THE UNCONSCIOUS DISCRIMINATION PARADOX: HOW EXPANDING TITLE VII TO INCORPORATE IMPLICIT BIAS CANNOT SOLVE THE ISSUES POSED BY UNCONSCIOUS DISCRIMINATION

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INTRODUCTION

"*The greater our knowledge increases*
the more our ignorance unfolds."
John F. Kennedy[**]

For some journalists and commentators, the election of Barack Obama as America's first African-American president, and the candidacy of Hillary Clinton as the first female major party presidential candidate signaled a shift in a major social framework—a shift wherein race and sex have become unimportant, and where minorities can attain equal employment opportunities.[1] Nevertheless, even in the midst of these proclaimed victories for minorities, and notwithstanding mainstream attitudes of social equality, it is difficult to claim that America exists in a post-racial or gender egalitarian society. In the wake of the 2016 U.S. Presidential Election, reports of continued racism and sexism have garnered increased attention in the news and across social media.[2] Discriminatory attitudes still exist in the social context, and victims of these discriminatory acts continue to suffer. As a result, advocates for social equality have increasingly turned to legal measures to combat pervasive discrimination and elicit social change.

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[*] This is dedicated my wife and best friend Caitlin. I'd like to thank my mom and my dad for their unending support in this process. I would also like to thank Mr. Stephen Robinson for his guidance.

[**] John F. Kennedy, Address at Rice University on the Space Effort (Sept. 12, 1962).

[1] *See* Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law*, 87 IND. L.J. 325, 325 (2012); Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 415 (2012); Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833, 833 (2011); Stephen Collinson & MJ Lee, *Clinton Nomination Puts 'Biggest Crack' in Glass Ceiling*, CNN POL. (July 27, 2016, 4:13 PM), http://www.cnn.com/2016/07/26/politics/democratic-convention-roll-call-day-two/.

[2] *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR.: SOC. & DEMOGRAPHIC TRENDS (June 27, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf; Katie Reilly, *Racist Incidents Are Up Since Donald Trump's Election. These Are Just a Few of Them*, TIME POL. (Nov. 13, 2016), http://time.com/4569129/racist-anti-semitic-incidents-donald-trump/.

One specific area that has garnered widespread attention in the last fifty years has been the American workplace. In an era of magnified focus and societal awareness on issues surrounding race and sex discrimination, society has increased pressure on employers to address, mitigate, and eradicate these issues. In 1964, Congress passed Title VII of the Civil Rights Act in an attempt to end widespread forms of employment discrimination.[3] The Supreme Court has made clear that, because Title VII was created to eliminate discrimination while preserving workplace efficiency, it in turn "tolerates *no racial discrimination, subtle or otherwise*."[4] Nevertheless, while plaintiffs have successfully employed Title VII to combat direct and overt cases of intentional discrimination,[5] Title VII has failed to address a common form of discrimination that pervades employment settings nationwide: unconscious discrimination based on implicit bias.

Implicit bias is widespread, and affects our unconscious attitudes, feelings, and aversions to certain social groups.[6] Because implicit biases affect the subconscious and do not cause an overt intent to discriminate, they present a unique problem for Title VII. Thus, there remains a major unsolved dilemma for victims of discrimination in the United States. As currently applied, Title VII addresses solely *conscious* discrimination, thus neglecting to protect individuals from latent racist, sexist, or discriminatory attitudes.[7]

The relevant question is paradoxical, yet carries heavy legal implications: how can an employer discriminate against his employee without being aware of his biases and discriminatory propensities? Congress enacted Title VII in an attempt to target discrimination, yet because it fails to address unconscious discrimination or pervasive implicit bias, it only targets a segment of a larger problem. For employers who subconsciously deny employment to minorities based on their race or sex, or employers who unknowingly treat their employees differently because of their race or sex, an anti-discrimination law focused solely on intentional discrimination fails to curb the negative effects for victims of unconscious discrimination. Conversely, since Title VII does not provide adequate protections under the law,[8] job candidates and employees subject to stereotypes or subtle, unconscious discrimination continue to be victimized simply due to their membership in a particular protected social group.

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3 Christopher Cerullo, *Everyone's A Little Bit Racist? Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 128 (2013).

4 Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) (emphasis added) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075.

5 Cerullo, *supra* note 3, at 128.

6 *Id.* at 138.

7 Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 355–56 (2008).

8 As will be shown, neither disparate treatment theory, nor disparate impact theory can adequately address the problems posed by unconscious discrimination. *See* discussion *infra* Part II.B.2.

