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Omnipotent Squirrels in the Attic: Trapping the Elusive “Intent” in Employment Racial Discrimination

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An acquaintance once shared the story of a family whose attic was infested with squirrels. The family would hear the squirrels scampering about above their ceiling. But whenever they went to the attic, the squirrels were out of sight. All of their efforts to keep the squirrels out of the attic, or to trap and evict the squirrels, failed. The squirrels even chewed through the metal wire that was placed in front of any opening to the outside. I joked that this family had an infestation of "omnipotent squirrels."

Proving racial discriminatory treatment in the workplace, or at the hiring phase, is a lot like trying to trap "omnipotent squirrels." Racial discrimination is often disguised and elusive. It stays out of sight. It is difficult to eradicate. And most of all, it is usually difficult to catch it in clearly visible discriminatory acts.

This essay will focus upon disparate treatment discrimination under Title VII of the Civil Rights Act of 1964.[1] Disparate treatment occurs where an employer has treated a particular person less favorably than others because of a protected trait. A plaintiff must establish that the employer had a discriminatory intent or motive for taking an adverse job-related action.[2]

However, direct evidence of intent to discriminate is difficult to obtain. Few employers articulate racial animus or prejudice in an explicit fashion, or leave a paper trail with "smoking gun" evidence, since doing so would guarantee defeat.[3] For this reason, the Supreme Court

[1]Title VII prohibits discrimination in "terms, conditions, or privileges" of work and the adoption of policies or practices that "deprive any individual of employment opportunities because of a protected classification (race, color, religion, sex, or national origin) that adversely impacted the employee in the terms and conditions of his or her employment. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255; 42 U.S.C.A. § 2000e-2(a)(West).
[2]Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009).
[3]United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

offered Title VII plaintiffs an alternative. The three-step burden-shifting analytical framework established in *McDonnell-Douglas v. Green* and *Texas Dept. of Community Affairs v. Burdine* was designed to permit plaintiffs to provide circumstantial or indirect evidence that an employee, or job applicant, in a protected group, was singled out and treated less favorably than others similarly situated, thereby establishing a prima facie case of discrimination. If a plaintiff establishes this prima facie case, the employer, to prevail, must rebut the plaintiff's evidence by proffering a "legitimate, non-discriminatory reason for the adverse employment action." The plaintiff then has the opportunity to offer evidence to persuade the court that the employer's explanation is unworthy of credence, and therefore, is most likely a pretext for discrimination.[4]

The *McDonnell-Douglas* framework was premised upon the "baseline assumption" that discrimination is an explanatory variable because it remains a pervasive reality in the American workplace.[5] When a plaintiff successfully makes a prima facie showing of discrimination, a "presumption of invidious intent" arises from the plaintiff's membership in a disfavored group.[6] As Justice Souter argued, when the employer's proffered reasons are exposed as implausible, then the decision was more likely than not the result of racial discrimination.[7]

However, numerous Supreme Court decisions since the early 1990's have made it more difficult for racial employment discrimination plaintiffs to prevail by eroding this baseline

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[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56, 255, n. 8 (1981). The framework is also referred to as *McDonnell-Douglas-Burdine*.

[5] Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 328 (1997); David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOU. L. REV. 1033, 1090 (2019

[6] Adamson v. Multi Cmty. Diversified Servs., Inc., 514 F.3d 1136, 1149 (10th Cir. 2008); Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1181-82 (1995).

[7] St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 530-35 (1993)(Souter, J., dissenting); *see also* Simson, *supra* note 6, at 1090.

assumption. *St. Mary's Honor Ctr. v. Hicks*[8] and *Reeves v. Sanderson Plumbing Prod., Inc.,*[9] moved the proverbial goal-line for plaintiffs by holding that the factfinder's rejection of the employer's proffered reason for its adverse employment action does not necessarily establish that the employment action was more likely than not the result of impermissible discrimination. Courts have also created other "sub-doctrines" that make it even more difficult to prove intentional discrimination, such as the "stray remarks doctrine"[10] and the "same actor defense."[11]

Approval for overt discriminatory attitudes and actions has diminished since the passage of the 1964 Civil Rights Act. "Second generation racism" is more subtle, suppressed, and implicit and therefore, harder to prove.[12] Beginning with the groundbreaking work of Charles Lawrence, III, many legal scholars have argued that courts should permit evidence of implicit bias. Drawing upon psychoanalytic theory and cognitive psychology, Lawrence argued that the source of most racial harm is found primarily in unconscious racist acts.[13] Linda Hamilton Krieger, among others, has been an advocate of the thesis that most employment discrimination

[8]St. Mary's Honor Ctr. v. Hicks, 509 U.S. 511, 519 (1993).
[9]Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000).
[10]The stray-remarks doctrine is the legal rule that a decision maker's occasional or sporadic use of stereotyped remarks or derogatory comments about an employee's age protected class is insufficient, without more, to establish a violation of Title VII because the prejudices revealed in such comments may not have been a factor in the employment decision. Knox v. First Nat'l Bank of Chi., 909 F. Supp. 569, 572-73 (N.D. Ill. 1995); Kerri Lynn Stone, *Clarifying Stereotyping*, , 59 U. KAN. L. REV. 591, 609-10 (2011).
[11]The same-actor defense is possible when an employer's decision-maker first makes a decision that benefits the claimant and later, the same supervisor or decision-maker makes another decision that adversely affects the claimant. The implicit theory supporting the doctrine is that a decision-maker with biases against members of a protected group would not, for example, have hired a member of the group in the first place. Therefore, the subsequent adverse decision cannot be discrimination. Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CAL. L. REV. 1, 18–19 (2016).
[12]The term "second-generation racism" was coined by law professor Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 930 (2016).
[13]Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

today is caused by implicit bias that is uncontrollable and unconscious.[14] It has been proposed that implicit bias evidence might serve to create an inference of discrimination when workplace decisions have discriminatory results, but decision-makers do not believe they harbor animus.[15]

However, as Michael Selmi argues, recourse to implicit bias is problematic for Title VII disparate treatment claims. Labeling discrimination as unconscious and uncontrollable, is likely to place it beyond legal reach, thereby making it more difficult to prove since governing legal standards often turn on one's ability to control one's behavior. [16] Since there is no singular consensus within the discipline of psychology about human consciousness, the nature of the unconscious mind, and the relationship between conscious and unconscious processes, there is little to be gained legally by appealing to unconscious biases, if the concept of "unconscious" is tethered to any particular theoretical account of the unconscious.[17]

Instead of turning inward to the unconscious, the way forward is to turn outward to analysis of socially mediated patterns of racial bias and racial discrimination. The search for evidence of patterns of social interaction, such as an inclination toward reinforcing racial hierarchy. The litigator's task is to scour the facts of the case for subtle racial biases embedded in patterns of interaction and habits of speech, such metaphor, cultural tropes and stereotypes.

The central argument of this essay is that culturally pervasive racial schemas, stereotypes, attitudes, beliefs, and legitimating ideologies, with deep roots in western history, provide some of the most important resources for lawyers representing Title VII discrimination plaintiffs.

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[14]Krieger, *supra* note 6, at 1170.
[15]Bornstein, *supra* note 12, at 934-35. Bornstein is describing the implicit bias in employment law. This is not her own position.
[16]Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L. J. 193, 195, 197-98 (2018).
[17]John A. Bargh and Ezequiel Morsella, *The Unconscious Mind*, 3 PERSEPCT. PSYCHOL. SCI. 73, 73-74 (2008).

Long-standing racial schemas that have shaped the social imagination of large segments of American society provide a metaphorical "lens" to enable the identification of subtle forms of racial discrimination. Awareness of these racial schemas, and the patterns of social interaction that tend to be produced by these latent racialized ways of perceiving persons and situations, will provide resources for situating facts into narrative frameworks, compelling stories persuasive to finders of fact.

In order to craft this argument, I will endeavor to weave a tapestry that makes connections between the current state of Title VII jurisprudence, some of the most interesting proposals of legal scholars seeking to develop evidence on the basis of stereotypes and identifiable patterns of subtle discriminatory behavior in the workplace, and recent theological analyses of the origins of a racialized imagination within medieval European Christianity that created white supremacy.

Part one of this essay will explore the complexities of Title VII racial discrimination jurisprudence and the challenges faced by plaintiffs seeking to prove that they were singled out and treated less favorably than others because of race or national origin. In this section, the *McDonnell-Douglas* framework will be discussed and the development of sub-doctrines that have made proving workplace discrimination extremely difficult.

The second portion of the essay will describe the claims and proposals of legal scholars, including Charles Lawrence, III, Jerry Kang, and Linda Hamilton Krieger, who have been advocates for implicit bias research in litigation. Krieger, as well as Susan Sturm, have specifically applied implicit bias evidence to employment law. This segment of the essay will also present the criticisms of "sympathetic critics" who share the goals of advocates of implicit bias research, but who believe that the appeal to unconscious motives is both counterproductive

and unnecessary. It will argued that what is implicit is not necessarily unconscious if the unconscious is defined as inaccessible to rational reflection and uncontrollable.

This section will conclude with the argument, which will set the stage for the rest of the essay, that the most important insight, at least for employment discrimination litigation, of the advocates of implicit bias is the recognition that implicit bias is actually the "internalization" of culturally mediated stereotypes, racial classifications and other cultural tropes or schemas.[18]

The third segment of this essay will explore Krieger's appropriation of insights from social cognition theory regarding processes of categorization, stereotypes, racial schemas, and intergroup bias. Krieger's ground-breaking argument, which is foundational to the argument of this essay, is that, within second-generation racism, race, gender, and national origin most often "make a difference," not because of malicious intention to discriminate, but rather, because racial schemas provide the proverbial "lenses" through which the decision-maker perceives persons and employment-relevant events. Implicit racial, and other, biases shape what a decision-maker "sees," how she interprets it, the causes to which he attributes it, and what they remember and forget.[19]

In order to make advance the central argument of this essay, it will be important, in the fourth segment, to propose minor reformations of Title VII jurisprudence that are more generous to plaintiffs. However, it is important to note that Title VII jurisprudence is not an entirely consistent or coherent body of legal doctrine. There are trajectories within Title VII jurisprudence that seem to define and limit impermissible discrimination to conscious

[18]CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (2003).
[19]Joan C. Williams et. al., *Beyond Implicit Bias: Litigating Race and Gender Employment Discrimination Using Data from the Workplace Experiences Survey*, 72 94 HASTINGS L.J. 337 (2020).Krieger, *supra* note 6, at 1179.

discriminatory intent or motive. In other words, employers must be aware that they are motivated by the employee's protected characteristic, such as race, sex, or national origin. However, other trajectories of Title VII jurisprudence have proven more capable of recognizing the role of subtle discrimination and judgments of employees based upon stereotypes. Therefore, the minor reformations that will be proposed are, in effect, advocacy that Title VII jurisprudence as a whole embrace these developments and trajectories that are more compatible with the realities of "second generation" racism. These proposed reformations include more flexible application of the *McDonnell-Douglas* test and a softening of the distinction between direct and indirect evidence in order that "stray remarks" giving expression to racial bias or stereotypes might be accorded greater weight in the effort to determine, by a preponderance of the evidence, whether the plaintiff was a victim of employment racial discrimination.

In the fifth section of the paper, I will return to and develop the thesis of the essay. The segment will begin with Robin Lenhardt that the category schemes and cognitive biases described by Linda Hamilton Krieger are not neutral or innocent. Our categories and racial schemas come from the social and historical context in which we find ourselves and result in categorization that inflicts harm, producing hierarchies in which some persons and groups are valued and others are excluded or stigmatized.[20] In this section, I begin to advance and develop the argument that culturally pervasive racial schemas, stereotypes, attitudes, beliefs, and legitimating ideologies, with deep roots in western history, provide some of the most important resources for lawyers representing Title VII discrimination plaintiffs. To do so, this essay will turn to sources rarely engaged in legal scholarship. Prior to Enlightenment racial "science," the

[20]R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 827 (2004).

idea of race emerged within western medieval and early modern Christianity. As western European Christians encountered the non-white "other," racial difference was mapped onto religious difference to create a hierarchical imagination, a scale of human being with lighter-skinned persons at the top of the hierarchy and dark skinned persons at the bottom of the scale. Associated with white skin was superior intelligence, morality, and beauty. This racial hierarchy functioned to legitimate slavery, domination, and colonial conquest. This racialized imagination and racial aesthetic shaped the landscape of American society and law. In spite of the fact the positive developments in American law and society in the 1960's, which officially rejected the avowed white supremacy that characterized American society for most of its history, a post-racial social order did not miraculously spring into existence. The white supremacist social imagination persists in multiple forms, from implicit bias, to explicit biases and stereotypes believed by persons who, paradoxically, simultaneously believe in racial egalitarian ideals, and in racism that may be concealed in polite company but explicitly articulated when persons believe themselves to be out of earshot of persons who would disapprove.

The sixth segment of this essay will connect the white supremacist social imaginary that had its origins in the western medieval Christian creation of race and a racial, hierarchical scale of human being with the identification of multiple patterns of workplace bias by the Workplace Experiences Survey ("WES"). Joan Williams, Rachel Korn, and Sky Mihaylo argue that the WES provides a fine-grained description of how racial and gender bias play out in everyday workplace interactions in pervasive and persistent patterns that are broadly recognized.

The final segment of this essay will offer a brief, suggestive look at how this approach might serve lawyers through its application as a lens through which to interpret factual details and craft a story of workplace discrimination.

Quick Methodological Notes

Much of the action in employment discrimination litigation takes place under state law, which often is modeled after Title VII, and is adjudicated by a state agency, such as the Department of Workforce Development's Equal Rights Division in Wisconsin. However, this essay will focus on Title VII and case law from federal courts.

This essay will restrict its focus to race discrimination. However, Title VII cases dealing with sex discrimination will be integrated into the analysis when helpful

Note on Language

In order to write inclusively, I will intersperse pronouns and sometimes utilize he or his, at other points she or her, and sometimes, they or their. When possible, I will refer to parties as plaintiffs and decision-makers or defendants in order to use entirely gender neutral language.

