

Unconscious Bias Theory in Employment Discrimination Litigation

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Deborah, an African American woman, worked as an administrative assistant for her employer for several years. She consistently received positive performance reviews until she came under the supervision of a new administrative director, Joan, who is white. One of only a handful of minority employees, Deborah became subjected to increased scrutiny by Joan, who singled her out by requiring her to document her use of time at work. Relations were strained between the two, culminating in Deborah's termination for failure to meet with Joan to discuss her job responsibilities. Joan's stated reason for terminating Deborah appears pretextual given that Deborah agreed to meet with her; because Deborah felt harassed, she had requested the presence of a supportive direct supervisor, a move recommended by the employee manual. Deborah has filed a Title VII race discrimination complaint against her employer in federal district court. Complaints of race discrimination against the employer have also been filed by at least two other minority employees.

Alejandro, a Hispanic man, worked for several years at a large retail store in a sales position. He was highly regarded by his supervisors and had received an award for his sales performance. Alejandro repeatedly expressed interest in a management position, but each of the three times an opening emerged, a white candidate with less relevant experience was selected. Shortly after the last management selection, Alejandro was terminated for alleged fraud for failing to deduct sales credit that had accrued toward his commission earnings for a series of returns. He claims the omissions were inadvertent due to mechanical errors with the register, but the store did not credit his explanation or consider his years of exemplary performance. Based on initial discovery in the Title VII race discrimination suit he has filed in federal district court,

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*it appears that a white employee had received a warning prior to her ultimate termination for similar reasons.*¹

The nature of discrimination today is dramatically different from the pernicious, overt discrimination that existed prior to the passage of the Civil Rights Act of 1964.² While advocates of the 1964 Civil Rights Act championed the need to protect minorities and women from intentional discrimination that limited their employment opportunities, the discrimination that civil rights advocates are currently challenging is of a more subtle nature. A burgeoning body of social science literature has empirically demonstrated the existence and prevalence of unconscious bias in today's society.³ This form of discrimination is specifically tied to the human cognitive process for receiving and storing information. Researchers have demonstrated that individuals tend to process incoming information by relying on cognitive shortcuts—in essence, stereotypes.⁴ Bias against another thus begins to occur at the point when new information is processed by the individual, such as upon a first meeting, and continues with each interaction between two people.⁵ This understanding of human bias is at odds with the current employment discrimination doctrinal framework under Title VII: in a disparate treatment case, the plaintiff must demonstrate that the employer was motivated by racial or other animus at the precise moment the adverse employment action was taken,⁶ while in a disparate impact case, the plaintiff does not look to individual bias, but rather how a neutral policy has a disparate, discriminatory impact on protected class members.⁷ Moreover, as employers become more aware of the statutory protections afforded members of protected classes, smoking gun statements have become largely a remnant of the past.⁸ In tandem with this trend, courts appear increasingly reluctant to allow individual disparate treatment plaintiffs to proceed past summary judgment,⁹ while fewer disparate impact cases are being filed.¹⁰

¹ These cases have been drawn from my clinical experience at the Hale and Dorr Legal Services Center in Jamaica Plain, Mass. All identifying qualities have been altered to preserve attorney-client confidentiality. The above fact patterns are derived from plaintiffs' complaints; both cases are currently pending in federal district court.

² Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

³ See discussion *infra* Part I.

⁴ *Id.*

⁵ *Id.*

⁶ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1181–85 (1995).

⁷ See *infra* Part III.A.

⁸ See *infra* note 89.

⁹ See generally Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (arguing that liberalized Supreme Court summary judgment standards have been used by courts to award summary judgment against employment discrimination plaintiffs on the ground that a reasonable jury could not infer discrimination from the facts plaintiffs are able to present at the pre-trial stage).

In this newer phase of employment discrimination litigation, the proper role for a theory of unconscious bias remains an open question. Courts have recognized the existence of unconscious discrimination since the earliest Title VII decisions and have specifically stated that Title VII reaches this form of discrimination.¹¹ What is unclear, however, is *how* a plaintiff could bring a discrimination case premised on a theory of unconscious bias. For example, in the cases introduced above, no racist statements were made to Deborah or Alejandro, but their situations appear suspect. Commentators have generally posited theories favoring the use of unconscious bias theory within the disparate treatment framework, but these proposals require significant alterations to the existing framework which seem unlikely under the current, textualist-leaning judiciary.¹²

This Article identifies specific strategies to apply the theory of unconscious bias to employment discrimination litigation.¹³ Part I examines the social science research underpinning the theory of unconscious bias and recent trends in employment settings that may facilitate the operation of unconscious bias. Part II highlights cases where courts have specifically stated that Title VII reaches unconscious bias. Part III examines current theoretical approaches to making unconscious bias actionable. Part IV assesses practical litigation strategies to incorporate unconscious bias theory in employment discrimination litigation and will present thoughts on the viability of its actual incorporation.

I. THE CHANGING NATURE OF DISCRIMINATION

A. *Social Science Research on Unconscious Bias*

According to social psychology research, the natural human process of categorizing like objects together and related cognitive biases can result in and perpetuate individuals' implicit reliance on stereotypes.¹⁴ These stereotypes may then operate largely independent of the intent of an individual.¹⁵ According to social cognition theory, stereotypes are person prototypes

¹⁰ See *infra* notes 85–87.

¹¹ See discussion *infra* Part II.

¹² See discussion *infra* Part III.

¹³ While intentional, covert discrimination, in which the actor is fully cognizant of his prejudice, undoubtedly still remains, the focus of this Article is on the development of a role for unconscious bias, as defined herein, in employment discrimination theory and practice.

¹⁴ See Krieger, *supra* note 6, at 1186–1209. Krieger's work, which draws heavily from psychological and social science research, is generally regarded as the leading summary of this material for legal audiences. See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) (citing Krieger's work for discussion on cognitive biases); see also Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 97–99 (2003) (discussing Krieger's application of social cognition theory to the employment discrimination project).

¹⁵ Krieger, *supra* note 6, at 1188.

that act as “implicit expectancies that influence how incoming information is interpreted”¹⁶ and remembered; in other words, stereotypes cause discrimination by influencing how individuals process and recall information about other people.¹⁷ Thus, once a person has stored information in this manner, the memory distorted by stereotype is the retained memory, as opposed to the “raw” incoming information.¹⁸ Studies have demonstrated that, once people have developed stereotypic expectancies, they “remember” stereotype-consistent behavior that did not actually occur; moreover, stereotype-inconsistent behavior that *did* occur is stored in a more diffuse manner and is thus less readily retrievable by the decision-maker.¹⁹

Psychologists have identified antecedent conditions that encourage stereotyping. Stereotyping is likely to occur when the target has “solo” or near-solo status (i.e., the only minority among all white colleagues or the only woman among all male colleagues) among an otherwise homogeneous group.²⁰ Specifically, in the employment context, stereotyping is likely to occur when a member of a previously omitted group (or protected class) assumes a job considered nontraditional for his group.²¹ Another condition shown to enable stereotyping in the employment context is the perceived lack of fit between the target’s category (i.e., female, minority, etc.) and occupation.²² Finally, stereotyping is likely to occur when the criteria used for evaluation of a target are ambiguous, as is the case with subjective evaluations.²³

Based on empirical data measuring individuals’ implicit associations, psychologists have found that unconscious bias is quite prevalent, often in sharp contrast to individuals’ self-professed identity. Professor Mahzarin Banaji and colleagues have developed a series of Implicit Association Tests (“IAT”),²⁴ which measure automatic association response times for

¹⁶ *Id.* at 1199.