Advocates for social justice and equality argue that, because Title VII only focuses on overt or conscious discrimination, it ultimately falls short in fulfilling Title VII's larger policy goal: to eradicate all discrimination.[9] Given the shortcomings of the current application of Title VII, much of the literature on this topic has focused on incorporating implicit bias into the current legal framework.[10] Current scholarship argues that recognizing the pervasive nature of implicit bias under Title VII will be advantageous to current victims of unconscious discrimination because it would allow the courts to address the shortcomings of the law, specifically, the inability of the current framework to address implicit discriminatory attitudes.[11] The current literature on this topic assumes that expanding the scope of Title VII to recognize implicit bias as a motivating factor is a desirable means to combat widespread societal discrimination.[12] Nevertheless, the same scholarship fatally ignores the clear prudential issues surrounding such an expansion, and the potential disadvantages to plaintiffs in recognizing implicit bias in Title VII litigation. The current literature overlooks the tangible and practical effects of implicit bias on courts under the Federal Rules of Evidence ("FRE" or "Rules"), and how courts might actually handle evidence of implicit bias in a jury trial. As this Comment illustrates, the recognition of unconscious discrimination and implicit bias in the context of Title VII poses dire evidentiary issues for courts under the current Rules and will in the long run prove counterproductive to Title VII's legislative purpose.

Herein lies the paradox for victims of unconscious discrimination: if the courts fully recognize implicit bias in the context of Title VII litigation, victims will face additional burdens and risk further discrimination. Thus, this Comment maintains that courts should not attempt to incorporate implicit bias into the current legal framework of Title VII because it will hurt potential victims of unconscious discrimination by creating evidentiary burdens that will paradoxically limit and deter litigation. Part I provides a brief overview of unconscious discrimination and implicit bias, their continued presence in the workplace, and the difficulties in detecting and measuring them. Part II discusses the current legal framework under Title VII and the various barriers and shortcomings of the current legal framework in addressing implicit bias. These include the statutory language of Title VII, the inability of disparate impact theory to address the problems of unconscious discrimination, the lack of clarity provided by the courts, and the burdens that implicit bias evidence might face under the Rules. Part II also outlines the possible

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9 *See* Cerullo, *supra* note 3, at 155, 157–58.

10 *See, e.g.*, *id.* at 158; Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R-C.L. L. REV. 481, 490–94 (2005); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 455 (2000); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 102–03 (2010).

11 *See, e.g.*, McGinley, *supra* note 10, at 418–20.

12 Pedersen, *supra* note 10, at 102–03.

strategies courts may employ to incorporate unconscious discrimination into the Title VII scheme. Part III describes why the issue of unconscious discrimination is now relevant in the field of antidiscrimination law. Part III also describes how various legal and prudential factors create an "unconscious discrimination paradox," wherein the proposed expansion of Title VII ultimately fails to curb the issues posed by implicit bias, and, ironically, further harms victims of unconscious discrimination. Part IV suggests that, because litigation is ineffective in the domain of implicit bias, solutions outside litigation will better allow society to combat unconscious discrimination and implicit biases.

I. BACKGROUND

A. *Overview of Implicit Bias and Unconscious Discrimination*

The difficulty in addressing implicit bias under Title VII stems from its early development in the human psyche and its elusive subconscious effect on individual decision-making. Legal scholars use the term "implicit bias"[13] to describe the lens that automatically filters how individuals absorb and act on information.[14] Implicit biases are the innate prejudices or automatic mental processes which exist—based on subconscious attitudes or stereotypes—beneath the surface of consciousness.[15] An individual develops implicit bias throughout his lifetime through social influences, culture, and his interpersonal relationships or interactions with other social groups.[16] Studies in social psychology, which form the basis of the notion of implicit bias, have shown that from an early point in human development, individuals naturally process and categorize "like" objects together in a manner that allows them to make sense of new information.[17] This process of mental categorization continues throughout an individual's life, and social psychologists have shown they result in efficient information processing, judgment-making, and facilitation in social interactions.[18]

Nevertheless, the same ongoing mental categorization processes that might help human decision-making can simultaneously perpetuate racial and gender stereotypes.[19] Stereotypes, or "person prototypes," influence how

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13 For the purposes of this article, "implicit bias" and "unconscious bias" are used interchangeably to refer to the same concept.

14 Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 278, 284 (2014).

15 *Id.*; Pedersen, *supra* note 10, at 104.