I. Title VII: Discriminatory Treatment Jurisprudence: The Primary Trajectory

Section 703 of Title VII of the Civil Rights Act of 1964[21] bans employment discrimination, which pertains to adverse employment actions with respect to hiring, promotion, compensation, discharge, or other terms, conditions, and privileges of employment *because of* a person's race, color, religion, sex, or national origin.[22] The Supreme Court has asserted that there

[21] Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

[22] It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a)(1)(West).

Title VII's protections apply to employers with fifteen or more employees employment agencies, and labor unions. 42 U.S.C.A. § 2000e-2(c)(West).

are only two causes of action under Title VII: (1) disparate treatment, which is intentional discrimination, and; (2) disparate impact.[23] Disparate treatment occurs where an employer has treated a particular person less favorably than others because of a protected trait. A plaintiff must establish that the employer had a discriminatory intent or motive for taking a job-related action.[24] Disparate impact pertains to an employer's facially neutral practices that are, in fact, discriminatory in their operation and outcomes or effects.[25] This essay will focus upon disparate treatment claims for racial discrimination in employment.

The statutory language forbids adverse employment actions *because of* a person's race, color, religion, sex, or national origin.[26] The words "because of" do not offer much guidance on what type of causation is required.[27] Linda Hamilton Krieger points out that a reasonable interpretation of the statutory language would simply require proof of causation rather than proof of motive. On this interpretation, a Title VII claimant would need only establish that his or her protected status "made a difference" or "played a role" in the challenged employment decision.[28]

Ambiguities and inconsistencies within Title VII jurisprudence have given rise to a disagreement between legal scholars such as Krieger, on the one hand, and Michael Selmi, Joan Williams, Sky Mihaylo, and Rachel Korn, on the other. While this issue will be addressed at

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[23] E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 771 (2015).
[24] Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009).
[25] *Id.* Disparate impact has been associated with 42 U.S.C.A. § 2000e-2(b)(West): It shall be an unlawful employment practice for an employer—
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
In Griggs v. Duke Power Co., 401 U.S. 424, (1971), the Supreme Court first held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703 of the Civil Rights Act of 1964. The evidence required in "disparate impact" cases usually focuses on statistical disparities and competing explanations for such disparities rather than focusing on specific incidents.
[26] 42 U.S.C.A. § 2000e-2(a)(1) (West):
[27] Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 491 (2006).
[28] Krieger, *supra* note 6, at 1168.

greater length in the fourth section, it is important to identify the disagreement. On the one hand, Krieger and Ann McGinley argue that the disparate treatment model is premised on the notion that racial discrimination is motivational in character. Therefore, an employer accused of discrimination must be consciously aware of their discriminatory behavior for the act to be classified as intentional discrimination. In the stories told by disparate treatment case law, Krieger argues, there is no discrimination without a villain, an invidiously motivated actor.[29] Justice Brennan gave voice to this trajectory of Title VII jurisprudence:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.[30]

On the other side of the scholarly debate, Williams, Mihaylo, and Korn argue that "intent" is a term of art in Title VII law that means that race or gender "has been taken into consideration by the decision-maker, or that the employee's protected trait entered the causal chain.[31] There is a line of case law that tends to interpret discriminatory intent as more fundamentally a matter of causation rather than motivation. A prime example comes from a first circuit case, *Thomas v. Eastman Kodak Co*., where the court stated,

> [t]he Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus .... 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.[32]

However, regardless of whether a court considers discriminatory intent to be most fundamentally motivational or causal, proving disparate treatment racial employment

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[29]Krieger, *supra* note 6, at 1161, 1167; Ann C. McGinley, *!viva La Evolucion!: Recognizing Unconscious Motive in Title VII,*. 94 CORNELL L.J. & PUB. POL'Y 415, 417 (2000).
[30]Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
[31]Williams et. al., *supra* note 19 at 403.
[32] Thomas v. Eastman Kodak Co., 183 F.3d 38, 58-59 (1st Cir. 1999).

discrimination is extremely difficult. On rare occasions, plaintiffs can prove, or at least attempt to prove, impermissible disparate treatment through direct evidence of discrimination. This requires evidence that so clearly and directly shows that an employment decision was made with discriminatory intent that no inferences are required by the factfinder to conclude that the employment decision was indeed discriminatory.[33]

However, the direct method of proof is rarely available. First, few employers articulate racial animus in an explicit fashion since doing so would guarantee defeat in an employment discrimination lawsuit. Second, any effort to offer direct proof of discriminatory intent is bedeviled by the fact that the mental states, motives or intentions, of employers are difficult, if not impossible, to observe or prove directly.[34] "There will seldom be eyewitness testimony as to the employer's mental processes."[35] Third, human behavior is complex and usually motivated by many different factors. As Kerri Lynn Stone notes, the mind of a discriminatory decision-maker is "a complex tapestry of unvoiced beliefs, assumptions and associations…… usually too tightly woven to easily uncover and isolate the discrete strand of thought that clearly shows a predisposition to see or judge certain groups differently.[36]

A. *McDonnell-Douglas-Burdine* Burden-Shifting Framework

Since direct evidence is more often than not, difficult to come by or not available at all, an employee in a protected group may offer indirect or circumstantial evidence that she or he was been singled out and treated less favorably than others who are similarly situated. The burden-shifting framework established in *McDonnell-Douglas v. Green* and *Texas Dept. of*

[33]Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511–12 (2002); Simson, *supra* note 6, at 1112; Bornstein, *supra* note 11, at 960.
[34] Simson, *supra* note 5, at 1072-73.
[35]United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).
[36] Stone, *supra* note 10, at 592.

Community Affairs v. Burdine[37] provides a three-stage analytical framework for proving intentional discrimination in situations where only circumstantial evidence is available.

A plaintiff alleging discrimination must first establish, by a preponderance of the evidence, a prima facie case of racial discrimination. Establishing a prima facie case of discrimination requires proving (1) that she or he belongs to a protected class; (2) that she or he was qualified for the position from which the person was terminated or the position the person applied for; (3) that she or he suffered an adverse employment action; [38] (4) the plaintiff was treated differently than someone outside of the protected class.[39] The last requirement is sometimes referred to as the requirement for "comparator" evidence. Sometimes, at least when the adverse employment action is failure to hire or to promote, the prima facie case is "established by proof that the employer, after having rejected the plaintiff's application, continued to seek applicants with qualifications similar to the plaintiff's.[40]

If the plaintiff establishes a *prima facie* case of racial discrimination, the burden of production, though not the burden of proof, shifts to the employer to provide a legitimate, non-discriminatory reason for the adverse employment action.[41] Employers are almost always able to present some facially plausible reason for firing or failing to hire or promote any particular employee or applicant. After all, most employees are not perfect, make mistakes, or sometimes show up to work late.

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[37] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 8 (1981).

[38] "Adverse employment actions" include termination, failure to hire, failure to promote, and sometimes, even a negative performance evaluation, if the negative evaluation results in denial of a raise or additional income such as a bonus.

[39] Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985-87 (1988); *Burdine*, 450 U.S. at 254-55; Walker v. NationsBank of Fla., N.A., 53 F.3d 1548, 1556 (11th Cir.1995).

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

[41] *Burdine*, 450 U.S. at 254-55; *Hicks*, 509 U.S. 502, 530, (1993)(Souter *Dissent).*

The ultimate burden of persuasion lies with the plaintiff, who must then rebut the employer's proffered non-discriminatory reasons by proving, by a preponderance of the evidence, that the reasons offered by the defendant were not the true reasons, but a pretext for discrimination. This burden merges with the ultimate burden of persuading the court that she has been a victim of intentional discrimination. A plaintiff may succeed either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.[42] A prime example of this process is found in *Jauregui v. City of Glendale*. After Officer Jauregui, a Hispanic police officer, established a *prima facie* case of discrimination, his employer, the City of Glendale, California, argued that Officer Jauregui had not been promoted because he lacked strong interpersonal relationship skills necessary for a supervisory position. However, Jauregui's purported lack of interpersonal relationship skills were not included in his performance evaluations. And, the comparator evidence initially presented in the effort to establish a *prima facie* case also was relevant to establishing pretext. The city's proffered non-discriminatory reason was exposed as pretextual. The white police officer promoted over Officer Jauregui had

[42] *McDonnell Douglas Corp.*, 411 U.S. at 802-05; *Burdine*, 450 U.S. at 253-56. Linda Hamilton Krieger provides an example of the effort to expose an employer's proffered reason as pretextual. Her client, a Salvadoran, was discharged. The employer claimed that his termination was because of tardiness, absence from work, and safety violations. This required Krieger to obtain his attendance and disciplinary records in his employee file and compare them with the records of his white co-workers to see if her client was treated differently. The effort to expose an employer's justification as pretextual might include, for example, evidence that the decision-maker undervalued or ignored facts favorable to the employee or evidence that the decision-maker is not able to point to any specific events that would reasonably support the decision-maker's judgments about the plaintiff. Krieger, *supra* note 6, at 1179-80. *See* Chiponllini v. Spencer Gifts, Inc., 814 F.2d 893, 901 (3d Cir. 1987)(showing that the employer's justification of the plaintiff's termination because of uncooperative behavior could not explain positive material in plaintiff's previous employment evaluations and was unable to offer specific examples of uncooperative behavior); Wilson v. Stroh Cos., 952 F.2d 942, 945 (6th Cir. 1992)(holding that plaintiff may establish pretext by proving that other employees who engaged in similar misconduct received less severe sanctions).

lower scores on the objective examinations and his performance evaluation noted the officer's "lack of interpersonal relationship skills."[43]

The Supreme Court in *Furnco Construction Corp. v. Waters* set forth what has been described as a presumption of invidiousness.[44] Writing for the majority, Justice Rehnquist stated that experience teaches that more often than not, people do not act in a totally arbitrary manner without any underlying reasons. This, he suggests, is all the more true in a business setting. Therefore, when all possible legitimate reasons for rejecting an applicant have been eliminated, it is more likely than not that the employer based his decision on an impermissible consideration such as race.[45]

David Simson and Michael Selmi argue that the *McDonnell-Douglas* test was originally premised upon the "baseline assumption" that discrimination is an explanatory variable because of the continued prevalence of racial discrimination in the workplace.[46] Until 1993, a plaintiff, relying upon the presumption of invidiousness, would, more likely than not, have succeeded on the *McDonnell-Douglas-Burdine* test by successfully persuading the court that the employer's proffered non-discriminatory reason for the adverse employment action was pretextual.[47] However, *St. Mary's Honor Ctr. v. Hicks*[48] and *Reeves v. Sanderson Plumbing Prod., Inc.* definitively moved the proverbial goal lines in a way that disadvantaged plaintiffs. The Supreme Court rejected the notion that there should be a mandatory finding of discrimination when an

[43]Jauregui v. City of Glendale, 852 F.2d 1128, 1135 (9th Cir. 1988).
[44]Krieger, *supra* note 6, at 1181.
[45]Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
[46]Simson, *supra* note 5, at 1090; Selmi, *supra* note 6, at 328
[47]There was confusion on this question and both a circuit split and contradictory conclusions within two circuits. The court of appeals in the second, third, fifth, eighth and D.C. circuits held that a finding of pretext mandates finding of illegal discrimination. Courts in the first, fourth, seventh, and tenth circuits held that a finding of pretext does not mandate finding of illegal discrimination without more evidence. The sixth and eleventh circuits featured divergent rulings on this question. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 512-13 (1993).
[48]Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000); *Hicks,* 509 U.S. at 502.

employee makes a prima facie case and then provides sufficient evidence that the employer's asserted non-discriminatory reason is not credible. In *Hicks,* the court held that proof that the employer's proffered reason is contrived does not compel judgment for the plaintiff that proof does not in itself answer the ultimate question of whether the employer intentionally discriminated. "It is not enough ... to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination."[49]

The court in *Reeves* allows that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. But, if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, even if the defendant gave a false explanation to conceal that nondiscriminatory, but perhaps embarrassing reason, the inference of discrimination will be weak or nonexistent.[50]

In his dissent, Justice Souter defended the *McDonnell-Douglas* burden-shifting framework "as it was" by asserting that this test was devised by the court to deal with employment discrimination claims when only circumstantial evidence is available. He pointed out the obvious dilemma in almost all disparate impact discrimination claims: There is seldom eyewitness testimony regarding an employer's "mental processes." And employers who discriminate are not likely to announce their discriminatory motive.. Justice Souter argued that the majority's scheme sets an almost impossibly high bar for Title VII plaintiffs without direct evidence of discriminatory intent. Now, the plaintiff is now faced with the amorphous

[49]*Reeves* 530 U.S., at 146-47; *Hicks,* 509 U.S., at 511, 519, 524; Selmi, *supra* note 5, at 329.
[50]*Reeves* 530 U.S., at 147-48.

requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record."[51]

David Simson contends that Justice Souter's dissent and the majority opinion in *Hicks.* represent divergent assumptions about the extent of discrimination in the American workplace. Justice Souter speaks of "common experience," by which he means the ongoing realities of racial and other discrimination. For Justice Souter, this common experience serves as a baseline assumption. If an employer cannot credibly explain why they refused an employment benefit to a non-white worker when the employer's proffered reasons are exposed as implausible, then the decision was more likely the result of racial discrimination. The majority, on the other hand, in essence codified their very different baseline assumption that significant racial progress had been made in the United States. Therefore, even if, for example, a qualified non-white applicant applies and is rejected for an open position, the employer continues to search for other applicants of similar qualifications and/or subsequently hires a white applicant who does not have superior qualifications, and if the employer's justification for hiring the white applicant or passing on the non-white applicant is exposed as lacking credibility, a finder of fact still is not required to infer that racial discrimination was the likely reason for the rejection of the black applicant. [52]

Ralph Banks and Richard Ford point out the conflicting policy priorities of the dissent and the majority. Justice Souter was motivated to protect the original purpose of the *McDonnell-Douglas* framework, which was to protect employees from workplace discrimination. Since discriminatory intent is hard to prove, the *McDonnell-Douglas* method offered a sensible, fair,

[51] *Hicks,* 509 U.S., at 530-35 (Souter, J., dissenting); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning The Basic Assumption*, 26 CONN. L. REV 997, 998 (1994)(arguing that the *Hicks* decision was based on the erroneous belief that discrimination is diminishing).
[52] Simson, *supra* note 5, at 1089-90.

and predictable way to uncover discrimination that employers had every incentive to hide. Without direct evidence, the plaintiff's only recourse is to prove discriminatory intent by a process of elimination, which the *McDonnell-Douglas* method provided through a formal structure and mandatory inference. Prior to *Hicks*, the plaintiff was not always required to eliminate every possible nondiscriminatory reason for the challenged action, but only the reason put forth by the defendant. Souter recognized that Justice Scalia's majority opinion moved the needle closer to a universal direct evidence requirement. The majority was extremely deferential to employers, seeking to safeguard the employer's prerogative to terminate the employment relationship at will, thereby avoiding a de facto good cause obligation.[53]

Selmi, Ford, and Thompson argue that Justice Souter's position would not, in fact, have unfairly burdened employers. Practically speaking, the dissent's rule merely forces employers to come forward with the actual reasons for their decisions. The employer is provided a chance to explain suspicious behavior and, of course, has an obligation under oath to present accurate testimony under oath. If the employer fails to do either, it is reasonable to assume the worst. If the employer acted for bad but nondiscriminatory reasons, the employer should be required to "fess up and face the jury" or to keep quiet and accept liability.[54]

Foster v. Dalton[55] offers a paradigmatic example of the difficulties faced by plaintiffs after *Hicks* and *Reeves*. The plaintiff, an African-American woman, was hired as a Professional Affairs Coordinator, a civilian employee of the U.S. Navy. After her hire, a management analyst position became available. Fearing that funding would not be available for this new position if it remained open at the start of the next fiscal year, Commander William Travis decided not to hire

[53]Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1076–80 (2009).
[54] Banks and Ford, supra note 53, at 1079-80; Selmi, *supra* note 5, at 333.
[55]Foster v. Dalton, 71 F.3d 52 (1st Cir. 1995).

through the ordinary competitive hiring process and instead, did an internal, non-competitive search. This involved assembling a list of potential qualified internal candidates. The plaintiff best satisfied the job description requirements and was at the top of the list.[56] After Travis was presented with the list, with the plaintiff's name on top, he had the job description re-written at a lower grade.