¹⁷ *Id.*

¹⁸ *Id.* at 1202–04. Research also indicates that individuals tend to accept stereotype-consistent behavior as true while subjecting stereotype-inconsistent behavior to more exacting scrutiny. *Id.* at 1211. Other researchers have found that because majority group members tend to have little contact with minority members, stereotyped conceptions of minority groups can result from illusory correlations between minority group membership and negative behavioral events, which, by their more infrequent nature, are more salient. See Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321–24 (1987) (arguing that our “cultural experience has influenced our beliefs about race” resulting in race discrimination “influenced by unconscious racial motivation”).

¹⁹ *Id.* at 1209.

²⁰ Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in Price Waterhouse v. Hopkins*, 46 AM. PSYCHOLOGIST 1049, 1050 (1991).

²¹ *Id.*

²² *Id.*

²³ *Id.* Within the evaluative process, evaluating a target’s credentials based on stereotypes of the target’s group (i.e., evaluating a woman’s work performance based on gender stereotypes) and evaluating based on limited evidence and selective interpretations of a target’s work product are also conducive to stereotyping. *Id.* at 1051.

²⁴ Professor Banaji’s tests can be viewed at <https://implicit.harvard.edu/implicit/demo/>

race, gender, and age, among other traits. Participants' preferences are measured by their response times in pairing "positive" words, such as "peace," and negative words, such as "war," with alternating white and black faces, with quicker association response times indicating an implicit preference for one association (e.g., white face and "wonderful").²⁵ The test is premised on the finding that it takes a subject longer to associate two items (white or black face with positive or negative word) that he views as incompatible; the test creators argue that this time differential may be quantified to provide an objective assessment of people's implicit attitudes.²⁶ Using the IAT, researchers have documented a general preference for white over black among study participants of multiple races,²⁷ which contradicted their self-avowed indifference between the two races.²⁸ Thus, racial preferences appear to be attributed, at least in part, to unconscious biases. While critics of the IAT find fault with the conclusions that Banaji and her colleagues draw from the test results,²⁹ the test has become widely regarded within the psychology field as a measure for implicit biases.³⁰

The prevalence of unconscious bias has manifested itself in hiring practices. In a recent labor market study, economists from the Massachusetts Institute of Technology and the University of Chicago sent out 5000 résumés in response to help wanted ads in Boston and Chicago.³¹ The economists randomly assigned stereotypically white-sounding names, such as Emily, or stereotypically African American names, such as Lakisha, to otherwise identical résumés.³² Applicants with white-sounding names received fifty percent more callback interviews than those with African American-sounding names.³³ A study on the effect of blind selection proc-

(last visited Mar. 25, 2005).

²⁵ *Id.*

²⁶ Shankar Vedantam, *See No Bias*, WASH. POST MAG., Jan. 23, 2005, at W12, available at <http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html>.

²⁷ Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL., 316, 321 (2000); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1473-74 (1998).

²⁸ Dasgupta, *supra* note 27, at 325 (Based on data from over two million results of the online IAT, approximately eighty-eight percent of white respondents exhibited a preference for white over black and approximately forty-eight percent of black respondents showed a similar preference for white.); Greenwald, *supra* note 27, at 1475; see Vedantam, *supra* note 26, at 3.

²⁹ See generally Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?,"* 15 PSYCHOL. INQUIRY 257 (2004) (challenging view that IAT gauges implicit prejudice).

³⁰ Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 122 (2004) (noting that "implicit responses" have become the "measure of choice for prejudice").

³¹ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 3 (June 2004) (unpublished working paper) (available at <http://post.economics.harvard.edu/faculty/mullainathan/papers/emilygreg.pdf>).

³² *Id.* at 2.

³³ *Id.* at 3. Applicants with white-sounding names needed to send approximately ten

esses in orchestral auditions yielded similar results. The study found that the blind process substantially increased the likelihood that a female musician would advance beyond the preliminary round and be ultimately selected for a position in the orchestra.³⁴ These studies, representative of the empirical research in this area, substantiate the view that unconscious bias is prevalent in employment-related decision-making.

Social psychology research suggests that individuals are able to control their unconscious biases. While individuals immediately identify and categorize a person's group status (particularly based on gender, race, and age), several factors have been shown to influence whether the individual will unconsciously "activate" the stereotype associated with that person's group.³⁵ For instance, when people are encouraged to form more accurate impressions, they have been found to engage in "more effortful impression processes," or individuation, which can overcome "automatic reliance on stereotypes."³⁶ Exposure to counter-stereotypes and individual motivation to avoid stereotypical thinking, among other factors, assist in this endeavor.³⁷ In the specific context of race, study participants demonstrated less unconscious racial bias toward African Americans when a test measuring automatic racial prejudice was administered by an African American,³⁸ suggesting that observing minorities (and presumably women) in positions of authority counters the implicit bias many harbor.

résumés to receive one callback interview, whereas applicants with African American-sounding names needed to send approximately fifteen résumés for the same result. *Id.* Another study aimed at assessing male and female applicants' odds of receiving interviews at sixty-five Philadelphia restaurants established that men were far more likely to receive job offers from upscale restaurants—forty-eight percent compared to nine percent for women. David Neumark et al., *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915, 925 (1996).

³⁴ Christine Jolls, *Is There A Glass Ceiling?*, 25 HARV. WOMEN'S L.J. 1, 4–5 (2002) (citing Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716 (2000)).

³⁵ Susan T. Fiske, *What We Know About Bias and Intergroup Conflict, the Problem of the Century*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 123, 124 (2002).

³⁶ Susan T. Fiske, *Power Can Bias Impression Processes: Stereotyping Subordinates by Default and by Design*, 3 GROUP PROCESSES & INTERGROUP REL. 227, 228 (2000).

³⁷ See generally Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (reviewing approximately fifty studies assessing the ability of individual motivation, perceivers' efforts to reduce stereotypes or promote counterstereotypes, perceivers' focus of attention, and contextual cues to decrease automatic stereotyping and concluding that automatic processes are malleable).

³⁸ See *id.* at 247 (citing B. S. Lowery et al., *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842 (2001)). A discussion of the ramifications of employment practices with the goal of providing a sufficiently diverse, gender-balanced supervisory workforce is beyond the scope of this paper. Literature examining the impact of preferences on peers' assessment of perceived beneficiaries' abilities suggests that an aggressive affirmative action policy alone may not successfully combat individuals' stereotyping tendencies. See Linda Hamilton Krieger, *Civil Rights Perestroika*, 86 CAL. L. REV. 1251, 1263 (1998) ("[M]uch of what we know about stereotypes' tendency to resist the corrective influence of disconfirming evidence reinforces concerns about the negative effects of affirmative action on intergroup perception and judgment.").