16 Cerullo, *supra* note 3, at 138.

17 Lee, *supra* note 10, at 483; Pedersen, *supra* note 10, at 104.

18 Pedersen, *supra* note 10, at 104–05.

19 Lee, *supra* note 10, at 483.

individuals process and recall information about individuals belonging to social groups by providing a social "starting point" from which an individual bases his interactions with a person of another group.[20] For example, studies have shown that when people develop such stereotypic expectancies, they will incorrectly remember stereotype-consistent activities that never actually occurred, and tend to forget instances of stereotype-inconsistent activities.[21] As such, stereotypes can directly guide an individual's judgment regarding members of other social groups and subconsciously influence decision-making during interactions with those individuals.[22]

"Unconscious discrimination," or discrimination on the basis of implicit biases, is the prejudicial mistreatment of individuals resulting from the subconscious aversion to social groups, such as racial or ethnic minorities, women, or other individuals protected by Title VII.[23] Because stereotypes or implicit biases influence how individuals process information about members of particular social groups, they can directly cause unconscious discrimination.[24]

B. *Measuring Implicit Bias*

1. IAT Testing and its Benefits

Within the last twenty years, the study of implicit bias, its presence in society, and its larger effects on law and social dynamics have become a popular and controversial focus among social scientists and scholars.[25] In an effort to aid the measuring and tracking of implicit bias, scientists have developed tests that are widely applied in implicit bias literature. Most notably, since its development in 1998, scientists have relied on the Implicit Association Test ("IAT").[26] The IAT gives researchers insight into the existence of implicit bias and its effect on the perception of race, gender, age,

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20 *Id.* at 483–84.

21 *Id.* at 484.

22 Pedersen, *supra* note 10, at 104–05.

23 Tolson, *supra* note 7, at 349.

24 Lee, *supra* note 10, at 483–84.

25 *See, e.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1056 (2009); Cerullo, *supra* note 3, at 129; Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467–68 (2010); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1025 (2006); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1130 (1999); Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 186–87 (2014).

26 L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1365 (2012).

or other stereotyped traits.[27] The IAT allows researchers to study the preferences that an individual or group of individuals may have for a specific race or social group.[28] It does so by making participants match particular concepts or traits with images of faces of people belonging to different racial, ethnic, or social groups.[29] Results from these tests suggest that most IAT participants show some measurable bias toward a particular group, even if they believe they are neutral.[30] Advocates for IAT research argue that this conclusively shows that implicit bias is pervasive and extremely common, and that the test's results can provide insight into an individual interactions with social groups outside the individual's own race or sex.[31]

This documented pervasiveness of implicit bias in society is particularly hazardous given the dire effects it can have on interpersonal interactions and deeper social frameworks.[32] By developing stereotypes or implicit biases in society toward certain social groups, individuals are more likely to engage in unconscious discrimination.[33]

2. The Weaknesses of IAT Testing and Implicit Bias Research

There remain critics who suggest that IAT testing and implicit bias research as a whole is based upon faulty science and unreliable methods of data production.[34] Most notable is the work of Professors Gregory Mitchell and Philip Tetlock, who argue that, because implicit bias research is not scientifically valid, it should not be accepted as either legislative authority or litigation evidence.[35]

Mitchell and Tetlock argue that implicit bias research based on the IAT suffers from four distinct weaknesses.[36] First, Mitchell and Tetlock are unconvinced that the IAT actually proves anything of scientific or legal value, and that the "scientific" label attributed to implicit bias research is unwarranted.[37] They argue that, because there is an ongoing dispute of what psychological processes the IAT actually measures, scholars tend to "jump the inferential gun" by concluding that implicit associations measure the

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27 *Id.*

28 Lee, *supra* note 10, at 484–85.

29 *Id.*

30 Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955 (2006).

31 Sarine, *supra* note 26, at 1367–68; Tolson, *supra* note 7, at 363.

32 *See* Sarine, *supra* note 26, at 1366–68.

33 *Id.* at 1366–67.

34 *See, e.g.*, Mitchell & Tetlock, *supra* note 25, at 1030.

35 *Id.* at 1034.

36 *Id.* at 1030.

37 *Id.* at 1029.

unconscious propensity to discriminate.[38] Second, they argue that, because much of the literature surrounding implicit bias relies entirely on "correlational evidence" to establish a relationship between implicit bias and discrimination, the research ignores alternative explanations for the alleged discriminatory behavior.[39] For example, Mitchell and Tetlock offer other viable alternative theories and explanations of IAT results, such as: (1) the psychological phenomena that the brain will simplify a task by focusing on only one category, rather than both; (2) an individual's unwillingness to honestly express attitudes, beliefs, or perceptions that they know to be socially disapproved during the IAT; (3) the creation of a "self-fulfilling prophecy" through testing; (4) sympathy for, rather than antipathy against, certain protected groups; and (5) cultural expectations, rather than individual preferences.[40] Third, they question the ability to make statistical conclusions of one's alleged implicit discriminatory propensities from IAT data, given its "serious psychometric flaws" and "alarmingly high" failure rate.[41] Finally, they question the conclusions that researchers can take from IAT data because the test cannot accurately replicate real-world conditions, and thus can only represent data from an experimental laboratory setting.[42]

Mitchell and Tetlock conclude that although it may be tempting to conclude that implicit bias research is "scientific," and while it is "easy to be overwhelmed by the sheer volume of laboratory studies, . . . the moral certitude with which they apply psychological generalizations to the real world, and by the impressive credentials they bring to the courtroom," to do so would be a big mistake.[43] As critics like Mitchell and Tetlock argue, if researchers cannot prove that individuals who demonstrate implicit bias according to the IAT manifest any real-world discriminatory behaviors, the validity of these studies and the effect that they have within the legal sphere should be limited.[44]

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38 *Id.* at 1030.