Using the *McDonnell-Douglas* mechanism, after the plaintiff met her prima facie case. Travis claimed that he hired Berry because he was the best available job candidate. The judge did not believe his testimony. The plaintiff argued that it was only after the decision-maker learned that the management analyst post would go to an African–American woman that he adopted an alternative means of candidate selection. The plaintiff argued that the court's disbelief of the explanation should have compelled an inference that the decision was race-driven.[57] However, the district court concluded that Travis's proffered reason was pretext, not for impermissible discrimination, but because he was trying to cover up the fact that his decision was cronyism. There was evidence in the record that Berry was his "fishing buddy" and that Travis changed the job criteria so his friend would get the job. The court found this to be a classic case of an old-boy network in operation. While cronyism is deplorable, the appellate court affirmed the district court's grant of summary judgment to the defendants. An employer can hire one person instead of another for any reason, fair or unfair, without violating Title VII.[58]

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[56] *Id.*, at 54.
[57] *Id.*
[58] *Id.*, at 55-56. The problem with the cronyism defense is that cronyism, even in the absence of direct discriminatory motivation, typically assures unfair advantages to white workers and conversely, the denial of equal employment opportunities to non-white workers. The court agreed, but stated that this argument is more appropriately brought under a disparate impact claim. But the Catch-22 for the plaintiff-appellant is that a disparate impact claim would have required her to persuade the trier of fact that pervasive cronyism infected multiple hiring decisions. But since this hiring process was unique, a departure from the usual hiring protocols, there was no class of employment decisions as is required for a disparate impact claim.

This case illustrates the roadblocks faced by a plaintiff alleging a race discrimination violation of Title VII using the *McDonnell-Douglas* test. While there was indeed evidence that the decision-maker was motivated by cronyism, it is also entirely possible that Travis would not have tweaked the job description to favor his "fishing buddy" if a white applicant had been on the top of the initial list as the most qualified candidate. Racial bias may have been primary and cronyism secondary, but without direct evidence of the inner workings of the mind of the decision-maker, the plaintiff could not have proven this to be the case. Prior to *Hicks*, the plaintiff would have likely prevailed since the employer's proffered reason was exposed as false.

B. Sub-Doctrines that Raise the Bar Higher for Title VII Plaintiffs: Stray Remarks, Moment-of-Decision, and the Same Actor Doctrines

Title VII case-law tends to think about unlawful discrimination as the discriminatory intent, or the employer's state of mind, at the moment when the adverse employment decision is made.[59] Directly related to the "moment of decision doctrine is the "stray remarks doctrine." Isolated remarks that provide evidence of racial bias, prejudice, and stereotypical views of racial minorities among decision-makers in the workplace are not deemed to be sufficient as *direct evidence* of discriminatory intent unless a plaintiff can demonstrate that a defendant "actually relied on racial stereotypes in making its decision. The logic of this doctrine is that prejudices revealed in isolated remarks may not have been a factor in the adverse employment action.[60]

In *Price-Waterhouse v. Hopkins*, the plurality observed that remarks at work based on, in this case, sex stereotypes, "do not inevitably prove that gender played a part in the actual employment decision. Rather, the plaintiff must show that the employer actually relied on the

[59]Price Waterhouse v. Hopkins, 490 U.S. 228, 241, 250 (1989).
[60]Stone, *supra* note 10, at 609-10. *See, e.g.,* Knox v. First Nat'l Bank of Chi., 909 F. Supp. 569, 572-73 (N.D. Ill. 1995)(asserting that "[e]vidence of a decision maker's occasional or sporadic use of stereotyped remarks or derogatory comments about an employee's age or race is generally insufficient, without more, to establish a violation of Title VII").

person's gender in making its decision." The court allowed that stereotyped remarks can be evidence that gender played a part, but not direct evidence that is decisive standing alone. [61]

The stray remarks doctrine, in combination with the moment of decision doctrine, has yielded outcomes that certainly seem absurd. In *Heim v. State of Utah*, a sex discrimination case, the plaintiff-appellant argued that, on a mixed motives"[62] analysis, she had showed direct evidence of discriminatory intent due to an offensive comment made by her direct supervisor, Mr. Tischner. In an angry outburst after Ms. Heim had problems with her work on ticket books, Tichner's remark was "[f]ucking women, I hate having fucking women in the office." Shortly after this outburst, Heim was refused permission to undertake a temporary field assignment, an important professional development opportunity, for which she had previously been granted permission. The court found that this offensive remark to be inappropriate and boorish, but merely a statement of Tischner's private negative view of women during an angry emotional outburst. The offensive remark was not found to be direct evidence of discriminatory intent with respect to his treatment of Heim. A discriminatory intent to prevent Heim from her field assignment might be inferred from the statement. As such, it would be permissible indirect evidence within the *McDonnell-Douglas* framework. Citing *Price*-Waterhouse, the *Heim* court concluded that a plaintiff must show that an employer actually relied on her gender in making its decision. To this end, remarks based on sex stereotypes may be indirect evidence that sex or gender played a part in the decision but do not inevitably prove that this is the case.[63]

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[61] *Price-Waterhouse*, 490 U.S. at 228, 251 (1989). The court made the determination, in this particular case, that sex stereotypes did in fact play an important part in the adverse employment action, that Price-Waterhouse relied upon evaluations of the employee that were based upon sex stereotypes regarding how a woman should act and dress.

[62] A "mixed-motives" analysis will be discussed in the next section. The *McDonnell-Douglas* framework is inapplicable to direct evidence.

[63] Heim v. State of Utah, 8 F.3d 1541, 1546-47 (10th Cir. 1993)(citing *Price-Waterhouse*, 490 U.S. at 251). *See also* Ramsey v. City & Cty. of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990)(determining that statements of a supervisor,

According to the same-actor doctrine, when a supervisor first behaves in a way that benefits an employee and then subsequently takes adverse action against the same employee, the supervisor's adverse treatment is presumptively nondiscriminatory. When it was originally articulated by the fourth circuit in *Proud v. Stone*,[64] the doctrine was deemed applicable only when an employee was hired and fired by the same person within a relatively short time span. The court in Proud reasoned that it is irrational to believe that animus exists in termination but not hiring: "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[65] The "short time-span" has since been extended to over seven years. The logic supporting the doctrine is that an employer or employer's decision-maker who holds bias against members of a stereotyped group would never have hired a member of such group (e.g., African Americans or women) in the first place; therefore, a subsequent adverse decision cannot be discrimination.[66]

While the same-actor doctrine has a certain logical appeal, there is evidence from psychological research on moral credentialing and moral licensing that matters are more complex. Victor Quintanilla and Cheryl R. Kaiser point to evidence that persons often feel more comfortable behaving in biased, non-egalitarian ways when they can point to evidence demonstrating previous lack of bias. After favoring a stereotyped group member, most majority group members are less concerned with continuing to appear and behave in egalitarian or

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who was widely known to have ideas about "women's place" in the workforce, that certain jobs were more suitable for women than others" did not constitute direct evidence of discrimination against the plaintiff).

[64]Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991

[65]*Id.* (quoting John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation,* 43 STAN. L. REV. 983, 1017 (1991)).

[66]Quintanilla & Kaiser, *supra* note 11, at 18-19; *See e.g.*, Hobdy v. Los Angeles Unified Sch. Dist., 386 F. App'x 722, 724 (9th Cir. 2010) (maintaining that since the principle was primarily responsible for both the hiring and demotion of the plaintiff, "the defendants were entitled to the "same actor" inference, which creates a strong inference that there was no discriminatory motive).

unbiased ways. The initial unbiased decision serves as a moral credential in the face of a subsequent decision that seems biased.[67]

C. **Mixed Motives**

Under a "mixed motives" analysis, a plaintiff need only establish that her race (or membership in another protected class) was one of the employer's motivations, a "motivating factor," for a particular adverse employment decision. There may have been other permissible motivations in play. Therefore, race need not have been the "but for" cause of the decision. If the plaintiff can make this showing, the employer is liable for disparate treatment discrimination. But if the employer can show that it would have made the same decision, even in the absence of the unlawful consideration of race, the plaintiff's remedies can be limited to declaratory relief, injunctive relief and attorney's fees.[68]

The breakthrough for plaintiffs in *Price-Waterhouse* is in the way the court interprets the statutory language. The plurality opinion asserts that the words "because of" do not mean "solely because of."[69] The court also stated that the *McDonnell-Douglas* framework is inapplicable where a decision was a product of some combination of legitimate and illegitimate motives. *McDonnell-Douglas* only applies to single-causation action. At issue is whether the "real" cause

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[67] *Id.*, at 9-10.

[68] Simson, *supra* note 5, at 1074. The court in *Price-Waterhouse* permitted an employer to avoid all liability if the employer could prove that it would have made the same employment decision even if it had not allowed the protected trait to play such a role. .*Price Waterhouse*, 490 U.S., at 244–45. In 1991, in response to the *Price-Waterhouse* decision, Congress amended Title VII of the Civil Rights Act of 1964 so that employers can be found liable if an impermissible factor played a motivating role in the employment decision, even if the employer would have made the same employment decision in the absence of the impermissible factor. However, if the employer can prove that it would have made the same decision in the absence of the impermissible factor, the employee cannot recover damages or gain reinstatement, hiring, or promotion. A plaintiff can recover attorney's fees and receive declaratory and injunctive relief. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999)). Thomas H. Barnard and George S. Crisci, "*Mixed-Motive" Discrimination Under the Civil Rights Act of 1991: Still a "Pyrrhic Victory" for Plaintiffs?*, 51 MERCER. L. REV. 673, 673-74 (2000).

[69] *Price Waterhouse*, 490 U.S., at 240–41.

of the adverse employment action was the employee's membership in a protected class or the legitimate, non-discriminatory reason proffered by the employer. Obviously, it makes no sense to ask about the one "true reason" in a mixed-motives case.[70]

For the plaintiff to prevail and receive damages in a mixed motives cause of action, she must make the case that, even though there may have been permissible motives in play, the employer nonetheless would not have made the employment decision "but for" the employee's protected trait. The employer, on the other hand, must try to show that the same adverse employment action would have been taken even in the absence of the illegitimate motive in order to limit the remedies available to the plaintiff.[71]

D. Title VII Jurisprudence and Race Discrimination: Concluding Remarks

David Simson points out that employment discrimination cases are difficult to win for plaintiffs. Employment discrimination plaintiffs fare more poorly than other civil plaintiffs in federal district courts. And if they succeed at the trial court level, there is a high likelihood that their victories will be overturned on appeal.[72] Black plaintiffs bring the most employment race discrimination cases and therefore, the anti-plaintiff bias of federal Title VII jurisprudence falls disproportionately upon black plaintiffs.[73] The irony is that one of the primary congressional purposes in enacting Title VII of the Civil Rights Act of 1964 was to create lasting improvements in the working conditions and equal employment opportunities of racial minority

[70] *Id*., at 246-47.
[71] Stone, *supra*., note 10, at 608-09.
[72] Simson, *supra*., note 5, at 1037-38 (Referencing extensive statistical research conducted by Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009)); S*ee also* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME U.L. REV. 889, 931-33 (2006).
[73] Simson, *supra* note 5, at 1038

workers, especially African-Americans. In spite of the Supreme Court's professed allegiance to the congressional purposes behind Title VII,[74] actual Title VII race discrimination jurisprudence in the federal courts is a game-board titled against plaintiffs. Plaintiffs' chances of success are slim even when they possess strong evidence of discrimination. The doctrines and case law explored in this section have contributed to this morass.