B. Structural Changes in Employment Settings

Changes in the structure of the workplace over the last several decades may have facilitated the operation of unconscious bias against minorities and women in the employment context.³⁹ In the decades between World War I and the 1970s, the workplace was characterized by hierarchies and defined job responsibilities.⁴⁰ Individuals would typically advance within an organization by “vertical ladders or pyramids” based on evaluative processes known to all employees.⁴¹ In sharp contrast, Professor Tristin Green characterizes our current workplace structure as highly diffuse. Beginning in the early 1980s, employers turned to more flexible modes of organization, due in part to the exportation of many blue collar jobs and companies’ efforts to gain a competitive edge in the increasingly globalized economy.⁴² In particular, this reorganization of the workplace exhibited three departures from the past: hierarchies were removed and job roles became less defined, work became more team-oriented, and employees began to be evaluated in a more flexible and subjective manner.⁴³ Green argues that this workplace structure poses challenges for Title VII plaintiffs in a variety of ways.⁴⁴ First, with no clear hierarchy in place, it becomes difficult for plaintiffs to point to a single discriminatory decision or decision-maker.⁴⁵ Second, the team-oriented nature of the workplace, combined with more subjective evaluative processes, contributes to more opportunities for subconscious bias to play a role in the evaluation of minority or women employees for promotions.⁴⁶ The problem is even more severe when a diffuse and subjective evaluative process is coupled with the “solo effect” that occurs in situations where minority and female employees are evaluated by mostly white peers or supervisors.

Thus, the more fluid, less hierarchical, and more team-oriented nature of current workplaces arguably plays a role in enabling subtle discrimination to influence employment decision-making as it affects members of pro-

³⁹ Green, *supra* note 14, at 99–100.

⁴⁰ *Id.* at 99.

⁴¹ *Id.* at 100.

⁴² *Id.*

⁴³ *Id.* at 101.

⁴⁴ *Id.* at 104–08; *see also* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 165–68 (2004) (discussing how the informal hierarchy of the “boundaryless workplace” is more “remote and impenetrable” for women and minorities). *See generally* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001) (discussing complexity of demonstrating causation and intent in employment decision-making involving multiple actors).

⁴⁵ Green, *supra* note 14, at 105.

⁴⁶ *Id.* at 104–08; *see also* Susan Strum, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485–86 (2001) (“[D]ecisions requiring the exercise of individual or collective judgment that are highly unstructured tend to reflect, express, or produce biased outcomes. This bias has been linked to patterns of underrepresentation or exclusion of members of nondominant groups.”).

tected groups. In addition, employers' heightened awareness of the legal ramifications for discriminatory transgressions—learned through litigation, among other means—suggests that employers will be increasingly savvy in not documenting, outwardly expressing, or retaining anything that is potentially damaging. If we are to give weight to the empirical research demonstrating the prevalence of unconscious bias, the trends that may enable such bias to operate in the workplace should be of concern to civil rights advocates.

II. JUDICIAL SUPPORT FOR ADVANCING UNCONSCIOUS BIAS THEORY

While it may seem radical to think that modern courts would embrace unconscious bias theory in employment discrimination litigation, plaintiffs may find support for this proposition in judicial statements that Title VII reaches unconscious bias. Relying on language from Title VII precedent, plaintiffs may argue that acceptance of unconscious bias theory is consistent with Title VII's longstanding statutory goal of combating the "entire spectrum" of discrimination against protected group members.⁴⁷ Indeed, some commentators argue that unconscious discrimination is the "most pervasive and important form of bias" today as "overt bigotry has waned in response to antidiscrimination laws and evolving social mores."⁴⁸

One of the strongest judicial assertions that Title VII reaches unconscious bias may be found in *Thomas v. Eastman Kodak Company*.⁴⁹ In *Tho-*

⁴⁷ See *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 59 (1st Cir. 1999) ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus. . . . Stereotypes or cognitive biases based on race are as incompatible with Title VII's mandate as stereotypes based on age or sex; here too, 'the entire spectrum of disparate treatment' is prohibited.").

⁴⁸ Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999); see Krieger, *supra* note 6, at 1164 (arguing that unconscious bias is "today's most prevalent type of discrimination").

⁴⁹ "The ultimate question is whether the employee has been treated disparately 'because of race.' This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias." *Thomas*, 183 F.3d at 58.

Other circuits have also recognized the unconscious nature of discrimination in the employment context. See *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061, 1064 (8th Cir. 1988) ("[A]ge discrimination is often subtle and 'may simply arise from an unconscious application of stereotyped notions of ability'" (quoting *Syvock*, 665 F.2d at 155)); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1273 (10th Cir. 1988) ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts.") (quoting *Sweeney v. Bd. of Trs. of Keene State Coll.*, 604 F.2d 106, 114 (1st Cir. 1979)); *EEOC v. Inland Marine*, 729 F.2d 1229, 1235–36 (9th Cir. 1984) (holding that disparate treatment occurs where decision-maker applies subjective wage-setting policy in racially discriminatory and subtle manner even absent malice); *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) ("[A]ge discrimination may simply arise from an unconscious application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the workforce"); cf. *Glass v. Phila. Elec. Co.*, 34 F.3d 188, 200 (3d Cir. 1994) ("putting aside the question of whether, as a matter of law, a plaintiff in a dispa-

mas, a race discrimination case, the First Circuit stated that “Title VII’s prohibition against ‘disparate treatment because of race’ extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias.”⁵⁰ In that case, the plaintiff alleged that her employer’s decision-making process with respect to her termination, which included the consideration of low performance evaluations that could not be reconciled with her high sales record, was influenced by unconscious bias and stereotypes.⁵¹ To clarify any potential ambiguity based on its own precedent, the court went on to explain that, while its precedent may suggest that “express and conscious employer intent to discriminate” must be demonstrated by the plaintiff in order to overcome the employer’s proffered legitimate, non-discriminatory reason, those cases “turn[ed] on the particular theories advanced by the plaintiffs therein.”⁵² Thus, the First Circuit appears willing to embrace employer liability under Title VII based on a theory of unconscious bias.⁵³

Courts have also found Title VII to reach unconscious bias in cases involving subjective hiring practices and evaluations. In *Watson v. Fort Worth Bank & Trust*,⁵⁴ the Supreme Court held that disparate impact may be applied to subjective employment practices. In explaining its reasoning, the Court stated that even if discrimination could be “adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.”⁵⁵ Thus, the Court endorsed the conception of disparate impact as a means for plaintiffs to obtain relief from discriminatory practices where no overt discrimination could be proven, noting that a “facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.”⁵⁶ In *Rowe v. General Motors Co.*,⁵⁷ the Fifth Cir-

rate treatment case may prevail based on evidence of ‘unconscious’ discrimination,” but finding “plaintiff’s reliance on this unconventional theory substantially diminished the probative value of the evidence of harassment” by the employer).

⁵⁰ *Thomas*, 183 F.3d at 42.

⁵¹ *Id.*

⁵² *Id.* at 42 n.13.

⁵³ Of course, not all courts have demonstrated a willingness to embrace unconscious bias theory in employment discrimination litigation. Although decided before *Thomas*, the approach of the court in *Jackson v. Harvard Univ.*, 721 F. Supp. 1397 (D. Mass. 1989), may be representative of some courts’ current view. In *Jackson*, an action alleging sex discrimination in the tenure process at Harvard Business School, Judge Woodlock stated that “[d]isparate treatment analysis is concerned with intentional discrimination, not subconscious attitudes.” *Id.* at 1432. According to Judge Woodlock, the “race and gender neutral process that [the dean] helped establish and maintain may not yet have eliminated ‘subconscious stereotypes and prejudices’ held by some of the Business School’s tenured faculty members; however, those subconscious attitudes that may well remain are precisely the sort that disparate treatment analysis cannot and was never designed to police.” *Id.* at 1433.

