discrimination, when decision makers are influenced by implicit biases in individual cases and systemic ones.[334] Disparate impact, which requires an articulated policy that is neutral on its face, cannot reach these decisions that are not the result of an explicit policy.[335]

CONCLUSION

Due to the prevalence of implicit bias in the workplace, to truly accomplish the goals of Title VII, courts must understand discriminatory intent to include implicit bias, in addition to conscious, malicious bias. When employers make decisions on the basis of implicit biases, employees and applicants bear the burden of that harm. If the courts explicitly adopted the causation-based model of the discriminatory intent requirement of individual and systemic disparate treatment, some of the cost of implicit bias could be shifted back to the employers. By focusing on responsibility as accountability, the current law can address racial discrimination in the workplace without attributing blame or contempt to employers for the effects of implicit bias. The law can hold employers accountable without drawing inferences about the virtue or character of an employer. Like product manufacturers who benefit from putting products into the market, employers benefit from being able to hire employees. Thus, employers should be strictly liable for the harms they cause in making employment decisions on the basis of implicit bias.

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[331] *See Albemarle*, 422 U.S. at 418 (noting that an employer need not have subjective bad intentions to find Title VII liability); Zheng, *supra* note 57, at 65–66 (noting that it is still appropriate to hold people accountable for unconsciously causing harms).

[332] *See Albemarle*, 422 U.S. at 418 (articulating the purposes of Title VII to compensate harms and to dismantle barriers to equal employment opportunities); *Selgas*, 104 F.3d at 12 (emphasizing the importance of the compensatory purpose of Title VII).

[333] *See* Green, *supra* note 190, at 425 (arguing that widespread differential treatment is unlikely to be caused by a few bad apples but is much more likely to be due to an institutional culture for which no individual is responsible); Kang & Lane, *supra* note 33, at 468, 468 n.30 (noting the pervasive nature of implicit bias and collecting several of the "hundreds" of peer-reviewed articles).

[334] *See* Bertrand & Mullainathan, *supra* note 65, at 992 (explaining the significant obstacles African Americans face when applying for jobs compared to their white counter parts based on resume studies); *see also* Uhlmann & Cohen, *supra* note 65, at 474 (finding that evaluators for jobs favored men applicants for stereotypically masculine jobs but women for stereotypically feminine jobs).

[335] *See* GOLD, *supra* note 241, at 18–19 (explaining that disparate impact liability requires the identification of a policy that is neutral on its face but that has a disparate impact on a protected class).