II. The Changing Nature of Employment Discrimination

Since the time of the passage of the Civil Rights Act in 1964, the good news is that approval for overt discriminatory attitudes and actions has diminished significantly.[75] Second generation racism" was the term coined by Columbia Law professor Susan Sturm to describe[76] racism that is more subtle, suppressed, and implicit. The bad news, however, is that this kind of discrimination is more difficult to prove.[77] For example, Michael Selmi contends that discrimination today is often the product of cumulative acts not traceable to a single actor or event.[78] Discrimination is expressed in small acts of disrespect or distrust. He provides a hypothetical, though it is one based on the real experiences of far too many persons, of an African-American who enters the workforce. Certain coworkers or supervisors may assume that his job is the result of affirmative action. In their eyes, he is less qualified. Because of this subtle bias, the employee is given fewer opportunities for professional development or fewer

[74]Local 28, Sheet Metal Workers' International Association v. EEOC, 478 U.S. 421, 448 (1986) ("[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' ... and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." (alterations in original) (quoting United Steelworkers v. Weber, 443 U.S. 193, 203 (1979)).
[75]Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2 (2006); Bornstein, *supra* note 12, at 929-30.
[76]Sturm, *supra* note 12, at 460.
[77]Bornstein, *supra* note 12, at 930.
[78]*Id.*

challenging assignments in the workplace. His work is carried out under a constant cloud of suspicion. The employee is likely subjected to biased evaluations. In this situation, the employee might react in different ways. He might work harder to prove himself, or he may begin to slack off under the assumption that no matter what he does, he will not be given credit. If he were to slack off, it will almost certainly be noticed and result in even poorer performance evaluations. If the employee is terminated and files suit, and if the courts rely upon the "moment of decision doctrine," the court is likely to make the determination, at the summary judgment phase, that the person was terminated for poor performance and discount his evidence of disrespect in the workplace. The analytical tools that have developed in Title VII jurisprudence are inadequate to identify discriminatory treatment during the entirety of the person's employment, as well as discrimination embedded in a business's culture.[79]

A. Implicit Bias and the Implicit Association Test

Beginning with the groundbreaking work of Charles Lawrence, and associated with the ongoing work Project Implicit and the Implicit Association Test (IAT), many legal scholars have argued that courts should permit evidence of implicit bias in cases involving racial (as well as sex/gender, disability, and national origin) discrimination cases. Lawrence identified the problem with proving discriminatory intent with respect to "second-generation racism." He noted that the precedent established in *Washington v. Davis* required a plaintiff challenging the constitutionality[80] of a facially neutral law to prove discriminatory purpose on the part of those enacting the law. Lawrence argued that such a:

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[79]Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 940-41 (2014).

[80]Washington v. Davis, 426 U.S. 229 (1976). In this case, two African-American applicants for police positions in the District of Columbia Police Department were rejected on the basis of a written personnel test. They filed suit,

> motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide. And because behavior results from the interaction of a multitude of motives, governmental officials will always be able to argue that racially neutral considerations prompted their actions.[81]

Drawing upon psychoanalytic theory and cognitive psychology, Lawrence argued that the source of most racial harm now is found primarily in unconscious racist acts.[82] Since implicit bias is both pervasive and unconscious, many people, including those who are well-intentioned, are unaware of the biases that influence their actions. Discrimination can occur even when the person does not intend any discriminatory treatment."[83]

The measure of implicit bias that is most widely accessible and publicly known is the Implicit Association Test ("IAT"), which relies upon "response latency measures" that analyze reaction times to stimuli. The IAT, debuted by Anthony Greenwald and colleagues in 1998, measures the relative strength of associations between pairs of concepts through a series of exercises in which participants are asked to sort concepts. According to Greenwald, The IAT is intended to uncover "implicit bias" by measuring the strength of the association between social categories (e.g., blacks or whites) and positive and negative attributes (e.g., "joy" and "love" versus "agony" and "evil"). The foundational assumption is that when two concepts are highly associated, the sorting task will be easier and require less time than when two concepts are not as highly associated.[84]

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alleging that the test, which functioned to exclude a disproportionate number of black applicants, was discriminatory. This practice of a governmental body was challenged, not under Title VII of the Civil Rights Act of 1964, but under the Equal Protection Clause of the Fifth Amendment since the police department in the District of Columbia was a governmental body not governed by state law.

[81] Lawrence, III, *supra* note 13, at 319.

[82] *Id.*, at 322-24.

[83] Selmi, *supra* note 16, at 194.

[84] Kirwin Institute for the Study of Race and Ethnicity, *Primer on Implicit Bias*, 64-65, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW, 2015, https://kirwaninstitute.osu.edu/research/2015-state-science-implicit-bias-review (last visited April 15, 2022); Banks & Ford, *supra* note 53, at 1060.

The popular Black/White IAT analyzes the speed with which participants categorize White and Black faces with positive and negative words. In this particular IAT, a participant uses two keys to categorize faces as European American or African American. The participant then does the same for words, categorizing each as "Good" or "Bad." One key is then assigned to "European American"/"Good" and the other to "African American"/"Bad" and a mixture of the categorized faces and the words then appears, with the participant categorizing each. Finally, the designations flip, with one key representing "African American"/"Good" and the other "European American"/"Bad". Someone who views white Americans more positively than black Americans will be faster on the trials that have one button for white Americans and good words and another button for black Americans and bad words, compared to trials that have one button for white Americans and bad words and another button for black Americans and bad words. If a participant more quickly sorts images and words when Black is paired with the negative attribute and White with the positive attribute, compared to when the pairings are reversed, then the participant is said to have an implicit bias against African Americans. Though other tests exist, the IAT is the most respected and peer-reviewed.[85]

One of the key claims on the part of advocates of implicit bias research is that implicit biases are widespread and operate largely beneath the radar of human consciousness.[86] Implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. Generally, our implicit biases tend to favor our own in-group, though persons can hold implicit biases against

[85]Kirwin Institute, *supra* note 81 at 64-65; Banks and Ford, *supra*. note 52, at 1061-62.
[86]Sharon L. Davies, *Letter from the Executive Director*, in Kirwin Institute for the Study of Race and Ethnicity, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW, 2015, https://kirwaninstitute.osu.edu/research/2015-state-science-implicit-bias-review (last visited April 15, 2022).

their own in-group. [87] One of the key claims is that implicit biases are not accessible through introspection and therefore, are different from known biases that individuals may choose to conceal to avoid social disapproval. According to the advocates of implicit bias research, because implicit bias is an automatic and unconscious process, people who engage in this unthinking discrimination are not aware of the fact that they do it."[88]

Because our implicit associations arise outside of our conscious awareness, they do not necessarily align with our declared beliefs or stances we would explicitly endorse.[89] Many individuals who claim to believe in egalitarian ideals with respect to race or sex and gender, for example, have high measures of implicit bias as measured by the IAT. [90] This discrepancy is what has led implicit bias researchers to posit that individuals are often unaware of their biases.[91]

B. Critiques of the Utilization of Implicit Bias in Title VII Racial Discrimination Litigation

Implicit bias and social framework theory have been utilized primarily in class action and disparate impact cases. Social framework theory posits that where workplace statistics show discrimination and workplace policies are likely to activate implicit bias, an employer entity intentionally discriminates by failing to prevent or correct for the implicit biases of its individual decision makers.[92] After some initial success, the momentum of implicit bias evidence has been stalled by several decisions of the Roberts court, especially *Ricci* and *Wal-Mart v. Dukes*. In

[87] Kirwin Institute, *supra* note 81, at 62 (referencing Anthony G. Greenwald and Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 945-967, 94 CAL. L. REV. (2006)).
[88] *Id.* at 62.
[89] *Id*.
[90] Selmi, *supra* note 79, at 976-77 (referencing Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESS. INTERG. REL. 359, 363 (2007).
[91] *Id*., at 976-77.
[92] Bornstein, *supra* note 12, at 938-39.

these cases, the Court narrowly circumscribed the use of "social framework" evidence.[93] In *Dukes v. Wal-Mart,* social framework theory was rejected as a means to satisfy the commonality requirement necessary to sustain a class action under Rule 23.[94]

Appeals to implicit bias are problematic for other reasons. Since implicit bias has been *theorized* as unconscious, pervasive and uncontrollable, Michael Selmi argues, labeling discrimination as implicit bias is likely to place it beyond legal reach and making discrimination more, rather than less, difficult to prove since governing legal standards often turn on one's ability to control one's behavior. [95]

Ralph Banks and Richard Ford and have argued that the results of the IAT are ambiguous because the IAT is unable to distinguish and disentangle implicit from conscious bias. Because of the widespread disavowal of racism in the wake of the civil rights era, a large percentage of persons in our society, including, presumably research participants, are unwilling to openly express views considered to be explicitly racist. This means that obtaining an accurate measure of conscious bias, against which to compare unconscious bias, is extraordinarily difficult.[96] Michael Selmi agrees. Since much of the implicit bias research explores the discrepancies between *self-reported* attitudes and the implicit biases exposed by the IAT, the question is whether self-reported attitudes about race, sex and gender, sexuality, and disability reflect a person's actual explicit beliefs or whether self-reported beliefs reflect social norms, and fear of social disapproval.[97] Selmi contends that:

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[93]*Id.,* at 922.
[94]Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354-55 (2011) (declaring that the expert testimony on social framework did "nothing to advance [plaintiff's] case" and the Court could "safely disregard it"); FED. R. CIV. P. 23; Williams, *et al, supra* note 19, at 343.
[95]Selmi, *supra* note 16, at 195, 197-98.
[96]Banks and Ford, *supra* note 53, at 1063-64.
[97]Selmi, *supra* note 16, at 193, 208-09.

> people may not be more biased than they realize but…they are more biased than they are willing to admit. If that is the case, there is no obvious reason why such bias would be labelled implicit rather than explicit, and implicit bias measures might be revealing concealed beliefs rather than unconscious ones.[98]

Banks and Ford point to studies that have shown that the degree of correlation between implicit and explicit attitude measures depends partly on the strength of social norms with respect to the group or practice at issue. For example, researchers have found a higher correlation between implicit and explicit attitudes toward being a vegetarian (a socially acceptable practice) than toward smoking (a more stigmatized practice). Participants' implicit and explicit attitudes were more highly correlated when judging Islamic fundamentalists in the years following September 11, 2001, than when judging Jews in a social context in which anti-Semitism is strongly disapproved.[99] The fact that the strength of the correlation between explicit attitudes as self-reported and unconscious bias as measured by the IAT depends upon social desirability pressures is significant. It suggests that the divergence may be at least partly a consequence of the understatement of conscious views. When research participants feel free to express negative views openly, as in the case of Islamic fundamentalists, implicit and explicit measures are more highly correlated than when there are social pressures to withhold negative sentiments.[100]

Joan Williams, Rachel Korn, and Sky Mihaylo contend that appeals to IAT and implicit bias are not particularly useful for employment law. The IAT, which focuses on the milliseconds that measure how stereotypes affect automatic associations, is a source of insight regarding matters such as police use of lethal force, where making a rapid decision is required. But in the workplace, different cognitive processes are in play. Workplace decision making proceeds at a slower pace. Workers, for example, regularly override initial instincts and self-edit to conform to

[98] *Id.*, at 211.
[99] Banks and Ford, *supra* note 53, at 1065.
[100] *Id.*, at 1065-66.

workplace norms. Few of us blurt out that we think our boss is an idiot or a colleague is sexy. We are capable of providing a cognitive override. Stereotype activation may be automatic, but stereotype application is controllable.[101]

C. Discarding Theories of Unconscious Racism

Michael Selmi correctly argues that implicit bias should be distinguished from, rather than equated with, unconscious bias.[102] Courts are unlikely to hold employers liable for what is unconscious and uncontrollable. In addition, if implicit bias is simply omnipresent, almost all employment decisions are tinged with bias. This may or may not be the case, but it is too broad of a principle to inform judicial discernment.[103]

There is no consensus within the discipline of psychology regarding the nature of the unconscious mind and its relationship to the conscious mind. In the words of John Bargh and Ezequiel Morsella, "different operational definitions lead to dramatically different conclusions about the power and scope of the unconscious."[104] Judges are not equipped to adjudicate between divergent theoretical accounts of the unconscious mind. While there are good grounds for believing that the IAT reliably identifies what is properly characterized as implicit bias. However, the precise nature and "location" of the "implicit" in the human mind or psyche or neurological system is more difficult to pinpoint with precision. For example, while

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[101] Williams, *et al*, *supra*, note 19, at 346.

[102] Selmi, *supra* note 79, at 979.

[103] *Id.*, at 980.

[104] Bargh and Morsella, *supra* note 17, at 73-74. Bargh and Morsella point out that cognitive psychology equates the unconscious mind with the task of processing subliminal information, while social psychology associates the unconscious mind with mental processes of which the individual is unaware. Studies of the acquisition of skills such as the ability to type or driving a car recognize that with experience, acquired skills do not require conscious focus. However, even though the ability to type without thinking about which key one should tap with each keystroke is integral to being a skilled typist, typing itself is an intentional act. In other words, one intends to type and one intends to type certain words by tapping the key corresponding to certain letters, even if the placement of the fingers for each and every keystroke is not at the forefront of one's conscious awareness.

discriminatory behavior may not be entirely at the forefront of a person or group's self-awareness, this does not mean it should be located in the Freudian unconscious. Persons may have a tacit awareness of their biases which shape their perceptions and behavior. Tacit bias may not at the forefront of their consciousness, but this does not necessarily mean it is entirely unconscious or uncontrollable. Persons may operate with stereotypes that have not been subjected to examination. But what is tacit or latent, what is not at the forefront of self-consciousness, may not be unconscious in the sense of being inaccessible if a person engages in self-reflection.

Though anecdotal, a prime example of this dynamic is one in which most white persons have engaged. A person is driving in an urban area and begins to see more African-American, or perhaps Hispanic, persons in yards and on sidewalks. The person, without thinking, instinctively locks his or her car doors. While this may be implicit bias in action, is it really unconscious? Most persons who do this would be, perhaps, embarrassed to admit it, but most could easily acknowledge that they perceived the presence of black or Hispanic persons as potentially dangerous. It is doubtful that the person who may have "unthinkingly" and "instinctively" locked the car doors would really have no conscious clue as to why they did so. Implicit bias may be on the periphery of conscious awareness, but this does not mean it is located in an unconscious sphere of the person's mental processes that is inaccessible to conscious reflection.

D. Two Indispensable Contributions of Implicit Bias Legal Scholarship

There are two major contributions of the advocates of implicit bias research in legal scholarship that are indispensable to the argument in this essay. First, Linda Hamilton Krieger's groundbreaking argument is that much discrimination occurs, not because decision-makers are motivated by animus, but because cognitive biases and racial categorization schemas provide the

lens through which decision-makers perceive and evaluate employees and workplace realities. Cognitive racial biases distort the decision-maker's perceptual and inferential processes, adversely influencing how information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. Race, gender, or national origin often make a difference in an adverse employment action, not because the employer intended to take the person's protected class into account to the detriment of the person, but due to these interpretive distortions.[105]

Second, what Charles Lawrence and Jerry Kang propose, in effect, is that what has been internalized as implicit bias is that which comes to us from the "outside" as culturally mediated stereotypes, racial classifications, racial schemas,[106] and other cultural tropes. In the second half of this essay, it will be argued that the direction in which these advocates of implicit bias should be followed is not inward, to the unconscious, but outward, in order to discern racial bias present within the social imagination passed along from generation to generation.