⁵⁴ 487 U.S. 977 (1988).

⁵⁵ *Id.* at 990.

⁵⁶ *Id.*

⁵⁷ 457 F.2d 348 (5th Cir. 1972).

cuit underscored the widely held belief that subjective standards for promotion lent themselves to be vehicles for potential discrimination against minorities:

[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.⁵⁸

The Supreme Court took the same view in *Hazelwood School District v. United States*,⁵⁹ where the school district employed a highly subjective “test” for hiring new teachers.⁶⁰ The only general guidance provided to the decision-makers was that they should select teachers based on factors including “personality, disposition, appearance, poise, voice, articulation, and ability to deal with people,” factors the Court considered conducive to the operation of subtle discrimination.⁶¹

III. IDENTIFYING THE APPROPRIATE ROLE FOR UNCONSCIOUS BIAS IN THEORY

Given the scope of social science research documenting the prevalence of unconscious bias and judicial assertions that anti-discrimination statutes reach unconscious bias, it is important to examine possible placements for unconscious bias theory in the current doctrinal frameworks; doing so will provide guidance on the best litigation strategy to promote unconscious bias theory on the ground.

A. *Disparate Impact*

From a theoretical perspective, disparate impact jurisprudence is appealing as a vehicle to advance unconscious bias theory due to the absence of a doctrinal requirement to prove intent. Disparate impact claims involve facially neutral employment practices that have a disproportionately harmful impact on one group and cannot be justified by job relatedness and busi-

⁵⁸ *Id.* at 359; see Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 974 (1982) (citing *Rowe*); see also *Wade v. Miss. Coop. Extension Serv.*, 528 F.2d 508, 518 (5th Cir. 1976) (finding that an evaluation form that was “subjective and vulnerable to either conscious or unconscious discrimination by the evaluating supervisors” violated Title VII).

⁵⁹ 433 U.S. 299 (1977).

⁶⁰ *Id.* at 302.

⁶¹ *Id.*

ness necessity.⁶² According to one commentator, disparate impact is the preferred vehicle to combat unconscious discrimination because it “cares not whether the cause of the adverse effects is intentional but concealed discrimination of the traditional type, the more subtle discrimination of cognitive bias, or the absolutely non-intentional use of neutral practices that just happen to exclude certain races or groups.”⁶³

While compatible in this theoretical regard, several tensions present themselves. The main tension between disparate impact jurisprudence and unconscious bias theory stems from disparate impact’s central reliance on a neutral employer policy. Disparate impact theory’s failure to consider the role of the individual decision-maker whose discrimination led to an adverse employment action renders cognitive bias theory unnecessary.⁶⁴ According to unconscious bias theory, discrimination in employment settings occurs as individual supervisors process and recall information about minority and female employees; any adverse impact created by a neutral employer policy would thus be secondary, though it might enable the operation of unconscious bias.⁶⁵

The disparate impact doctrinal requirement that the employee identify a particular employment practice that causes the disparate impact⁶⁶ is also problematic. The fluid, ongoing nature of unconscious discrimination is in tension with the need to single out a particular employment practice that, even absent discriminatory intent, operates to “‘freeze’ the status quo of prior discriminatory employment practices.”⁶⁷ Although the Civil Rights Act of 1991 gives plaintiffs the opportunity to analyze an employer’s entire decision-making process as one employment practice, upon demonstrating that the elements of the employer’s decision-making process are not capable of being separated,⁶⁸ it is not clear how this would play out in litigation. For a single employment decision with a nuanced fact pattern, such as those described in the opening case studies, it is unclear what general employment “practice” the plaintiffs would be challenging. These employment decisions do not correspond to the types of “practices” that courts have previously upheld as legitimately disputable in disparate im-

⁶² *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (describing Title VII of Civil Rights Act of 1964).

⁶³ Charles A. Sullivan, *Re-Reviving Disparate Impact* (unpublished manuscript, on file with author).

⁶⁴ “[I]ntent plays no role in the disparate-impact inquiry. The question, rather, is whether an employment practice has a significant, adverse effect on an identifiable class of workers—regardless of the cause or motive for the practice.” *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 670 (1989).

⁶⁵ *See also* Green, *supra* note 14, at 138 (arguing that disparate impact does not account for the “interplay between institutional choices and the operation of discriminatory bias in individuals and groups at multiple levels of interaction in the workplace”).

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

⁶⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

⁶⁸ 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000).

pact cases, such as educational and minimum test score requirements.⁶⁹ Even if these were acceptable employment practices under the Civil Rights Act of 1991, disparate impact would still be an inappropriate framework because it fails to account for unconscious bias at the individual level at which it is known to operate.⁷⁰

B. Disparate Treatment

Disparate treatment has been described as the “most easily understood type of discrimination,” whereby an employer simply treats some employees less favorably than others because of their race, gender, or other protected trait.⁷¹ In disparate treatment cases, the plaintiff will prevail if he can demonstrate that his protected trait “*actually motivated* the employer’s decision.”⁷² The need to demonstrate causation—that the employer acted “because of” the protected trait⁷³—would appear to be problematic to the inclusion of unconscious bias theory in the disparate treatment framework. Thus, the primary tension between disparate treatment doctrine and unconscious bias theory lies in the fact that disparate treatment is widely perceived as exclusively reaching intentional, conscious discrimination.

Commentators like Krieger and Green have advanced models to surmount these theoretical challenges. Both theories, however, involve significant modifications to the current framework. Krieger argues that the current disparate treatment jurisprudence construes the process of employment decision-making (i.e., hirings, promotions, firings) as being “functionally distinct from the processes of perception, encoding, and retention” of “decision-relevant events.”⁷⁴ In response, Krieger proposes replacing the *McDonnell Douglas* pretext evidentiary model⁷⁵ with an “actuating factor” analysis, where the central inquiry would be “whether the applicant or employee’s group status ‘made a difference’ in the employer’s action, not whether the decision-maker intended that it make a differ-

⁶⁹ See, e.g., *Griggs*, 401 U.S. at 430 (identifying high school degree and test score requirements as employer practices with disparate impacts).

⁷⁰ In the case of subjective employment practices, such as evaluations, disparate impact has been used as a vehicle for addressing subtle discrimination. See *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 978 (1988) (applying disparate impact to subjective employment practice to address the “problem of subconscious stereotypes and prejudices”).

⁷¹ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). Disparate treatment is “the most obvious evil” Congress intended to target with Title VII. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citing 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey)) (“What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.”).

⁷² *Hazen*, 507 U.S. at 610 (emphasis added).

⁷³ 42 U.S.C. § 2000e-2(a) (2000).

⁷⁴ Krieger, *supra* note 6, at 1167.