39 *Id.* at 1032.

40 Mitchell & Tetlock, *supra* note 25, at 1073–85.

41 *Id.* at 1033.

42 *Id.* at 1033–34.

43 *Id.* at 1029.

44 *Id.* at 1030. *Contra* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 479 (2007) (arguing that despite Mitchell and Tetlock's findings, this does not undermine the case for including implicit bias research in antidiscrimination law); David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1393 (2008) (rejecting Mitchell and Tetlock because "the scientific fit of proffered evidence must be evaluated in light of the full research literature, and not any single strand of it").

C. *Implicit Bias in the Workplace*

While studies show that implicit bias has a wide impact on society, particularly in the context of criminal law,[45] it is especially relevant in the context of employment law. Studies have documented the effects of implicit bias in the workplace setting.[46] Research has consistently shown that one's race or one's sex can have measurable effects on employment decisions.[47] For example, in one study, researchers showed that even when job applicants' qualifications were identical, people with Arab or Muslim-sounding names received less callbacks for interviews than people with European-sounding names. In another study, researchers found that traditionally White/Caucasian last names were 50 percent more likely to receive a callback than traditionally African-American-sounding names, even if their resumes and qualifications were otherwise identical.[48]

The effects of implicit bias in the context of employment decisions are especially harmful because they can impede an individual's long-term career development. For example, if an individual with qualifications equal to a non-minority counterpart is not offered a job due to implicit biases, he or she is unable to build both the tangible benefits of the position (e.g., monetary compensation) and the intangible benefits (e.g., work experience, relationships, connections) that would help prepare him or her for further career opportunities. Even more, the pervasiveness of implicit bias in a workplace, resulting in unconscious discrimination toward an individual, negatively impacts that employee's morale, productivity, performance, and general work experience in ways identical to cases of overt discrimination targeted by Title VII.

Dealing with implicit bias in the workplace has become especially problematic given modern societal perceptions of racism or discriminatory attitudes.[49] Paradoxically, as racist or sexist views have become widely rejected in modern society, unconscious discrimination has become even more common than conscious discrimination in the modern workplace.[50] This contradictory trend can be attributed to the widespread rejection of discriminatory attitudes, which discourages conscious discrimination, and encourages individuals to express their implicit biases on a more subconscious basis.[51]

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45 Pedersen, *supra* note 10, at 107.

46 *See, e.g.*, Tolson, *supra* note 7, at 356.

47 *Id.*

48 *Id.* at 357–58 (citing Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004)).

49 Tolson, *supra* note 7, at 356–58.

50 *Id.* at 357–58.

51 *Id.*

Victims of unconscious discrimination suffer in the same ways as victims of conscious discrimination. For example, simply on the basis of their race or sex, they may be denied employment, prevented from advancement in a company, denied raises or other promotion, or demeaned in interpersonal interactions. Thus, to garner protection from unconscious discrimination under the law, victims of this pervasive implicit bias in the workplace are forced to look toward the current framework of Title VII; a legal framework that is currently inadequate to address their claims for relief.[52]

II. ACCOUNTING FOR UNCONSCIOUS DISCRIMINATION UNDER TITLE VII

A. *The Current Legal Framework Under Title VII*

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any other individual . . . because of such individual's race, color, religion, sex or national origin."[53] An employee need not show that any of these prohibited characteristics are the sole motivating factor in an adverse employment decision.[54] It is sufficient for the complaining party to demonstrate that a prohibited characteristic was a "motivating factor for any employment practice, even though other factors motivated the practice."[55] Because it is often rare that a victim can produce direct evidence of such discriminatory intent, circumstantial evidence is the basis for proving most Title VII cases.[56]

Two major varieties of cases arise under Title VII, delineated by the form of discrimination and the effect of discrimination: disparate treatment cases[57] and disparate impact cases.[58] Disparate treatment cases require a conscious discriminatory motive—meaning that, at the time the employer makes an adverse employment decision, an employer is overtly discriminating against a member of a social group because of a known bias

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52 Pedersen, *supra* note 10, at 113–14.