III. Linda Hamilton Krieger: Categorization, Intergroup Bias, and Social Cognition Theory

Linda Hamilton Krieger's groundbreaking essay, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," was a bold effort to propose a paradigm shift for Title VII jurisprudence. Krieger's thesis is that most second-generation employment racial discrimination occurs because cognitive intergroup biases distort the lenses, the interpretive framework, through which employers and employer's decision-makers perceive an employee and workplace realities. Krieger argues that "[a]n

[105] Krieger, *supra* note 6, at 1167, 1182, 1199, 1213.
[106] Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499-1506 (2005); Lawrence, *supra* note 13, at 322-23.

employee's group status may have affected the decision-maker in completely non-conscious ways by affecting what he saw, how he interpreted it, the causes to which he attributed it, what he remembered, and what he forgot.[107]

Krieger's proposal is designed to combat the problems with Title VII jurisprudence as she interprets it. Under current doctrine, she argues, we must either find that the decision-maker intended to discriminate or that no discrimination occurred. A finding of disparate treatment discrimination requires evidence that the employer or the employer's decision-making agent possesses transparency of mind and is fully aware of the reasons for their decision. A discriminatory decision-maker must choose to discriminate by consciously including the employee's group status into the judgmental calculus. The employer may be motivated by antipathy toward the person's race or other protected class, desiring to exclude such persons from employment in the business in question, or she may make decisions on the basis of stereotypes, treating the person's group status as a "proxy" for some other job-relevant trait. For example, an employer may have a stereotype of Hispanic males as lazy. When a highly qualified Hispanic male applicant applies for the job, the employer does not hire him because he believes he will not be a hard worker. Therefore, Title VII jurisprudence, she argues, is based on the assumption that well-intentioned decision-makers are able "not to discriminate," while ill-intended decision-makers know they are discriminating on the basis of the employee's membership in a protected class. When challenged, ill-intentioned decision-makers fabricate "pretexts," that is, lies, to cover their tracks.[108]

[107] Krieger, *supra* note 6, at 1170.
[108] Krieger, *supra* note 6, at 1170-72, 1182, 1185

In her essay, Krieger offers an extensive account of developments in social cognition theory since the 1950's that illuminate the dynamics of categorization and intergroup bias. Categorization is interpreted by social cognition theory as part of normal human cognitive functioning. Categorical structures simplify the perceptual environment by transforming "fuzzy" differences into clear-cut distinctions. Because complexity threatens the stability of our categorical structures, categorical thinking generates the tendency towards thinking that "all 'x's' are alike. Humans often create "mental prototypes" of a typical category member. We carry in our heads an image of the "typical chair," the "typical law school professor," and "the typical drug dealer." Cognitive psychologists refer to these categorical structures as "schemas." We experience the objects, and persons we encounter, first as members of some basic category, the category most accessible at the moment of perception or encounter.[109]

Krieger describes a significant body of research illuminating the nature of intergroup bias. Experimental data indicates that when persons are divided into groups, even on a trivial or random basis, strong biases in their perception of differences result. As soon as the concept of "groupness" is introduced, subjects perceive members of their group as more similar to themselves, and members of other groups as more different from themselves, than when those same persons were simply viewed as non-categorized individuals. Experimental subjects also consistently evaluated in-group members more favorably than out-group members. Subjects were also better able to recall undesirable behavior of out-group members than similar behaviors among in-group members. They disproportionately attributed in-group members' failures to situational factors and out-group members' failures to dispositional factors.[110]

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[109] *Id.* at 1189-90.

[110] *Id.*, at 1191-92 (referencing research by Henri Tajfel, M.G. Billig, R.P. Bundy, & Claude Flament, *Social Categorization and Intergroup Behaviour*, 1 EUR. J. SOC. PSYCHOL. 149, 154 -55 (1971); *see also* John W. Howard

Krieger affirmed Henri Tajfel's argument that intergroup bias was is not necessarily motivational in origin, but rather, is the result of the same processes of categorization, assimilation, and search for coherence that underlies all human cognition, whether the objects judged be persons of different races or objects assigned to different groups. As such, intergroup bias is "a natural, automatic, and inevitable aspect of imperfect learning about the individual members of overlapping groups."[111]

How does this play out in the real world? Persons tend to perceive out-group members as being homogeneous, almost as an undifferentiated mass, while in-group members are viewed as similar in whatever are the most relevant features, but nonetheless,, are seen as more differentiated than out-group members are recognized to be. For example, Krieger narrated the story of a race discrimination case she litigated. Her client was Salvadoran, but the plant manager described him as "Mexican," which was evidence that he perceived Latinos as an undifferentiated out-group.[112]

These same cognitive structures and processes result in stereotypes. Social cognition theory regards stereotypes, like other categorical structures, as cognitive mechanisms that all people use to simplify the task of perceiving, processing, and retaining information. However, once in place, stereotypes operate as "social schemas, As such, they "bias" the perception, interpretation, encoding, retention, and recall of information about other people. These biases are more fundamentally cognitive rather than motivational. They operate even in the absence of any intent to favor or disfavor members of a particular social group. As such, they bias a decision-

& Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERS. SOC. PSYCHOL. 301, 302- 03 (1980

[111]Krieger, *supra* note 6, at 1191-92 (quoting Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83-86 (1969)).

[112]Krieger, *supra* note 6, at 1191-92.

maker's judgment long before the moment of decision. Finally, when operating as schemas, stereotypes are beyond the reach of a decision-maker's self-awareness. As such, cognitive bias may be unintentional and unconscious.[113] When majority group members do not have much contact with an outgroup of minority group members, negative behaviors become salient, that is, they stand out to the perception of a majority group member. Negative stereotypes shape what we expect to see. Operating as "correlational expectancies," stereotypes and racial schemas distort incoming information about members of different social groups. As such, they lead persons to unintentionally "screen out," and thereby insulate themselves from, disconfirming evidence; i.e., positive behaviors that we do not expect to see.[114]

To summarize Krieger's argument, cognitive sources of inter-group bias distort the interpretive framework through which employees, their work, and their interactions are perceived, thereby distorting the decision-making process. Stereotyped racial categories and schemas affect perception, what the employer saw and didn't see, how she interpreted it, the causes to which he attributed it, what they remembered, and what they forgot, thereby distorting the decision-maker's perceptual and inferential processes. In other words, decision-making is not distinct from processes of perception, memory, and interpretation that relevantly shape decisions. Cognitive forms of intergroup bias affect decision-making at all points along a perceptual /inferential/ judgmental continuum. This means that race, gender, or national origin make a difference in the adverse employment action, even in the absence of invidious motivation or

[113] *Id.*, at 1187-88.

[114] *Id.* at 1189-90, 1197-98, 1212 (citing David L. Hamilton & Terrence L. Rose, *Illusory Correlation and the Maintenance of Stereotypic Beliefs*, 39 J. PERS. SOC. PSYCHOL. 832 (1980) (also referencing Felicia Pratto & Oliver P. John, *Automatic Vigilance: The Attention-Grabbing Power of Negative Social Information*, 61 J. PERS. SOC. PSYCHOL. 380, 380 (1991) (observing and defining automatic vigilance as "a mechanism that serves to direct attentional capacity to undesirable stimuli")).

discriminatory animus. This calls into question, Krieger argues, the body of Title VII case-law that looks to the employer's state of mind, at the moment when the adverse employment decision is made. Her thesis is that Title VII jurisprudence is almost completely unable to respond to second-generation racism. The question is whether Title VII jurisprudence is, or has to be, as inflexible as it is in Krieger's narrative.[115]

Ambiguities, Positive Trajectories, and Possibilities of Reformation of Title VII Case Law

As noted in the previous section, Krieger has argued that disparate treatment jurisprudence is flawed because it is premised on the notion that racial discrimination, as well as discrimination on the basis of other protected classes, is construed by the courts as motivational in character.[116] There is a significant volume of case law supporting Krieger's description of Title VII jurisprudence. Disparate treatment is consistently described as "intentional discrimination."[117] In a case in the eighth circuit, the court maintained that a showing by the plaintiff that he was treated differently than other employees is insufficient. Rather, the court held that the plaintiff must show that the employer intentionally discriminated against him because of his race.[118] A fourth circuit decision stated that "[d]iscriminatory intent means actual motive."[119] In *EEOC v. Flasher Co.*, the court in the tenth circuit asserted that "merely finding that people have been treated differently stops short of the crucial question: *why* people have been treated differently."[120] Title VII prohibits only intentional discrimination *based upon* an

[115] *Id.*, at 1161, 1167, 1182-85. 1199, 1213.
[116] *Id.*, at 1161, 1167, 1170.
[117] Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).
[118] Smith v. Honeywell, Inc., 735 F.2d 1067, 1068–69 (8th Cir. 1984).
[119] Warren v. Halstead Indus., Inc., 802 F.2d 746, 751–52 (4th Cir. 1986).
[120] E.E.O.C. v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992).

employee's protected class characteristics.[121] A district court case, *Gomez v. Medical College*, took this logic to its extreme, holding that only a finding that discrimination was *the* motive, the sole reason for adverse action will impose liability on the employer."[122]

Nonetheless, Michael Selmi, Joan Williams, and others argue that this is a misunderstanding of the meaning of "intentional discrimination." Intentional discrimination does not necessitate that an employer had a self-conscious intent to discriminate against an employee in a protected class and then engaged in a cover-up to hide that nefarious intent. Rather, Joan Williams and her colleagues argue, "intent" is a term of art in Title VII law. It means that race, gender or other protected class status has been taken into consideration by the decision-maker or that the employee's protected trait entered the causal chain.[123] Michael Selmi adds that the concept of intent is only tangentially related to animus or illicit motive. In defining intentional discrimination, the issue is not what the decision-maker subjectively intended, but rather, whether the record permits an inference that an impermissible factor, such as race or sex, was the impetus for the adverse employment action.[124]

Stephanie Bornstein argues that "intentional" disparate treatment is a flexible concept of judicial design and interpretation.[125] An example is found in a seventh circuit decision, *Lust v. Sealy.* After the plaintiff, a woman, had expressed interest in a promotion that would have required her to relocate, her supervisor did not recommend her for the position because he did not think she would want to relocate her family, in spite of the fact that she never told him she

[121] *Id*., at 1319.
[122] Gomez v. Med. Coll. of Pennsylvania, No. CIV. A. 92-5048, 1994 WL 423847, at *10-11 (E.D. Pa. Aug. 12, 1994).
[123] Williams et. al., *supra* note 19, at 403.
[124] Selmi, *supra* note 5, at 288, 294.
[125] Stephanie Bornstein, *Reckless Discrimination*, 105 CAL. L. REV 1055, 1081 (2017).

was unwilling to relocate. The Court of Appeals upheld a jury verdict in favor of the plaintiff.[126] Bornstein points out that Lust's supervisor did not intend to disadvantage her because she was a woman. In other words, his intent was not to discriminate against her because of her membership in a protected class.[127] But her supervisor acted on the basis of a stereotype. Judge Posner even gave his opinion that the stereotype is on average more often true than not. He opined that "the average mother is more sensitive than the average father to the disruptive effect of moving to another city upon children. However, he noted that antidiscrimination laws entitle employees to be evaluated as individuals rather than "as members of groups having certain average characteristics."[128] Even though her supervisor did not intend to discriminate against the plaintiff and disadvantage her because she was a woman, this is still a case of discriminatory treatment involving "intent." The supervisor intended to act upon his views that were related to her class membership as a woman with a family. This consideration entered into the causal chain and resulted in discriminatory consequences.[129]

The reforms that are needed in Title VII jurisprudence are already part of the stream of Title VII jurisprudence. What is needed is for these jurisprudential tendencies and trajectories to be moved to the forefront so that plaintiffs have the opportunity to offer the full panoply of evidence available to them. Perhaps the most interesting cases, and the most promising as a trajectory for reform of Title VII jurisprudence is a ninth circuit case, *EEOC v. Inland Marine Indus.*, and a first circuit case, *Thomas v. Eastman Kodak Co.*, along with *Lust v. Sealy*.

[126]Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).
[127]Bornstein, *supra* note 12, at 1081.
[128]*Lust*, 383 F.3d at 583.
[129] Bornstein, *supra* note 12, at 1081.

The court in *Inland Marine* stated that "the essence of disparate treatment is different treatment. Subjective wage-setting criteria resulted in a situation in which no black employee ever earned more than any white worker. This disparate wage structure had slowly evolved over time, but when black workers made management aware of it, the company did not correct the disparities. When notified, the owner raised the wages of the complaining black workers twenty-five cents an hour, but this did not result in wages equivalent to similarly situated white workers. The owner confined the raises to the persons who complained and made no attempt to institute across-the-board changes to correct systemic wage inequity. Inland Marine argued that the complaint should have alleged disparate impact instead of disparate treatment. However, the district court maintained and the appellate court agreed that this was indeed a disparate treatment case because it was a case in which the company treated black employees differently from the way it treated white employees. In making this judgment, the court demonstrated a more flexible account of discriminatory intent. The court maintained that the discrimination was subtle, that Inland Marine had discriminated without malice, but that the discrimination was intentional because the owner failed to act to rectify the disparities for all black employees. Nor was the fact that there was no malicious scheme to pay black workers less than white workers necessary to determine that there was intentional discrimination. The court stated, instead, that while racial discrimination today (in 1984) often wears a benign mask, current practices that perpetuate racial disparities may hide subconscious attitudes.[130]

Thomas v. Eastman Kodak Co. represents the direction in which Title VII jurisprudence should evolve. The court demonstrated the ability to adapt to the complexities of second

[130]E.E.O.C. v. Inland Marine Indus., 729 F.2d 1229, 1233-36 (9th Cir. 1984).

generation racism and, as will be pointed out, the ability to adjust its proof structures or analytical frameworks to the particular facts of the case

Thomas had been regarded as an exemplary employee, praised by her managers and customers alike, in her position of customer service representative. She received excellent performance evaluations until she was assigned to a new supervisor after her tenth year of employment. Flannery, the new manager, tried to sabotage Thomas by damaging her professional standing with customers. On one occasion, Flannery came to a customer training session to observe Thomas at work and instead, took over the session and conducted the training herself. On another occasion, Flannery attempted physically to block Thomas from leaving a meeting which had been scheduled at the same time as an important training session for one of Thomas's customers. And whereas Thomas had regularly received the highest ratings, of 5 and 6, on her performance reviews, Flannery regularly gave her 2's and 3's for the same categories of job performance. Because Kodak used a performance appraisal ranking system, Thomas was laid off during a workforce reduction because of her low performance evaluation scores.[131]

The court held that an employee has been treated disparately "because of race" regardless of whether the employer consciously intended to base the evaluations on race or simply did so because of unthinking stereotypes or biases. Subjective evaluations can easily mask covert or unconscious discrimination on the part of predominantly white managers. The court quoted with approval a statement of the D.C. Circuit court in *Hopkins v. Price-Waterhouse*:

> In keeping with [Title VII's remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirement[ ] of discriminatory motive in disparate treatment cases

[131] *Id.*, at 43-45.