⁷⁵ See *infra* Part IV.

ence.”⁷⁶ In contrast, Green’s theory of structural disparate treatment would allow a plaintiff to obtain injunctive relief if she is able to demonstrate that the employer “unreasonably enabled the operation of discriminatory bias” through its organizational structures or practices.⁷⁷ The trier of fact would make this inquiry by measuring the employer’s efforts to minimize the operation of conscious and unconscious bias as compared to those structures empirically demonstrated to reduce the likelihood of stereotyping.⁷⁸ While Green envisions prospective relief as the predominant remedy given the “amorphous, fluid, ongoing nature of the injury in these cases,” she does account for possible monetary damages in individual cases.⁷⁹

The proposed theoretical modifications to the current disparate treatment model leave many questions unanswered. First, both models advanced by Krieger and Green call for radical reconceptions of disparate treatment, making their actual acceptance and use by courts unlikely. Assuming, however, that courts were to embrace these modifications to disparate treatment doctrine, it is difficult to see how a plaintiff would prove both the existence of unconscious bias in the decision-maker *and* that the employer was actually motivated by this bias at the moment the employment decision at issue was made.⁸⁰ While both Krieger and Green attempt to circumvent these difficulties,⁸¹ their conceptions of disparate treatment do not provide guidance as to how plaintiffs could satisfy their burden of persuasion on this critical element. While Green’s emphasis on employer structural decisions avoids the problem of holding an individual liable for unconscious discrimination, its structural approach does not escape the practical difficulty of demonstrating causation. Green suggests that the evidence to demonstrate causation would include statistical data, expert

⁷⁶ *Id.* at 1241–43. With respect to damages, Krieger proposes that the ADEA’s concept of “willful” discrimination and two-tier liability system be grafted onto Title VII. Under this model, plaintiffs who are able to demonstrate that their protected trait played a role in the adverse employment action would be entitled to injunctive relief, back and front pay, and attorneys’ fees, while those who are able to prove *conscious* discrimination would be entitled to the additional remedies of compensatory and punitive damages. *Id.* at 1243.

⁷⁷ Green, *supra* note 14, at 147. Injunctive relief would take the form of requiring the employer to institute “safeguards” aimed at disabling the operation of unconscious bias, such as the adoption of more structured evaluation processes, or the implementation of a monitoring system to gauge emerging patterns in the workplace. *Id.* at 148.

⁷⁸ Under this model, statistical disparities in employment outcomes (i.e., hirings, promotions, and terminations) would not necessarily serve as evidence from which to infer intentional discrimination, but rather as a means to “signal that discriminatory bias may be operating in workplace dynamics.” *Id.* at 146.

⁷⁹ *Id.* at 148. If a defendant were found liable under a structural disparate treatment theory, the individual plaintiff would enjoy a presumption of “individualized hindrance of opportunity.” Accordingly, if the plaintiff were able to point to a specific opportunity lost or damages incurred, the employer would be liable for relief, including monetary damages, unless the employer could establish that the damage was caused by non-discriminatory reasons. *Id.*

⁸⁰ See *infra* Part IV.

⁸¹ See *supra* notes 76–79 and accompanying text.

testimony, and anecdotal evidence of employees and supervisors.⁸² Assuming that a court would be willing to embrace a structural theory of disparate treatment, and the plaintiff could demonstrate that the employer had not implemented a single, identified method of decreasing the operation of subtle bias (as identified in the social science and empirical research), the employee would still need to demonstrate that the discriminatory structure caused or enabled the adverse employment action. Although Green recognizes the “amorphous” nature of discrimination as it percolates through an employer’s chosen institutional structure, and only allows for injunctive relief in most cases, there is no guidance on how to successfully demonstrate causation even in this limited context.

IV. IDENTIFYING AN APPROPRIATE ROLE FOR UNCONSCIOUS BIAS THEORY IN PRACTICE: LITIGATION HURDLES AND STRATEGIES IN DISPARATE TREATMENT CASES

While commentators have presented arguments in favor of different theoretical frameworks for advancing unconscious bias, little discussion is spent on an analysis of how these competing theories would play out in litigation. Yet, a discussion of how these theories would work in practice is an essential component of the analysis; indeed, the questions left unanswered by commentators’ competing theories underscores the need for a practical analysis.⁸³ Because the litigation of strong cases may be the primary means for raising awareness of the prevalence of unconscious bias and for advancing more widespread acceptance of its use in employment discrimination litigation,⁸⁴ it is particularly important to assess the special difficulties posed by advancing an unconscious bias theory in litigation.

In practical terms, a disparate impact approach is less desirable given its increasingly rare use. By one account, disparate impact cases constituted less than two percent of federal courts’ Title VII caseloads during the 1980s.⁸⁵ In addition, class actions, traditionally brought by disparate impact plaintiffs, have markedly declined in recent years⁸⁶: according to one estimate, roughly seventy-five employment discrimination lawsuits, including class action claims, are filed annually, compared to approximately twenty thousand individual cases.⁸⁷ While even a small number of dispa-

⁸² Green, *supra* note 14, at 146.

⁸³ See *supra* Part III.

⁸⁴ See Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 335 (1999) (arguing that litigation may be the best means of adjusting employer attitudes and approaches to the workplace).

⁸⁵ John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989, 998 (1991) (reviewing American Bar Foundation employment discrimination litigation data).

⁸⁶ *Id.* at 1019.

⁸⁷ Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1255 (2003) (analyzing figures compiled by the Administrative Office of the U.S. Courts for 1997–1999).

rate impact cases may still have a broad impact on disempowered employees,⁸⁸ it is more efficacious to focus on hurdles that arise in the litigation of disparate treatment cases.

A plaintiff who believes she has been the victim of unconscious discrimination but who lacks any direct evidence will bring her claim using the familiar *McDonnell Douglas* burden-shifting framework.⁸⁹ As such, she must first establish a prima facie case of discrimination;⁹⁰ in other words, she must demonstrate that she was a member of a protected class, she was qualified for the job and performed well based on her employer's expectations, she suffered from an adverse employment action, and other similarly situated employees outside the plaintiff's protected class were treated better. This should not be difficult to demonstrate. Recall the case of Deborah, an African American woman employed as an administrative assistant for a large company. She can easily establish her prima facie case: she is a member of a protected class; she performed well in her job as demonstrated by her positive past performance evaluations; she was harassed by her super-

Among other factors, the number of class action disparate impact cases may be decreasing because of the difficulty plaintiffs face in mustering the necessary statistical evidence. On the one hand, under disparate impact jurisprudence, statistical evidence demonstrating a disparity in employment actions (i.e., hirings, terminations, and promotions) imposes a powerful burden on defendants to justify their actions. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) ("Statistics showing racial or ethnic imbalance are probative . . . only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."). However, in practice, this is often an extremely difficult threshold showing for plaintiffs to demonstrate at the prima facie stage of litigation. *See, e.g., EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1275 (11th Cir. 2000) (noting "no statistically-significant disparity" between the percentage of women who actually applied to Joe's and those who were hired as servers, despite no women being hired during the fifty-year period at issue).

⁸⁸ Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 671-72 (2001) (noting that the "number of disparate impact claims is not a reliable predictor of their actual importance" and that these cases have "much broader potential impact" than an individual disparate treatment case).

⁸⁹ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Given that "smoking gun evidence is rarely found in today's sophisticated employment world," *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n.12 (1st Cir. 1999) (internal citations omitted) (citing *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 171 n.8 (1st Cir. 1998)), the *McDonnell Douglas* burden-shifting framework is increasingly used by courts in Title VII cases.