53 42 U.S.C. § 2000e-2(a)(1) (2006).

54 Desert Palace, Inc. v. Costa, 539 U.S. 90, 94 (2003) (quoting 42 U.S.C. § 2000e-2(m) (2006))

55 *Id.*

56 Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 670 (1989) (Stevens, J., dissenting) (recognizing that because direct evidence of discriminatory intent is difficult to establish, discriminatory intent will be more often established by inference), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1074; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 751 (2005).

57 *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075.

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

or motive.[59] Conversely, disparate impact cases can impart liability upon an employer even though it is employing technically "neutral" hiring criteria, without any showing of a discriminatory intent.[60] To establish a disparate impact claim, a plaintiff must precisely identify which particular employer policy or practice caused the alleged disparate impact.[61] For example, suppose an employer establishes a hiring criterion that has a negative effect on whether certain minorities are qualified to apply for a position, such as a requirement that applicants have a high school degree. So long as a job applicant identifies the specific discriminatory hiring criterion—i.e. the requirement of having a high school degree—and the employer cannot show that the criterion was business related or necessary, a plaintiff may establish a disparate impact claim.[62]

In *McDonnell Douglas Corp. v. Green*,[63] the Supreme Court outlined a framework for courts to analyze cases of employment discrimination when an individual with qualifying credentials applied to a job, but was rejected.[64] This framework was later modified into a more general employment discrimination evaluation framework.[65] To first bring an actionable discrimination claim under Title VII, a potential complainant must prove by a preponderance of the evidence that he or she (1) belongs to a protected class; (2) was meeting the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than similarly situated employees outside his or her classification.[66]

Second, if a plaintiff can establish a prima facie case of discrimination, a rebuttable presumption of discrimination arises.[67] The burden of production then shifts to the defendant-employer to establish a legitimate, nondiscriminatory reason for the decision.[68] For example, the employer may

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59 *See Price Waterhouse*, 490 U.S. at 241 ("The critical inquiry . . . is whether gender was a factor in the employment decision, *at the moment it was made*."), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075.

60 *See Griggs*, 401 U.S. at 430.

61 Hart, *supra* note 56, at 781 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2000)).

62 *See Griggs*, 401 U.S. at 436 (holding that a policy adopted to limit jobs to persons with high school diploma or who have passed a standardized test was illegal because it had a disparate impact on African-American applicants).

63 411 U.S. 792 (1973).

64 *Id.* at 802 ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial [or gender] discrimination. This may be done by showing (i) that he [or she] belongs to a racial [or gender] minority; (ii) that he [or she] applied and was qualified for a job which the employer was seeking applicants; (iii) that, despite his [or her] qualifications, he [or she] was rejected; and (iv) that, after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.").

65 *E.g.*, Moser v. Ind. Dept. of Corr., 895, 900 (7th Cir. 2010).

66 *Id.*

67 Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

68 Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000); *McDonnell Douglas Corp.*, 411 U.S. at 802.

show that a job candidate's poor interpersonal, interview, or technical skills were the cause of rejection.

Third, if the employer can establish a nondiscriminatory reason for an adverse employment decision, a plaintiff may still succeed by proving that the employer's excuse was a "pretext."[69] A plaintiff may establish pretext by showing the court that "a discriminatory reason more likely motivated the employer or . . . by showing that the employer's proffered explanation is unworthy of credence."[70]

B. *Barriers to the Inclusion of Unconscious Discrimination under the Current Legal Framework*

1. The Statutory Language of Title VII

While litigants have successfully employed the current legal framework of Title VII to combat overt or conscious forms of discrimination, as it stands, Title VII is ill equipped to fully address unconscious discrimination.[71] Given the statutory language of Title VII, as well as the Supreme Court's interpretation of Title VII's scope, the current framework does not directly address implicit bias.[72]

Nothing within the statutory language of Title VII addresses its applicability to cases of unconscious discrimination based on implicit bias.[73] In 1991, Congress attempted to clarify ambiguities in the language of Title VII by adding that "an unlawful employment practice is established when the complaining party demonstrates that [a prohibited characteristic] was a motivating factor for any employment practice, even though other factors also motivated the practice."[74] Nevertheless, this language still does not make clear whether implicit bias can be a sufficient "motivating factor."

2. Disparate Impact Theory Does Not Capture the Problem of Unconscious Discrimination

Although the Supreme Court has recognized a disparate impact theory of discrimination under Title VII,[75] this does not precisely address the problem posed by unconscious discrimination. The foundation of disparate

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69 *Burdine*, 450 U.S. at 255-56.

70 *Id.* at 256.

71 *See* Cerullo, *supra* note 3, at 145–46.

72 *Id.*

73 *See* 42 U.S.C. §2000e-2(m) (2006).