> does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's race, sex, religion, or national origin are eliminated.[132]

The *Thomas* court further aligned with the D.C. Circuit in *Price-Waterhouse* in its argument that disparate treatment doctrine focuses on causality rather than conscious motivations:

> unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination…….If the plaintiff has shown that she was treated less favorably because of her gender, the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it.[133].

The *Thomas* court also argued that the Supreme Court has recognized that unlawful discrimination can stem from stereotypes and other kinds of cognitive biases. In *Washington v. Gunther*, the court appealed to its "past interpretations of Title VII as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."[134] The court then added, "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes."[135]

First and foremost, the most fundamental reform would be that of treating this line of case law as paradigmatic of theTitle VII jurisprudence that is needed to account for second-generation racism that is subtle because it is tethered to stereotypes and other cognitive biases.

Second, the distinction between direct and indirect evidence is more elusive than typically imagined. Direct evidence is defined as, in effect, "smoking gun" evidence requiring no

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[132] *Id.*, at 59-60 (quoting Hopkins v. Price Waterhouse, 825 F.2d 458, 468-69 (D.C.Cir.1987)).
[133] *Id.*, at 60 (quoting Price Waterhouse, 825 F.2d, at 69)(noting that the Supreme Court upheld this portion of the D.C. Circuit's decision).
[134] Washington Cty. v. Gunther, 452 U.S. 161, 180 (1981) (quoting Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976).
[135] *Id.* (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707, n.13 (1978)).

inferences by the factfinder to conclude that the employment decision was discriminatory.[136] Defined as such, almost all evidence is indirect. In *Brown v. East Mississippi Electric Power Ass'n*, the plaintiff presented evidence that the decision-maker routinely used racial slurs and had directly referred to Brown as a n****.[137] The district court decision, which was prior to *Desert Palace v.Costa*,[138] denied Brown the option of proceeding under a mixed-motives theory, treating his supervisor's abusive racial language as indirect evidence of discrimination. Since Brown could not disprove each of the employer's proffered reasons at the third stage of the *McDonnell-Douglas* analysis, the employer prevailed at the summary judgment phase. On appeal, the court overturned the decision, determining that the racial slurs constituted direct evidence that racial animus was a motivating factor in the adverse action against Brown.[139]

The problem, as Linda Krieger points out, is that, given the definition of direct evidence mentioned above, Brown's evidence really was indirect and circumstantial evidence. While a supervisor's use of vicious racial slurs is highly significant, it nonetheless requires an inference that the supervisor allowed his racial animus to determine his employment decision.[140] Brown lost at the district court level because the *McDonnell-Douglas* test functioned as a straight-jacket which marginalized the incredibly persuasive evidence he presented. Subsequent developments, which will be described, would have benefitted Brown at the district court level and enabled him to survive a summary judgment motion.

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[136]Swierkiewicz v. Sorema N. A., 534 U.S. 506, 511–12 (2002); Simson, *supra* note 6, at 1112; Bornstein, *supra*. note 11, at 960.
[137]Brown v. E. Mississippi Elec. Power Ass'n, 989 F.2d 858, 860-62 (5th Cir. 1993
[138]Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) will be discussed in the next section.
[139]*Brown*, 989 F.2d at 860-62 (5th Cir. 1993
[140]Krieger, *supra* note 6, at 1221.

What is needed is to relax the rigid distinction between direct and indirect evidence and the rigid dichotomy between *McDonnell-Douglas*'s single cause assumption and a mixed-motives cause of action.

In *Desert Palace, Inc. v. Costa*, the Supreme Court held that in a mixed-motive cause of action, a plaintiff is not required to present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.[141] Instead, the court held that a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." In holding that direct evidence was not required for a plaintiff to bring a so-called mixed-motive claim, the Court essentially did away with the distinction between circumstantial and direct evidence in the context of determining the proper analytical framework to apply.[142] In *Desert Palace*, the court addressed a circuit split based upon divergent interpretations of *Price-Waterhouse*.

Professor Kerri Lynn Stone argues that confusion has persisted in the courts in the aftermath of *Desert Palace,* but she contends the most courts agree that a plaintiff seeking to establish discrimination may proceed either directly, by persuading the court that a discriminatory reason more likely motivated the employer or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Where the confusion lies is in the distinction between the direct and indirect *methods of proof,* on the one hand, and the distinction between direct and indirect, or circumstantial *evidence.* The direct method of proof does not require only direct evidence. Hence, a plaintiff using the direct method of proof may present

[141] *Desert Palace*, 539 U.S. at 92, 95.
[142] Stone, *supra* note 10, at 610–11.

direct *and* indirect *evidence* which together, must be sufficient to satisfy her burden of proof. While some courts have erroneously conflated the direct method of proof and direct evidence, the approach most consistent with *Costa* was articulated by the court in *McGinest v. GTE Service Corp.* The court stated that the decision in *Costa* gives plaintiffs the option to use the *McDonnell-Douglas* burden-shifting framework at the summary judgment stage. However, parties are not required to use this test. Plaintiffs also have the option simply to produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the employer.[143]

The courts in *McGinest* and in *Burton v. Town of Littleton* offer a simplified analytical framework that prevents plaintiffs from the proverbial straight-jacket of the *McDonnell-Douglas* framework when that framework would be an impediment to a presentation of the evidence that supports the plaintiff's case. As Kerri Lynn Stone argues, the outcome is an approach in which the plaintiff must simply present enough evidence to permit a finding that there was differential treatment in an adverse employment action that was caused, at least in part, by a forbidden type of bias. The issue, then, is the sufficiency of the evidence, not its classification.[144]

Bostock v. Clayton Cty. is a positive development because it frees plaintiffs from the rigid dichotomy of having to choose either: (1) the route of proving that their membership in a protected class was the sole reason for their mistreatment, governed by the *McDonnell-Douglas* test, or; (2) a mixed-motives cause of action with the attendant risk of the sharp limitation on

[143]McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004); *See* also Burton v. Town of Littleton, 426 F.3d 9, 19-20 (1st Cir. 2005 (following *Costa* and maintaining that any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive.").

[144]Stone, *supra* note 10, at 612-13.

damages governed by the 1991 amendments to the Civil Rights Act of 1964.[145] In *Bostock*, the court insisted that Title VII's "because of" test incorporates the simple and traditional standard of "but-for causation." However, the court maintained that events often have more than one "but-for" cause and if the adverse employment action would not have happened "but-for" the person's protected class status, then the employer has committed impermissible discrimination. An employer cannot avoid liability by claiming that other causes also influenced his or her adverse employment action so long as the plaintiff's protected status was a "but-for" cause. If the employer would not have terminated or demoted or refused to hire if, for example, the employee or job applicant was white instead of Hispanic, then the person's race was a "but-for" cause even if other considerations came into play.[146]

Finally, in reforming Title VII jurisprudence, it is important to avoid falling into the trap of treating the *McDonnell-Douglas* method as rigid, mechanized or ritualistic, an error the court in *Furnco* cautioned against.[147] *Thomas v. Eastman Kodak* is a paradigm of jurisprudential flexibility to accommodate racial discrimination complaints that do not conform to a rigid application of the *McDonnell-Douglas* framework with respect to pretext analysis. One of the prime limitations of the *McDonnell-Douglas* framework has been its treatment of racial discrimination on a "single-motive" model. At the third stage of the analysis, the question is whether the employer discriminated on the basis of the plaintiff's protected class or whether the employer's proffered reason is a dishonest attempt to hide their true, discriminatory motives. However, this pretext analysis lacks the analytical tools to easily identify discrimination in the

[145]42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 1999)).
[146]Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1739, (2020); Williams, *supra* note 19, at 405.
[147]Furnco Const. Corp. v. Waters, 438 U.S. 567, 577, (1978) (stating that "[t]he method suggested in *McDonnell Douglas* …was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.").

form of cognitive biases. A biased decision-maker's proffered reason may be one the decision-maker believes but in fact, was the result of biased evaluation of the employee or applicant.

The court in *Thomas v. Eastman Kodak Co*. recognized that the disparate treatment that Thomas, the plaintiff, alleged was more subtle than forms of discrimination more easily detectible with the *McDonnell-Douglas* framework. In this case, Thomas did not claim that Kodak, her employer articulated a false reason for her termination and that the company's proffered reason was a lie designed to disguise the racial animus that was the "real reason." The employer terminated Thomas because of her more recent low performance evaluations. But Thomas challenged the race neutrality of the evaluator and argued that her low performance evaluations were themselves the disparate treatment leading to her termination, not because her supervisor was lying to cover up explicit racial animus, but rather, because her supervisor was biased and that bias distorted her perception of Thomas's performance.[148]

In a footnote, the court in *McDonnell-Douglas* stated that because facts vary in Title VII case, the prima facie proof required is not necessarily applicable in every respect to differing factual situations.[149] This footnote is significant because courts often treat the *McDonnell-Douglas* test rigidly as a threshold requirement for the plaintiff to make out a *prima facie* case of discrimination.[150].Bornstein points to a positive development for plaintiffs alleging other forms of Title VII discrimination in a line of caregiver and transgender cases in which courts have allowed plaintiffs with sex stereotyping evidence to create an inference of discrimination even when they lack comparators. [151] In *Back v. Hastings on Hudson Union Free School District*, a 2nd

[148]Thomas v. Eastman Kodak Co., 183 F.3d 38, 58 (1st Cir. 1999).
[149]McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, n.13 (1973).
[150]Bornstein, *supra* note 12, at 943-44 (citing Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L. J. 728, 745 (2011)).
[151] Bornstein, *supra* note 12, at 941-42.

circuit decision, a sex stereotyping plaintiff succeeded without a comparator in a field impacted by occupational segregation. The plaintiff was a school psychologist who, after she had a child, experienced declining performance evaluations, resulting in her unexpectedly being denied tenure. The court rejected the defendant school's argument that she should lose on summary judgment unless she could produce evidence of "similarly situated men" that the school had treated better than her. Requiring a male comparator would have proven difficult or even impossible since the plaintiff was the only school psychologist and 85% of the school's teachers were women, 71% of whom were mothers. According to the court, "stereotypical remarks about the incompatibility of motherhood and employment" made by the female decision makers who denied her tenure was evidence enough that "'gender played a part' in [the] employment decision." Thus, the court held, "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive."[152]

All of these proposed reforms represent strands or trajectories already operative in at least some federal circuits. But if: (1) the rigidity in application of the *McDonnell-Douglas* framework is relaxed in response to the unique circumstances of each case; (2) if intentional discrimination is recognized to include employment decisions infected by stereotypes or other cognitive biases, and; (3) if the plaintiff is simply permitted to make their case by presenting sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, without having indirect evidence marginalized by the stray remarks doctrine, the impediments to race discrimination plaintiffs described in the first segment of this essay will be minimized.

[152]Bornstein, *supra* note 12 at 947; Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 114-122, 126 (2d Cir. 2004).

V. The Theological Formation of Race

Robin Lenhardt agrees that humans constantly and unconsciously try to "fit experience into some interpretive scheme" in the effort to achieve some meaningful ordering of our world.[153] However, Lenhardt points out that categorization is not innocent or neutral. The operation of stereotypes and racial schemas result in stigmatic harm, by which some groups are treated as disfavored, with individual members considered to be dishonored persons and consigned to outsider status.[154]

Lenhardt also argues that while categorization may be an inevitable human process, how we classify and categorize, how we come to value and devalue with respect to racial difference, is not natural or an internally driven phenomena. Our racial classification schemes come to us from the social systems into which we are socialized. We internalize community norms regarding normal and abnormal, about who should be regarded positively and who should be regarded negatively. Societies create hierarchies to order social relations and some of these hierarchies inflict harm and injustice.[155]

The turn to the work of Christian theologians may seem a strange detour in a law review article.[156] But long before the development of modern racial "science," the idea of race emerged within western medieval and early modern Christianity. Even though these developments

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[153]Lenhardt, *supra* note 20, at 826.

[154]*Id.* at 826-27.

[155] *Id.* at 827.

[156]Though I am and have been a theologian for most of my career, there is an important distinction to be drawn. Theologians are engaged in the task of theology when they endeavor to provide **normative** articulations of the meaning of Christian faith and practice. But one could also provide a **descriptive** account of the ways in which theological thought/discourse was developed in ways that helped to 'create' the concept/category of race. This mode of scholarly analysis falls into the category of "religious studies." A person can study a religious faith in this way whether or not the person is an adherent of that faith. Since this is a paper in law rather than theology, I will be engaged in the latter task.

occurred seven to eight centuries ago, the racialized imagination and hierarchical ordering of human beings by skin color have continued to shape the racial schemas into which persons today are socialized. As will be described below, this hierarchical racial ordering, which was believed to be the objective truth about race, was explicitly present in American law until the 1960's. Since the 1960's, race continues to shape the law and, most important for the purposes of this essay, human interaction in the workplace.