⁹⁰ A Title VII plaintiff alleging disparate treatment must proceed under the *McDonnell Douglas / Burdine* burden-shifting framework. First, the plaintiff must establish a prima facie case that: (1) she was within a protected class; (2) she was qualified for the position and met the employer's legitimate performance expectations; (3) she was adversely affected; and (4) the evidence presented is sufficient to give rise to an inference of unlawful discrimination (i.e., similarly situated employees not of the complainant's protected class were treated better). The burden of production then shifts to the employer to rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for the dismissal. In the final stage, the burden of production shifts back to the plaintiff to show that the employer's stated reason for the plaintiff's dismissal was false and merely a pretext for discrimination. The burden of persuasion rests with the plaintiff at all times. *Burdine*, 450 U.S. at 252-54.

visor and ultimately terminated from her position; and finally, it appears that she was singled out for increased scrutiny in being required to document her time, and that other similarly situated, predominantly white administrative assistants were not treated the same. The burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. This burden is also likely to be easily met by employers, as it is here. In this case, the employer's reason for termination is insubordination, or Deborah's failure to meet with her supervisor to discuss her job responsibilities. At this stage, the burden shifts back to Deborah to demonstrate that the reason given by the employer is pretextual, and further, that the true reason for the adverse action was discrimination.⁹¹ This would be the stage where evidence of social science and empirical research on unconscious bias may have the strongest impact, but several questions still remain, specifically surrounding the use of expert testimony.

A. *The Role of the Expert Witness*

Commentators in this area generally agree on the importance of having an expert witness testify on the nature and pervasiveness of unconscious discrimination.⁹² What is less clear is how extensively a plaintiff should rely on an expert witness. An ideal plaintiff's expert witness on unconscious bias would be a social scientist who has engaged in extensive psychological research on unconscious discrimination. Professor Banaji⁹³ and Princeton University social psychology professor Susan Fiske would fit such a description. Assuming the expert witness meets all *Daubert*⁹⁴

⁹¹ While under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), the trier of fact is permitted to find for the plaintiff once pretext has been demonstrated, courts have split on this crucial issue in practice. Compare *Ratliff v. City of Gainesville*, 256 F.3d 355, 362 (5th Cir. 2001) (ruling that if the plaintiff establishes pretext the trier of fact is "permitted, but not required, to enter judgment for the plaintiff"), with *Schnabel v. Abramson*, 232 F.3d 83, 88 n.3, 88-91 (2d Cir. 2000) (holding that plaintiff had demonstrated that the employer's proffered legitimate, non-discriminatory reason could be construed as pretextual, but affirming summary judgment for the employer because plaintiff had "not demonstrated that the asserted pretextual reasons were intended to mask age discrimination").

⁹² It is worth noting that, despite the universality of this recommendation, it is still rare in practice. See Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 573 (2001).

⁹³ Banaji and her IAT colleagues have publicly stated that they would not allow the IAT to be used in litigation to hold individuals accountable for their unconscious biases. Vedantam, *supra* note 26, at 7. Presently, they hope the test will be used for personal and public education. *Id.* It is not clear, however, whether they would object to the use of research based on IAT results in the litigation of employment discrimination cases.

⁹⁴ Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. The trial court determines whether the underlying reasoning and methodology of the potential expert witness testimony is "scientifically valid" and whether the testimony will assist a trier of fact to understand or determine a fact in issue. *Daubert v. Merrell Dow Pharm.*,

qualifications, there appear to be two approaches for the plaintiff. The first option is for the plaintiff to provide an expert who would testify about the extensive cognitive psychological research explaining the manner in which humans codify, store, and recall information based to a certain degree on implicit stereotyping; it would then be left to plaintiff's counsel to make the argument that the facts at issue—including factors such as the number of minorities employed, organizational structure, and evaluation procedures—strongly suggest that the unconscious bias of the decision-maker led to the adverse employment decision. The second option is for an expert to first provide a general overview of the social science research in the area and then to render an opinion, based on her analysis of the facts of the particular case, as to whether she believes the unconscious bias of the decision-maker had a role in the adverse employment action. The latter approach appears promising given the nature of courts' prior acceptance of expert witness testimony on stereotyping in employment discrimination cases.⁹⁵

B. Presentation of Expert Testimony and Related Evidence

Evidence of unconscious bias may have its greatest impact in the final phase of the *McDonnell Douglas* burden-shifting framework, where some courts have created a heightened pretext requirement despite *Reeves*.⁹⁶ Re-

Inc., 509 U.S. 579, 592–93 (1993). Based on courts' prior analyses, it seems likely that a proposed expert such as Fiske or Banaji would meet *Daubert* qualifications. See, e.g., *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1262–65 (N.D. Cal. 1997) (reviewing Fiske's qualifications and denying defendant's motion to exclude Fiske's testimony regarding social psychology and stereotyping under *Daubert*).

⁹⁵ In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Court found expert testimony by social psychology professor Dr. Susan Fiske to be probative of sex stereotyping on the part of the decision-makers. *Price Waterhouse*, 490 U.S. at 255 (plurality opinion). Dr. Fiske's testimony included analysis of written evaluations and statements describing Hopkins. *Id.* While this lends some support to the use of experts in unconscious discrimination cases, it is not clear how the current Supreme Court, comprised of more *Price Waterhouse* dissenters than those in the plurality, would approach testimony on unconscious bias when there will likely be no tangible evidence of stereotyping. Plaintiffs may find encouragement in Justice O'Connor's apparent acceptance of the use of expert testimony to build evidence of employer reliance on stereotyping. See *id.* at 277 (O'Connor, J., concurring) (noting that expert evidence alone would not justify shifting the burden of persuasion in mixed motive cases to the employer); see also *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 60 (1st Cir. 1999) (citing *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 864 (D. Minn. 1993) (noting that expert testimony related to sex stereotyping may be relevant to plaintiff's disparate treatment claim under *Price Waterhouse*)).

An expert such as Dr. Fiske appears particularly attractive to plaintiffs given her testimony in several employment discrimination cases since *Price Waterhouse*. See, e.g., *Cremmin v. Merrill Lynch*, 328 F. Supp. 2d 865 (D. Ill. 2004) (testifying before arbitration panel on behalf of prevailing plaintiff class in Title VII gender discrimination suit); *Butler*, 984 F. Supp. at 1257 (testifying on behalf of plaintiffs in class action Title VII gender discrimination suit); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502–06 (M.D. Fla. 1991) (discussing Fiske's testimony on behalf of prevailing plaintiff in sex harassment case).