74 42 U.S.C. §2000e-2(m) (2006).

75 Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

impact theory is the notion that Title VII protects beyond "overt discrimination," and that "Congress directed the thrust of the act to the *consequences* of employment practices, not simply the motivation."[76] On their faces, there seem to be clear overlaps between disparate impact and unconscious discrimination cases.[77] For example, in both types of cases, the employer may be at some point unaware of the negative consequences of its actions to minorities, and its actions may reflect predispositions toward and against certain racial groups.

Nevertheless, there are two significant hindrances in classifying unconscious discrimination cases under disparate impact theory. For one, disparate impact theory relies centrally on the idea of "neutral employer policy."[78] In contrast to these disparate impact cases, the focus in an unconscious discrimination suit is beyond any such neutral employer policy, and instead on the interpersonal interactions between employer and employee that go beyond mandated corporate policy.[79] Simply, in an unconscious discrimination suit, an employer discriminates against its employee in a manner that is not necessarily prescribed by any specific neutral employment policy.[80] Second, to establish a disparate impact, a plaintiff must directly identify which specific employment practice causes the disparate impact.[81] Nevertheless, given the fluid and ongoing nature of unconscious discrimination in the workplace, a victim can never precisely identify a discriminatory employment policy or practice, thereby precluding victims from ever meeting this statutory requirement.[82] Thus, disparate impact theory under Title VII cannot solve the issues posed by unconscious discrimination.

3. Courts Have Failed to Provide Clarity to the Issue

Courts across the United States are split on the issue of how to incorporate unconscious discrimination and implicit biases into Title VII.[83] In the last thirty years, some federal district courts and courts of appeals have indirectly suggested that unconscious discrimination and the recognition of implicit bias may exist in the purview of Title VII.[84] More recently, in *Kimble*

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76 *Id.* at 432.

77 *See, e.g.*, Lee, *supra* note 10, at 490–91.

78 *Id.* at 491.

79 *Id.* at 482.

80 *Id.* at 491.

81 *Id.*

82 *Id.*

83 Cerullo, *supra* note 3, at 151.

84 *See, e.g.*, Thomas v. Cal. State Dep't of Corr., No. 91-15870, 1992 U.S. App. LEXIS 20346, at *8–9 (9th Cir. Aug. 18, 1992) (recognizing the necessity to review both conscious and unconscious discrimination); Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1064 (8th Cir. 1988) ("Age

v. Wisconsin Department of Workforce Development,[85] the district court held that biases and stereotypes could have influenced an employer's decision-making process, thus becoming the first court to expressly rely on implicit bias evidence and scholarship in reaching its holding.[86]

Nevertheless, the status quo in the area remains a judicial resistance to the concept of implicit bias.[87] For example, in *Pippen v. State*,[88] the Iowa District Court found that despite the proffered implicit bias expert testimony, the evidence was insufficient to demonstrate disparate impact because (a) the presence of implicit bias does not necessarily result in actual prejudicial behavior; (b) there was no evidence that the specific defendants at issue took the IAT; and (c) there was an insufficient showing of causation between implicit bias and discriminatory behavior.[89] In another recent case, *Burrell v. County of Santa Clara*,[90] a district court rejected the plaintiffs' use of implicit bias studies to establish their disparate impact claim.[91] Because the plaintiffs failed to submit any statistical evidence of disparate impact in the course of their employment, the court denied their use of implicit bias data.[92] The court was specifically wary of implicit bias testing because, as it stated, "[t]estimony about the general challenges faced by a minority group, without more, does not constitute evidence that any particular employer's practices had a disparate impact on that group."[93] Thus, even though there is no language within Title VII that expressly limits the scope of the law to conscious or intentional discrimination, and although no court has explicitly stated that unconscious discrimination claims are impermissible pursuant to

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discrimination is often subtle and 'may simply arise from an *unconscious* application of stereotyped notions of ability. . . .'") (quoting Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149, 154–55 (7th Cir. 1981)); Pitre v. W. Elec. Co., 843 F.2d 1262, 1273 (10th Cir. 1988) (recognizing that sex discrimination can be conscious or unconscious); Namenwirth v. Bd. of Regents, 769 F.2d 1235, 1243 (7th Cir. 1985) ("[F]aculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars."); Robinson v. Union Carbide Corp., 538 F.2d 652, 662 (5th Cir. 1976) (finding that an employer's employee evaluation forms were potentially unconstitutional because they were "vulnerable to conscious or unconscious discrimination by the evaluating supervisors") (quoting Wade v. Miss. Coop. Extension Serv., 528 F.2d 508, 518 (5th Cir. 1976)).

85 Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765 (E.D. Wis. 2010).