J. Kameron Carter traces the formation of the category of race in medieval Europe to the European Christian hostility to the Jewish persons and communities in their midst. This required a theological maneuver that theologians have characterized as "supersessionism." In both the Hebrew scriptures and the early Christian writings of the first century that compose the Christian canon of sacred writings, the Jewish people were understood to stand in a unique covenant relationship with God that was designed to be the source of blessing for all of humanity.[157] In the first century, non-Jewish converts to Christianity understood themselves to have been incorporated into God's special relationship with Israel. Supersessionism is the notion that the Christian church has replaced the Jewish people, who have been discarded or abandoned by God. In the middle ages, white Europeans mapped themselves onto Israel's special relationship with God. This meant that the religious identity "Christian" and what will become a racial category, whiteness, are merged together, with white Europeans as God's "chosen" people.[158]

In the middle ages, the foundation for the creation of race and white supremacy is laid with the identification of Jewishness as a racial difference. As early as the twelfth and thirteenth

[157]The designations "Israelite" and "Hebrew" are used to refer to the Hebrew people prior to the destruction of the capital city of Jerusalem by the Babylonian empire in the early sixth century B.C.E., followed by exile and resettlement in Babylon. This people group came to be identified as "Jewish" and their religion as "Judaism."
[158]J. KAMERON CARTER, RACE: A THEOLOGICAL INQUIRY, 4 (2008); *See also* KRISTOPHER NORRIS, WITNESSING WHITENESS: WHITE SUPREMACY IN THE AMERICAN CHURCH, 46 (2020).

centuries, one finds an obsession with "marking and ensuring Jewish difference and separateness."[159] The Fourth Lateran Council[160] in 1215 began imposing regulations on the activities of European Jews, including the ominous requirement in Spain and England that Jews wear a badge of identification. This ruling was motivated, in part, by the fear that "through error Christians have sexual relations with the women of Jews and Saracens."[161] With Jewish identify imagined as an inferior and defective racial identity, Jewish persons who converted to Christianity were never entirely welcomed, but were viewed as suspect. In Spain, they were labeled as swine (*marranos*). Jewish identity was regarded by much of the leadership of the church as a perverse racial identity, at least partially irredeemable, which no amount of baptismal water could entirely "wash away."[162]

This fear of the "mixing of blood" and obsession with distinguishing and categorizing people set the stage, tragically, for further injustice and exclusion in the "racially charged" colonial encounter with another form of otherness.[163] The hostility toward Jews and Muslims produced that tragic theological view that persons outside the faith were enemies of God and of Christian civilization. As white Europeans encountered the non-white other who was simultaneously the religious other, these two categories merged together. Europeans, who were almost exclusively white-skinned, understood themselves as uniquely God's people and as such, the chosen and superior class of humanity. When they encountered non-Christian others who

[159]Norris, *supra* note 158, at 39-40.
[160]A gathering of bishops of the church.
[161]Norris, *supra* note 158, at 39-40; Carter, *supra* note 158, at 79-115. Saracens were Muslims.
[162]Norris, *supra* note 158 at 39-41.
[163]*Id.* at 38-41.

were simultaneously darker-skinned, a world viewed through the lens of a religious and racial hierarchy emerged.[164]

What emerged was a sliding scale of humanity, with whiteness on the top of the scale as the marker of true Christianity and true humanity. Whiteness became the measure by which others were evaluated, the criterion for determining who was an insider and who was an outsider and for determining who is more and who is less capable of rationality, morality, and religion. This results in the creation of races as ordered hierarchically, with white as superior in intelligence, civilization, and capacity for the religion and black flesh at the bottom of the hierarchy as less intelligent, less capacity for being civilized without coercive discipline or enslavement, and less capable of intellectually and spiritually mature Christian faith.[165]

Willie James Jennings describes this imagination at work in the Jesuit theologian Alessandro Valignano (1539-1606), who viewed the Japanese as "white, courteous and highly civilized,….naturally very intelligent. In contrast, Valignano spoke contemptuously of persons with dark skin:

> They are a very untalented race….incapable of grasping our holy religion or practicing it; because of their naturally low intelligence, they cannot rise above the level of the senses; they lack any culture and are given to savage ways and vices…..live like brute beasts…..they are a race born to serve, with no natural aptitude for governing.

Vignano concluded that black flesh is reprobate flesh, belonging to the sphere of rejection by God. On this racial scale, whiteness indicates high salvific probability, rooted in the signs of movement toward God (e.g., cleanliness, intelligence, obedience, social hierarchy, and advanced

[164]Norris, supra note 158, at 46; JEANINE HILL FLETCHER, THE SIN OF WHITE SUPREMACY: CHRISTIANITY, RACISM, AND RELIGIOUS DIVERSITY IN AMERICA, 27 (2017).
[165]WILLIE JAMES JENNINGS, THE CHRISTIAN IMAGINATION: THEOLOGY AND THE ORIGINS OF RACE, 15-37, 232 (2011).

civilization). For Valignano, the sign of African reprobation is that "they go around half naked, have dirty food, practice polygamy, show avarice, and display marked stupidity."[166]

Willie James Jennings also describes the creation of a racial aesthetic, with white flesh as beautiful and black flesh as damaged and ugly flesh. Jennings draws upon the description, by Portugal's royal chronicler, Gomes Eanes de Azurar, of the arrival of a ship filled with persons captured in Africa and placed in a field to be bid upon and possessed as slaves. The scene was described in these terms:

> And these, placed all together in that field, were a marvelous sight; for amongst them were some white enough, fair to look upon, and well proportioned; others were less white like mulattoes; others again were as black as Ethiops [Ethiopians], and so ugly, both in features and in body, as almost to appear (to those who saw them) the images of a lower hemisphere.[167]

This white aesthetic repeats itself in Christopher Columbus's description of the natives he encountered in what is today the southern portion of Venezuela. He described a canoe with twenty-four men,

> all young and fine looking and not negroes but rather the whitest of all those that I had seen in the Indies, and they had graceful and fine had fine bodies and long, smooth hair cut in the Castilian manner.[168]

For European explorers at this time, Jennings notes, the color white signified culture, refinement, and a 'just like us' designation.[169]

However, this formation of a racialized optic and a racial scale of being was not merely a matter of attitude. The logic that racial others are religious others and as such, enemies of Christ, provided the sacred canopy to legitimate domination and slavery. Even before Christopher

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[166] *Id.* at 32-36.
[167] *Id.* at 18.
[168] *Id.* at 29-30.
[169] *Id.*

Columbus' voyage, papal decrees had blessed the African slave trade by Portuguese explorers. Muslims and Africans were both religious enemies and on that basis, explorers were granted full authority "to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ, wheresoever placed, and reduce their persons to perpetual servitude."[170] After Columbus' return from "the new world," Pope Alexander VI issued two papal bulls in 1493 that were the founding documents of "Doctrine of Discovery," granting Spanish monarchs authority to expropriate any new land not owned by a Christian lord. The theological vision that placed white Christians at the top of the human scale of being now carried with it the mandate to subdue the earth and other people groups.[171]

The production, maintenance, and reproduction of social dominance requires legitimizing ideologies or "myths" that provide moral and intellectual justification for the social practices that distribute social value within the social system."[172] The racial hierarchical imagination that originated in western Europe has shaped the social imagination of generations of white western persons, including white American citizens, for hundreds of year. In the United States, persons of African descent were enslaved and after emancipation, subjected to other violent means of control, from tenant farming to black codes and vagrancy laws to a brutal convict leasing system.[173] Lynching was a means of social control and African-Americans were subjected to *de jure* segregation by Jim Crow laws and *de jure* residential segregation by federal and local

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[170] POPE NICHOLAS V., BULL ROMANUS PONTIFEX: GRANTING THE PORTUGUESE A PERPETUAL MONOPOLY IN TRADE WITH AFRICA, January 8, 1455, https://www.papalencyclicals.net/nichol05/romanus-pontifex.htm. (Last Accessed April 22, 2022).

[171] POPE ALEXANDER VI., INTER CAETERA: DIVISION OF THE UNDISCOVERED WORLD BETWEEN SPAIN AND PORTUGAL, May 4, 1493, https://www.papalencyclicals.net/alex06/alex06inter.htm, (Last Accessed April 22, 2022

[172] Simson, *supra* note 5, at 1048 (quoting Jim Sidanius & Felicia Pratto, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION, 309 (1999)) (also referencing Jim Sidanius et al., *Social Dominance Theory: Its Agenda and Method*, 25 POL. PSYCHOL. 845, 847-48 (2004)).

[173] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS, 20-58 (2010); DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2009).

housing policy until the 1960's.[174] The infamous *Dred Scott*[175] decision defined black persons as permanent outsiders. Theologian Kelly Brown Douglas argues that in the American social imagination, the black body is hypersexualized, dangerous, and criminal. Writing in 2014, she related this to the murder of Trayvon Martin and to police extra-judicial violence.[176] Published in 2015, the book's argument has only been tragically reinforced by the violent deaths suffered by Tamir Rice, George Floyd and Armaud Arbery.

Of course, the nation's history also includes denigration, exclusion, and mistreatment of other non-white persons and groups, from the Chinese exclusion act to the tragically perennial revival of nativism and hatred of immigrants. For example, Otto Santa Ana describes the dehumanizing rhetoric often used to describe persons of Mexican descent entering or residing in the United States. These images include a "rising brown tide" that will wash away Anglo-Saxon cultural dominance, along with depictions of immigrants as animals, weeds that must be uprooted, pathogens, enemies, criminals, and tax burdens.[177]

The patterns of racial hierarchy and the forms of domination, such as slavery and colonial conquest, which emerged within medieval European Christianity, remain relevant to the analysis and identification of contemporary modes of racial bias and discrimination. The racialized hierarchical mapping of people groups generated by medieval European Christianity remains deeply embedded within American public life, even if latent and often repressed.

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[174]See, for example, RICHARD ROTHSTEIN, THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).
[175]Dred Scott v. Sanford, 60 U.S. 393 (1857).
[176]KELLY BROWN DOUGLAS, STAND YOUR GROUND: BLACK BODIES AND THE JUSTICE OF GOD (2015).
[177]OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICA PUBLIC DISCOURSE. (2002).

Canadian philosopher Charles Taylor and others have proposed that all humans live "within" a social imaginary, a picture of the world that shapes what we inchoately and intuitively take to be common sense, what assume to be real, true, good and normal. The term "social imaginary" describes the ways a people group imagines their social existence. Included within a social imaginary are expectations about how humans are supposed to interact with one another in different social spaces. Taylor stresses that the ways we "imagine" or world is not, first and primarily, expressed in theoretical language, but is carried by stories, images, and legends.[178] Barry Harvey makes a similar point, contending that "all human endeavors, our relationships to the people, places, and things around us—are situated within some network of metaphors and analogies that generates our convictions and shapes our judgments about what is true, good, and beautiful."[179] A social imaginary provides "a frame of reference for all our comings and goings, our actions and affections, our desires and decisions, linking them together to form a hopefully coherent account of our lives."[180]

Prior to the 1960's, white supremacy was assumed by the majority of Americans as simply common sense, the way things are. In other words, white supremacy was a deeply embedded feature of the American social imaginary. Until the 1960's, as Robert P. Jones points out, most white persons explicitly believed that African-Americans were biologically and culturally inferior and incapable of assimilating into the American mainstream.[181] The social transformations with respect to race in the 1960's did not simply or instantaneously eradicate deeply embedded modes of imagination with respect to race and racial hierarchy. In terms of the

[178]Taylor, *supra* note 18, at 23; CHARLES TAYLOR, A SECULAR AGE, 171-72 (2007).

[179] Barry Harvey, *Imagination and the Nature of Evil*, 63 THEOLOGY TODAY 450, 452 (2007).
[180]*Id*.
[181]ROBERT P. JONES, WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY (2020).

long arc of history, the fifty-eight years since the passage of the Civil Rights Act of 1964 is the proverbial blink of an eye.

Consider two bits of evidence that, in spite of sweeping social changes that began in the 1950's and 1960's, significant traces of this part of our collective social imaginary persist.

First, in one of the prominent black hairstyle cases, the plaintiff was told that she would not be hired if she was planning to work with her dreadlocks. The interviewer made this comment, "they tend to get messy, although I'm not saying yours are, but you know what I am talking about."[182] The interviewer's assumptions about what constitutes acceptable, professional hairstyle is a more than faint echo of Christopher Columbus's positive assessment, more than six hundred years earlier, of the long, smooth hair cut in the Castilian manner that he observed among the native peoples in what is today the nation of Venezuela. Just like Columbus, the interviewer assessed attractiveness and the acceptability of an employer's hairstyle by way of comparison with white norms.

Second, consider the dimensions of this long-standing social imaginary that have erupted into view with the rhetoric of the previous president. As one example, former President Donald Trump asked why the United States should accept more immigrants from "shithole" countries such as Haiti and countries in Africa and asserted that "we should bring in more people from places like Norway."[183] This crude comment may not have reproduced all of the sentiments

[182] EEOC v. Catastrophe Mgmt. Solutions, No. 14-13482, 2016 WL 7210059, at *1 (11th Cir. Dec. 13, 2016); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 989 (2017).
[183] Kathryn Watson, *Trump questions why U.S. welcomes people from "sh*thole" countries*, CBS NEWS, January 11, 2018, https://www.cbsnews.com/news/trump-asks-why-u-s-welcomes-people-from-shole-countries-report/. (Last accessed April 29, 2022).

articulated by Alessandro Valignano in the sixteenth century, but it certainly echoes Valignano's contempt for the people groups he encountered in Africa.

How might persistent and residual traces of the social imagination that was created by the theological formation of race manifest itself in employment situations? While this list is not exhaustive, racial discrimination in the workplace that manifests the traces of this longstanding racial hierarchical imagination include:

(1) Perceptions of a racial minority employee as dangerous, as a threat.[184] The racial schema that imagined white skin to be correlated with a higher level of morality and darker skin to be correlated with inferior morality has given rise to an association of darker skin, whether black, Hispanic, "Middle Eastern," etc., with criminality and violence.