⁹⁶ See *supra* note 91.

call Alejandro, the plaintiff who worked for several years at a retail store and who was passed up for promotions and ultimately terminated from his position. He, like most Title VII plaintiffs, is able to make a prima facie case of discrimination;⁹⁷ the difficulty lies in the third phase of the burden-shifting framework. He will assert that he was discriminated against because other similarly situated (or arguably less qualified) white employees were promoted, and a white co-worker apparently was treated more leniently with regard to misringings of the cash register. This creates a presumption that the retail employer discriminated against Alejandro.⁹⁸ To counter this presumption, the employer must “articulate some legitimate, nondiscriminatory reason” for the adverse actions taken against Alejandro, which, if believed by the trier of fact, would support a finding that prohibited discrimination did not cause the adverse action.⁹⁹ The employer would likely meet its burden of production at this stage¹⁰⁰ for both the failure to promote and the termination claim by alleging that the other candidates had qualifications unbeknownst to the plaintiff and by stressing the need to enforce company policy, respectively. At the final stage of the burden-shifting framework, the plaintiff must persuade the trier of fact that these reasons are pretextual.¹⁰¹ With respect to the failure to promote claim, Alejandro could argue that the company had a policy of promoting from within, that he had been told by management that sales and “back of the house” experience were necessary for the position, and that each person hired for the position lacked this stated skill set that he himself possessed. With respect to the termination claim, Alejandro can point to an arguably similarly situated white employee who was given warnings for alleged fraud violations before being terminated. But has he carried his burden of persuasion?

Based on the practical consideration that some courts require plaintiffs to demonstrate more than a pretext of discrimination at this stage, it may be at this precise moment in litigation that unconscious bias evidence will have the most impact. In support of his argument that the employer’s proffered legitimate, nondiscriminatory reason is pretext, Alejandro could present expert witness testimony on how unconscious bias pervades a supervisor’s mental impressions of an employee’s abilities and performance. Dr. Susan Fiske has provided expert testimony of this nature in several employment discrimination cases.¹⁰² General testimony on social psy-

⁹⁷ See *supra* note 90.

⁹⁸ See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)).

⁹⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *St. Mary’s Honor Ctr.*, 509 U.S. at 507 (citing *Burdine*, 450 U.S. at 254).

¹⁰⁰ See *St. Mary’s Honor Ctr.*, 509 U.S. at 508 (citing *Burdine*, 450 U.S. at 254–55).

¹⁰¹ See *supra* note 90.

¹⁰² Dr. Fiske would likely be asked to provide expert testimony similar in nature to that which she provided in *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1261 (N.D. Cal. 1997), a class action Title VII gender discrimination case. In *Butler*, the plaintiffs offered testi-

chology research regarding how humans naturally and implicitly stereotype individuals from the moment of introduction, and how this initial stereotype shapes the processing of incoming information about the individuals' performance, could help Alejandro. This research could explain how a similar action—the misringing of the cash register—could be viewed differently when he committed the action as opposed to a white comparator; the difference is that his actions may have been viewed through the lens of implicit stereotypes. The expert's testimony should also include research findings regarding the disconnect between individuals' self-professed attitudes toward race and their implicit associations.¹⁰³ The facts presented in support of pretext, combined with this presentation of empirical psychological data on unconscious bias, may cause the trier of fact to reach a tipping point whereby he deems that the plaintiff has met his burden of persuasion.

Indeed, the plaintiff in *Thomas* successfully advanced this type of argument. At the third stage of the *McDonnell Douglas* burden-shifting framework, she challenged the “racial neutrality” of the defendant's proffered legitimate nondiscriminatory reason—that the termination decision was based solely on racially neutral performance evaluations.¹⁰⁴ The First Circuit specifically noted that this type of claim is also a “cognizable” form of disparate treatment: “[I]f an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to ‘discriminat[ion] . . . because of . . . race.’”¹⁰⁵ For the court, the ultimate question was whether the employee had suffered disparate treatment “because of race,” irrespective of whether the employer “consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.”¹⁰⁶

mony from Fiske to establish:

(1) that gender stereotyping plays a major role in Home Depot's hiring, placement, and promotion patterns, (2) that much of this stereotyping is automatic and not fully conscious at the individual level, (3) that stereotyping is nevertheless convenient for individual decisionmakers, so they do not examine it, (4) that organizations can control these effects of stereotyping through proper information and motivation, and (5) that Home Depot has not taken adequate steps to control these biased individual practices.

Id. at 1262.

¹⁰³ See *supra* Part I.A.

¹⁰⁴ *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 56, 58 (1st Cir. 1999).

¹⁰⁵ *Id.* at 58 (internal citation omitted).

¹⁰⁶ *Id.* (noting from its prior precedent, *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984), that disparate treatment plaintiffs may challenge “subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers”).

A counterexample may be instructive. In *Ezold v. Wolf, Block, Schorr and Solis-Cohen*,¹⁰⁷ the plaintiff alleged that unlawful sex discrimination led to her failure to be promoted to partner at her law firm. The district court had found that Wolf's legitimate nondiscriminatory reason—that Ezold lacked the requisite “legal analytic ability”¹⁰⁸ to join the partnership as a full member—was a pretext for discrimination. But the Third Circuit held this finding to be clearly erroneous and unsupportable by the evidence.¹⁰⁹ In reaching this conclusion, the court devoted significant attention to the district court's interpretation and findings with respect to the evaluations of Ezold's male peers who were also being considered for partnership. The evaluations that were reviewed in determining whether a senior associate would be offered a partnership were admittedly subjective in nature; partners were asked to provide grades as well as written comments.¹¹⁰ While both the district and reviewing court devoted considerable attention to identifying the appropriate male comparator for Ezold, it is interesting to note that it appears that the plaintiff did not draw any attention to the highly subjective nature of the evaluations.¹¹¹ Specifically, the plaintiff did not appear to present evidence to support the argument that the evaluations themselves, upon which her promotion was largely decided, may have been influenced by unconscious biases.

While it is unclear what impact expert testimony on unconscious bias would have had in Ezold's case, it would have been advantageous for the plaintiff to have explored this possibility. Even before she began employment at the firm, she was told during her interview that it would not “be easy for her at Wolf because ‘she was a woman, had not attended an Ivy League law school, and had not been on law review.’”¹¹² Given what is known from the social psychology literature, this is notable because once an impression is formed in the human mind, incoming information—such as impressions and evaluations of employee performance—is categorized and processed based on this initial stereotype; stereotype-consistent behavior is also more easily recalled.¹¹³ Other conditions may have contrib-

¹⁰⁷ 983 F.2d 509 (3d Cir. 1992).

¹⁰⁸ *Id.* at 526. Legal analysis was defined by the firm as the “ability to analyze legal issues, grasp problems, collect, organize and understand complex factual issues.” *Id.* at 515.

¹⁰⁹ *Id.* at 547.

¹¹⁰ *Id.* at 515. The five grade categories were distinguished, good, acceptable, marginal, and unacceptable. *Id.*

¹¹¹ “Wolf's articulated [legitimate, nondiscriminatory] reason, lack of legal analytic ability to handle complex litigation, like all its other criteria, involves subjective assessment of an associate's manifested behavior and performance.” *Id.* at 530. Partner candidates were evaluated on ten criteria measuring legal performance and ten personal characteristics, which included “creativity,” “negotiating and advocacy,” “attitude,” “ability under pressure,” and “dedication.” *Id.*

¹¹² *Id.* at 514.