86 *See* Cerullo, *supra* note 3, at 154 (citing Kimble v. Wisconsin Dep't of Workforce Dev., 690 F. Supp. 2d 765 (E.D. Wis. 2010)).

87 *See* Cerullo, *supra* note 3, at 147–51.

88 No. LACL107038, 2012 WL 1388902 (Iowa Dist. Ct. Apr. 17, 2012), *aff'd*, 854 N.W.2d 1 (Iowa 2014).

89 Cerullo, *supra* note 3, at 149–50 (citing Pippen v. State, No. LACL107038, 2012 WL 1388902 at *1 (Iowa Dist. Apr. 17, 2012), *aff'd*, 854 N.W.2d 1 (Iowa 2014)).

90 No. 11-CV-04569-LHK, 2013 WL 2156374 (N.D. Cal. May 17, 2013).

91 *Id.* at *106–07.

92 *Id.* at *107.

93 *Id.*

Title VII, the status quo remains that the majority of modern courts still focus their inquiry on conscious or "intentional" discrimination.[94]

The Supreme Court has failed to clarify this ongoing ambiguity in Title VII jurisprudence. While the Supreme Court held in *Price Waterhouse v. Hopkins*[95] that employers may not consider gender stereotypes in employment decisions, [96] and suggested that stereotypes can influence adverse employment decisions,[97] it has more recently expressed in *Reeves v. Sanderson Plumbing Prods., Inc.*[98] that "[t]he ultimate question in every employment discrimination case involving a [claim under Title VII] is whether the plaintiff was the victim of *intentional discrimination*."[99]

The Court's decision in *Wal-Mart Stores, Inc. v. Dukes*[100] further confuses the issue. In *Wal-Mart*, the Court denied certification of a class action suit wherein the plaintiffs alleged a discriminatory pattern and practice against female Wal-Mart employees.[101] During the case, the plaintiffs' expert witness provided evidence based in social sciences—specifically, how stereotypes, a form of implicit bias, could affect discrimination.[102] Nevertheless, writing for the majority, Justice Scalia found the social science analysis too vague to provide sufficient evidence to establish the class.[103] Instead, Scalia cast doubt on the validity of the proffered evidence, expressing skepticism over whether the Court should consider anything more than general social science research summaries, and rejecting the expert's testimony, stating:

> [Plaintiff's expert Dr. Bielby] could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5[%] or 95[%] of the employment decisions at Wal-Mart might be determined by stereotyped thinking.[104]

Scalia doubted whether the Court should allow experts to apply general social science research to facts in a given case to determine the likelihood of

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94 *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 854 (9th Cir. 2002) ("Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate."), *aff'd*, 593 U.S. 90 (2003); Oest v. Ill. Dep't of Corr., 240 F.3d 605, 611 (7th Cir. 2001) (holding that to prevail under Title VII, "a plaintiff must establish that she is the victim of intentional discrimination.").

95 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075.

96 *Id.* at 251.

97 *Id.* at 258.

98 530 U.S. 133 (2000).

99 *Id.* at 153.

100 564 U.S. 338 (2011).

101 *Id.* at 343.

102 *Id.* at 353–55.

103 *Id.* at 352.

104 *Id.* at 354.

discrimination in a specific instance.[105] Some scholars have taken these words to suggest that the Court's rejection of the plaintiff's expert witness testimony might result in a chilling effect on the use of social science evidence in discrimination cases.[106] Others may interpret these same words, however, as the Court keeping the door open to the use of social science evidence. Specifically, some may take the language as suggesting that the problem with the plaintiff's expert witness testimony in *Wal-Mart* was not one of substance, but degree. Scalia's words seem to imply that the proffered expert testimony would have been sufficient had the plaintiff's expert, Dr. Bielby, been able to calculate with certainty that implicit biases drove 95% of the employment decisions at Wal-Mart.[107] In this sense, the Court did not wholly shut out the possibility of considering evidence of implicit biases, leaving questions about the substantive and evidentiary scope of Title VII unanswered.[108]

Together, *Price Waterhouse*, *Reeves*, *Wal-Mart*, and wide-ranging district and court of appeals jurisprudence provide little to no clarity on the issue of unconscious discrimination and its recognition under Title VII.[109] Insufficient guidance in this emerging line of cases results in uncertainty for courts and additional barriers for victims of unconscious discrimination.

4. Federal Rules of Evidence

Another significant barrier to recognizing unconscious discrimination and implicit bias under Title VII exists under the Federal Rules of Evidence. It would be futile for courts to recognize unconscious discrimination under a Title VII analysis if implicit bias evidence is not admissible under the Rules.