(2) Treatment of the employee as if his/her presence was "transgressive." The person is not "in their place." This is particularly the case when there is one non-white employee in a workplace or workspace in which all the other employees are white. Outside of the employment context, the phenomenon of white persons calling the police to report black persons in public spaces where the white caller believed black persons should not be present, illustrates this tendency.[185]

[184]Linda Hamilton Krieger describes this dynamic in a non-workplace setting. In a study, school-age children were presented with cartoon-like drawings of two children in a classroom, one seated behind the other. The verbal description of the scene as: "Mark was sitting at his desk, working on his social studies assignment, when David started poking him in the back with the eraser end of his pencil. In one drawing, David was depicted as white and in another drawing, David was depicted as black. The school children were asked to rate David's behavior on four scales, with one representing playful, two friendly, three mean, and four, threatening. When David was presented as black, his actions were judged to be more mean and threatening than when David was presented as white. Krieger, *supra* note 6, at 1202-03.

[185]Taja-Nia Y. Henderson and Jamila Jefferson Jones, *#LivingWhileBlack: Blackness as Nuisance,* AMERICAN U. L. REV. 863 (2020).

(3) Patterns of separation and exclusion: Are non-white workers excluded from channels of communication, networking relationships, and decision-making processes?

(4) A hierarchical imagination may manifest itself in a visceral reaction against a non-white person in a role that involves authority over white employees or conversely, negative evaluation of the job performance of a racial minority person who is not deemed sufficiently deferential to white persons in positions of authority, or even sufficiently deferential to white co-employees who are not in positions of managerial authority.

(5) Racial hierarchy stereotypes: Minority employees are stereotyped as less intelligent or less capable.

(6) A racial aesthetic: a minority candidate is treated as unprofessional to the extent that she or he does not conform to white corporate or business norms in dress or hairstyles. The black hairstyle cases illustrate how deeply embedded are these aesthetic norms.

VI. Testing the Thesis: The Workplace Experiences Survey

The confirmation that this social imaginary continues to impact discrimination in the workplace is found, in part, in the research of Joan Williams, Rachel Korn, and Sky Mihaylo. The Workplace Experiences Survey ("WES") provides a fine-grained description of how racial and gender bias play out in everyday workplace interactions in pervasive and persistent patterns that are broadly recognized. The WES confirms that variations of the racial hierarchical social imaginary that were part of the theological formation of the "idea" of race and the accompanying hierarchical racialized optic persist as identifiable and pervasive patterns of bias and discrimination in the workplace. [186]

[186]Williams, et al., *supra*. note 19, at 338, 342, 348.

Williams and her colleagues shift the focus from cognitive psychology to social psychology, which focuses on the social dimensions of human action. The WES is a simple ten-minute bias climate survey that asks people whether they have experienced bias and where.[187] The WES's combination of both laboratory and field studies, which includes the survey itself, offers objective evidence of the pervasiveness of certain patterns of discrimination in the workplace.[188]

The first pattern of bias is categorized as the "Prove-it-Again bias." Women and racial minority persons have to prove themselves more than white men do. Women and many non-white persons find that they need to provide more evidence of competence in order to be seen as equally competent**.** Resumes of people of color get evaluated more negatively than identical resumes of white people. Prove-It-Again bias reflects assumptions that groups lower in status are less competent and less intelligent.[189]

Obviously, the "Prove-it-Again-bias" indicates that a racial and gendered hierarchical imagination is extremely pervasive.[190] Black people and LatinX individuals are stereotyped as less competent than white people. This has measurable consequences that have been demonstrated over and over again in lab and audit studies. White applicants are more than twice as likely to be considered for a job than identical Black applicants. One of the "identical resume studies" shows that "Jamal" needed to have eight more years of experience to get called back at the same rate as "Greg."[191] Mistakes made by a woman or non-white person tend to be

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[187] *Id*.
[188] *Id*. at 341-42.
[189] *Id*. at 341.
[190] Since the focus of this essay is racial employment discrimination, addressing the ways in which a gender hierarchy has even longer history is beyond the parameters of this essay.
[191] Williams, et al., *supra*. note 19, at 359-60 (citing Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 226 (2012)).

remembered longer and colleagues are more likely to notice more of their mistakes.[192] Since persons tend to see what we expect to see, a phenomenon known as confirmation bias, racial and gendered stereotypes of incompetence or lower intelligence lead to this result.[193]

Prove-it-again bias shapes how one's ideas are received by others. In the WES, women and non-white persons reported that others often get credit for the ideas they originally presented at much higher rates than white men report stolen ideas.[194]

Williams and colleagues also call attention to dynamics of exclusion in professions dominated by white men from elite backgrounds. White men within that demographic find it easier to gain sponsors, to be "in the know," and to get the benefit of the doubt.[195] In-group favoritism will result in sponsorship and information advantages. The strongest determinant of who is in one's social network is similarity. People tend to build social networks made up of people who are like them. If the professional workplace was traditionally all but exclusively composed of privileged white men from elite backgrounds and continues to be predominantly composed of privileged white men from elite backgrounds, then those they sponsor (i.e., whose careers they champion) will tend to be same-class white men and their bonding activities will likely be class-linked (e.g., golf). Valuable information, such as plum assignments or sales opportunities, tend to be shared through social networks.[196]

For example, plaintiffs in a disparate impact case succeeded in receiving class certification because they were able to describe precisely how in-group favoritism operated to

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[192] *Id.* at 357-58.
[193] *Id.* at 357-58.
[194] *Id.* at 361.
[195] *Id.* at 355 (citing Marilynn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS, 160, 163-69 (David M. Messick & Ann E. Tenbrunsel eds., 1996).
[196] *Id.* at 357.

deprive black brokers of equal opportunities. They explained how Merrill-Lynch's "teaming" policy functioned to create "little fraternities" of white brokers who chose to work with other white brokers like themselves. This meant that black brokers found it difficult to access the teaming that led to information crucial to gaining access to lucrative accounts. The plaintiffs succeeded because they were able to craft a narrative that explained in detail how stereotyping contributed to these mechanisms of exclusion that affected the defendant's workplace.[197]

Williams and colleagues also describe the ways in which prescriptive stereotypes about how persons lower in status ought to behave function. Behaviors that signify competence, mastery and leadership are more accepted from white men than from women and persons of color, male or female. Anger is also perceived as more unacceptable and threatening when coming from racial minorities. This makes it more difficult to exercise or establish authority when the person's position requires it. Persons from lower status groups, whether gender-related or race-related, are typically expected to be deferential rather than dominant, to act in ways that demonstrate that the person knows his or her place in a real but rarely explicitly articulated status hierarchy. For example, studies have found that white Americans both expect individuals of Asian descent to be passive and tend to dislike those who display dominant behavior.[198] A Latinx woman scientist reported that she was treated as if she was angry when she was not angry. Her "wrong" was that she was not deferential, which triggered a prescriptive gender stereotype of the "hot-blooded Latina woman.[199] Such prescriptive stereotypes mean that assertive behavior by African-American men triggers fear or hostility in predominantly white workplaces. Black men

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[197] Williams, et al., *supra*. note 19, at 343. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488-490 (7th Cir. 2012).

[198] Williams, et al., *supra*. note 19, at 365-67 (referencing Jennifer L. Berdahl & Ji-A Min, *Prescriptive Stereotypes and Workplace Consequences for East Asians in North America*, 18 CULTUR. DIVERS. ETHNIC PSYCHOL. 141, 149-50 (2012)).

[199] Williams, et al., *supra*. note 19, at 370.

are quickly stereotyped as violent and quick to anger. Due to the operation of stereotypes of black men as dangerous, when Black men display merely assertive behavior, they are at risk of triggering the "violent" stereotype and be classified as "intimidating." [200]

In these ways, features of the racialized hierarchical imagination remain in play. Non-white persons are expected to act in deferential ways that express inferiority and when black men or other non-white persons express anger, they are viewed as dangerous, potentially criminal, and presumed to be less moral and in control of themselves.

Similarly, the exercise of authority outside of a racial hierarchical ordering may trigger resistance from white persons. For example, a LatinX science professor had trouble getting the white administrative assistants to do routine work for her that they did without question or resistance for other professors. She noted their resentment that she, a Mexican woman, was telling them what to do.[201]

Concluding Reflections: Making Connections and Pulling the Strands Together

As a law school student, I worked as a clerk at a small employment law firm. While in this position, I contributed to the representation of a client who filed a racial discrimination complaint with the state agency responsible for the adjudication of discrimination complaints. While the case was not a Title VII case brought to federal court, the state law was modeled upon Title VII.

Prior to his termination, "Smith"[202] had communicated by email with the Human Resources Director. He wrote that he was having "by far the worst experience that [he had] ever

[200] *Id.* at 371.
[201] *Id.* at 389.
[202] Smith is not his real name. For the sake of confidentiality, I am describing events in such a way as to avoid the possibility of disclosing the identities of the actual parties in this employment action.

had at a company." He noted that he was the only African-American in a management position at the location of the company where he worked. "Smith" believed that he had been consistently sabotaged by management in the tier above him. He was cut out of crucial meetings with his own customers, as well as from internal conversations. In a company reorganization, he was the only manager whose input was not sought and the only manager excluded from any information regarding his new role until the reorganization was announced to the entire company. In his new role, his official responsibility was that of a liaison between the company's IT department and customers learning how to use new industrial management software in ways that best fit their needs. But instead, he was often assigned new and complicated technical IT tasks which were outside the parameters of his new job description. Then he was blamed for having a bad attitude when he indicated that these were technical competencies outside of his area of expertise. He was, he firmly believed, set up to fail by management in the tier above him.

The company presented, as evidence that Smith's termination was for "legitimate non-discriminatory reasons, a performance evaluation. Smith's overall performance rating was 1 star out of 3, which meant "failing to meet performance expectations." But a close reading of this evaluation revealed that this rating was blatantly arbitrary. There were positive comments sprinkled throughout the review. Most tellingly, there was not a single comment offering a rationale for this rating or any indication of precisely how he failed to meet performance expectations.

Something was clearly amiss, but it was difficult to prove discriminatory intent. No one hurled racial epithets at Smith. He overheard a conversation in the hallway. Another member of the management team stated that he left a youth basketball tournament he attended with his children because things were getting tense and some of the players on the other team "were of a

darker skin tone." Smith claims that another manager made a comment, in a meeting in which Smith was present and after the murder of George Floyd, that he might need to "put a knee on the neck" of one of the company's suppliers. However, the manager denied that he made the statement. However, both of these comments would be dismissed if the court applied the "moment of decision" and "stray remarks" doctrines since Smith would not have been able to connect either comment to the actual decision to terminate his employment.

Though Smith believed that the supervisor above him was biased against him and played the most pivotal role in sabotaging him, Smith faced subtle biases which had a cumulative effect. When I wrote the initial brief seeking a "probable cause" determination to the state adjudicatory agency,[203] I was not confident of a determination favorable to our client. I engaged in the *McDonnell-Douglas* analysis and endeavored to make the case that the employer's stated rationale was pretext for discrimination. But given the lack of "smoking gun evidence" and the employer's proffered reasons for its adverse employment action, I held my breath as I waited, lacking confidence that we had enough evidence to persuade the fact finder at the first stage of the adjudicatory process.

But how might the patterns identified as rooted in the very origins of the western creation of "race" as a hierarchical scale of being, from white to black permit Smith's attorney to weave together a persuasive narrative to convince the finder of fact that Smith was a victim of impermissible discrimination? How might the correspondence between this long-standing racial optic and the patterns detected by the Workplace Experiences Study permit Smith's attorney to

[203]My firm was not pursuing Smith's claim in federal court under Title VII. However, the state employment law governing race discrimination claims is closely modeled on Title VII.

highlight the patterns of racial bias in a way that makes the racial discrimination he experienced more evident to the trier of fact?

First, Smith was a confident person who spoke out and advocated for his ideas. This antagonized one of the supervisors who clearly had a visceral dislike for Smith. As in *Hicks*, a court or adjudicatory body could easily believe that Smith was fired because the supervisor did not like him on a personal level rather than believing that Smith was fired because of racial discrimination. But if the proposed categories operate as a lens for detecting patterns of racial interaction, it is clear that Smith's self-confidence and willingness to advocate for his ideas and disagree with management colleagues triggered long-standing racial schemas. Smith was not sufficiently deferential to his white colleagues. While Smith was sometimes invited to the table, his willingness to speak on equal terms with his colleagues was resented. Smith's presence was now transgressive. He was a black person in white space. And since he stood up for himself and his viewpoints about how things should be done, he broke the unspoken rules by stepping out of a subordinate place in the hierarchy.

In response, Smith's colleagues began to isolate him to exclude him from white space. He was cut out of conversations with his customers and excluded from the conversations about the company's reorganization. Then, the tropes and stereotypes about black incompetence shaped the ways in which he was treated as incompetent and put in situations designed to set him up to fail, thereby confirming his incompetence. His supposed failures, caused by being asked to complete IT tasks outside his job description, were viewed by his colleagues and supervisors as further evidence of his incompetence. As noted by the Workplace Experiences Survey, his mistakes were noticed and amplified in the minds of his colleagues. Finally, Smith's willingness

to complain about discrimination to Human Resources triggered a response from colleagues and managers who regarded his anger as threatening.

If this care were in federal court, two racist comments, one of which Smith overheard that was not directed to him personally, and which was, might be dismissed as stray remarks. However, if Smith were permitted, in the wake of *Costa*, to present direct and circumstantial evidence of discrimination, these remarks would be taken seriously as evidence of racial bias. Ironically, the two comments are tethered to long-standing racial schemas and stereotypes. The supervisor who commented about leaving a youth basketball tournament because things were getting tense and some of the players were of a darker skin tone, unwittingly invoked the stereotype correlating dark skin with danger and immorality. The comment about a knee to the neck of the vendor was even more insidious. Given that the comment was designed to be heard by Smith, the comment invoked white dominance over black bodies and constituted a performance by which the supervisor sought to assert dominance over Smith. The comment reflected the very origins of a racialized optic in that black bodies place in the hierarchy require enslavement and domination to subdue immoral and violent impulses.

By weaving these elements together, the litigator is able to expose the partially hidden and covert racial biases by inserting the facts into a narrative pattern that makes visible and manifest what was hidden in the fragments. But when the fragments are "glued together" by situating them within a long-standing pattern of racialized hierarchy, with its ongoing patterns of latent racial bias, a persuasive story becomes possible.