¹¹³ See *supra* Part I; see also Krieger, *supra* note 6, at 1242 (discussing application of social cognition theory to employment discrimination litigation in general terms); White & Krieger, *supra* note 44, at 524–25 (arguing that lower level supervisor recommendations, which may themselves be affected by unconscious biases, influence the ultimate decision-

uted to the facilitation of unconscious stereotyping, such as Ezold's near-solo status among those being considered for partnership.¹¹⁴ These factors, which enable the activation of automatic stereotyping, may have played a role in how her supervisors viewed her performance over the years as compared to her male peers. Given the increased scrutiny by courts as to whether the plaintiff has identified appropriate comparators,¹¹⁵ it is important to note the potential of this form of evidence.

Strategies to incorporate unconscious bias theory in litigation should also include the introduction of evidence pertaining to causation and the solo effect. Assuming a plaintiff is able to persuade the trier of fact that unconscious bias falls within the rubric of disparate treatment, she still encounters the difficulty of demonstrating that the decision-maker acted *because of* unconscious bias stemming from the plaintiff's protected trait. While this hurdle is not insignificant for plaintiffs, psychological research may suggest options to address this concern. Research has demonstrated that the best predictors of an absence of unconscious bias is an individual's self-identified political ideology and whether an individual has personal friends of different races (with those self-identifying as liberal and having personal friends of the opposite race demonstrating less unconscious racial bias).¹¹⁶ Given this finding, plaintiffs could conceivably question Joan, the supervisor in Deborah's case, on her political beliefs and the racial identity of her friends. Support for expert testimony and analysis on this issue may be found in *Daubert*: this type of expert testimony (and the necessary information on the employer/supervisor) could arguably assist the trier of fact in determining a fact at issue.¹¹⁷ If the IAT were ap-

maker's actions in a "recommendation-consistent direction").

¹¹⁴ Of the eight associate candidates in Ezold's class, five male associates and one female associate were recommended for regular partnership. *Ezold*, 980 F.2d at 520.

¹¹⁵ See, e.g., *Holbrook v. Reno*, 196 F.3d 255, 261 (D.C. Cir. 1999) (stating that female plaintiff must show that "all of the relevant aspects of her employment situation were nearly 'identical' to those of the male employee"); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997) ("Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.").

¹¹⁶ IAT-related research results are based on voluntary questionnaires IAT internet test takers are asked to complete before beginning the test. Vedantam, *supra* note 26, at 4; see Fiske, *supra* note 35, at 128 (noting that intergroup friendships "demonstrably" reduce stereotyping, prejudice and discrimination). While it is important to note that Banaji and her colleagues are opposed to holding individuals responsible for their unconscious biases, it is not clear whether they would oppose the introduction of social science research stemming from their aggregate IAT results.

¹¹⁷ See *supra* note 94. In ruling on the plaintiffs' motion for class certification, the court in *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 154 (N.D. Cal. 2004), recently dealt with the unique nature of this type of expert testimony in discussing the opinions of the expert in the case, Dr. Bielby:

Defendant also challenges Dr. Bielby's opinions as unfounded and imprecise. It is true that Dr. Bielby's opinions have a built-in degree of conjecture. He does not present a quantifiable analysis; rather, he combines the understanding of the scientific community with evidence of Defendant's policies and practices, and concludes that

proved to be administered for litigation at some point in the future,¹¹⁸ a test result that Joan exhibited an implicit preference for whites over blacks at a deposition or at trial would not necessarily demonstrate that she was motivated by this bias when she made the termination decision. However, even skeptics of the test's use in litigation like Banaji agree that implicit biases are a "powerful predictor" of how people actually behave.¹¹⁹

The plaintiff should also present specific evidence on the tendency for protected class members to be evaluated more harshly when they are the single representative of their class within their work cohort. The *Price Waterhouse* court recognized this phenomena, referred to as the "solo effect" in social psychology. As Dr. Fiske testified, Ann Hopkins' "uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks" from those who evaluated her candidacy for partnership, but had little contact with her, "were the product of sex stereotyping";¹²⁰ in other words, being the only woman in the pool of candidates increased the likelihood that she would be judged more severely.¹²¹

Citing *Price Waterhouse*, the *Thomas* court reached a similar conclusion noting that the "very fact that Thomas was the only black [Customer Support Representative] at the Wellesley office may have increased the likelihood that she would be evaluated more harshly."¹²² Because Alejandro and Joan were both near-"unique" employees in this sense, expert testimony on the nature of the "solo effect" would be advantageous to present during litigation; doing so may convince the trier of fact that the very evaluations of their performances, upon which the adverse employment actions ostensibly relied in part, were colored by their supervisors' unconsciously stereotyped lenses.

Wal-Mart is "vulnerable" to gender bias. See Bielby Decl. ¶ 63. Defendant rightly points out that Dr. Bielby cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. See Def.'s Opp'n at 20:25-28. However, this is the nature of this particular field of science. See FED. R. EVID. 702 (allowing "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence") (emphasis added).

Dukes, 222 F.R.D. at 154. The court concluded that Bielby's testimony was warranted at this stage of litigation because it could "add probative value to the inference of discrimination that plaintiffs allege." *Id.* at 154.

¹¹⁸ In addition to Banaji and others' reluctance to have the test used in litigation at the present time, an additional concern related to its use is the finding that highly motivated individuals are able to register less implicit bias by temporarily holding counter-stereotypes in their minds. Vedantam, *supra* note 26, at 7. Of course, this tactic, among others, may also be used by those who desire to alter their implicit biases in the long-term. See *supra* Part I.A.

¹¹⁹ Vedantam, *supra* note 26, at 4.

¹²⁰ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989).

¹²¹ See *supra* note 20 and accompanying text.

¹²² *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 65 (1st Cir. 1999) (citing *Price Waterhouse*, 490 U.S. at 235-36).

Finally, a plaintiff would be well-served to argue directly an unconscious bias theory of the case. The First Circuit in *Thomas* stated that unconscious bias was actionable under Title VII and that it was reasonable to infer that the supervisor's evaluations of Thomas were "affected by some form of conscious animus or less conscious bias."¹²³ This somewhat surprising directness appears to have been motivated in part by the plaintiff's argument that the negative evaluations she received, which could not be reconciled with objective measures of her performance, were colored by her supervisor's unconscious bias.¹²⁴ While the court admitted its precedent may give the impression that only conscious bias is actionable, the court went on to state that this merely reflected how plaintiffs have presented their cases.¹²⁵ This statement should encourage plaintiffs and their attorneys that increased overt reliance on unconscious bias theory will help promote its further understanding and judicial acceptance.

CONCLUSION

Unconscious bias is the emerging form of discrimination that limits employment opportunities for women and minorities. Courts have acknowledged its existence for some time and have more recently begun to engage in explicit discussion of its prevalence and its inclusion in Title VII's prohibitions. While commentators disagree as to whether disparate treatment or disparate impact is the appropriate model for incorporating unconscious bias theory, practical considerations favor further exploration in the disparate treatment context. In particular, an analysis of hurdles presented in the litigation of an unconscious bias disparate treatment case reveals that the most viable strategy may be encouraging plaintiffs (and their attorneys) to bring strong cases that appear to have an unconscious bias component with the goal of developing judicial discourse on the most acceptable means of demonstrating unconscious bias. In this way, plaintiffs such as Deborah and Alejandro may hope to find relief from being hindered in their employment opportunities by a discrimination for which there is no direct proof.

¹²³ *Id.* at 64.

¹²⁴ *Id.* at 62–64.

¹²⁵ *Id.* at 58 n.13.