Enacted by Congress in 1975, the Rules represent an effort to balance the competing litigatory interests of admissibility and preventing unfair prejudice to parties.[110] Organized into a series of eleven articles, Congress designed the Rules to assist fact-finding by preventing parties from relying

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105 *Id*. at 352–55.

106 *See* Andrea Doneff, *Social Framework Studies Such As Women Don't Ask and It Does Hurt to Ask Show Us the Next Step Toward Achieving Gender Equality-Eliminating the Long-Term Effects of Implicit Bias-but Are Not Likely to Get Cases Past Summary Judgment*, 20 WM. & MARY J. WOMEN & L. 573, 619–20 (2014).

107 *See Wal-Mart Stores*, 564 U.S. at 354–55.

108 *See id.* at 354.

109 *Id.* at 354; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228, 243–44 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1075.

110 Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 154 (2008).

on jury members' inflamed passions and discouraging appeals to emotion, thus preventing flawed jury reasoning when rendering verdicts.[111]

Especially pertinent to a discussion of unconscious discrimination and implicit bias in the context of Title VII litigation are the rules pertaining to both relevance and expert witness testimony.[112]

a. *Relevance of Evidence*

Whether evidence is "relevant" is a central inquiry for admissibility under the Rules, which provide standards for how relevancy grounds should bar certain evidence.[113] Under Rule 401, evidence must be both probative and material, such that the evidence tends to prove the point or fact for which it is offered, and the point of fact is significant in the case.[114] To have probative worth, the evidence must tend to make the existence of a fact more or less probable.[115] Rule 401 does not concern the actual impact of evidence, but rather concerns the "potential effect" that evidence may "reasonably have on the perceptions of the trier of fact."[116] As noted in the Advisory Committee's Note to Rule 401, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."[117] Per Rule 402, all evidence that is relevant under Rule 401 is admissible, except as otherwise provided by the Constitution, statute, or other rules.[118]

Even if evidence is relevant, however, it may not be admissible under Rule 403 if the trial judge determines that the evidence is substantially more "prejudicial" than "probative," such that the evidence might confuse the issues, mislead the jury, cause undue delay, waste time, or present needless cumulative evidence.[119] Under Rule 403, unfair "prejudice" is the "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[120] Thus, evidence may be unfairly prejudicial if it injects powerful emotional elements into a case, such as evidence that is unnecessarily graphic, evidence that presents outrageous or offensive

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111 *Id.* at 156.

112 *See* FED. R. EVID. 401–04, 702.

113 Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 572 (1987).

114 FED. R. EVID. 401; 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:2 (4th ed. 2013).

115 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:2.

116 *Id.* at 537.

117 FED. R. EVID. 401.

118 FED. R. EVID. 402.

119 FED. R. EVID. 403.

120 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:13.

conduct,[121] or evidence that will function to confuse the issues for the jury. To determine the probative value of evidence under Rule 403, the courts consider "not only the extent to which it tends to demonstrate the proposition which it has been admitted to prove, but also the extent to which that proposition was directly at issue in the case."[122] Therefore, as observed by the Eighth Circuit, a court may exclude evidence when its admission would lead to litigation of collateral issues, thereby creating a side issue that might distract the jury from the main issues.[123]

A court may also exclude evidence if its basis is character evidence under Rule 404. Under Rule 404(a), "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[124] While the precise scope of "character" has not been expressly defined,[125] scholars have suggested that "character" for the purposes of Rule 404 is that which either (a) suggests a propensity to act a certain way, or (b) is a trait that carries a moral connotation in context.[126] The purpose of Rule 404 is to avoid situations where a jury may punish an individual for past misdeeds, where a jury may overvalue prior crimes in assessing guilt, or where the defendant must defend against both immediate charges and prior alleged misdeeds.[127] Courts are cautious of the admission of character evidence in the context of litigation because a jury could either believe that character played a greater role in the defendant's actions than it actually may have played, or might judge the defendant's actions based on the kind of person he may be, rather than what the he might have actually done.[128] The purpose of Rule 404 is to preclude any use of one's character as circumstantial evidence of behavior by blocking any resort to a "general propensity" argument.[129]

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121 Westfield Ins. Co. v. Harris, 134 F.3d 608, 613 (4th Cir. 1998) (indicating that a risk exists that the jury's emotions will be excited to irrational behavior); 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:13.

122 United States v. Herman, 589 F.2d 1191, 1198 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979).

123 United States v. Dennis, 625 F.2d 782, 796–97 (8th Cir. 1980).

124 FED. R. EVID. 404.

125 *See* 22 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5233 (Supp. 2017) (explaining that "character" in the context of evidence has not yet been satisfactorily defined).

126 Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1945 (2012).

127 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:22.

128 Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); Anderson, *supra* note 126, at 1917.

129 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:22.

b. *Admissibility of Expert Witness Testimony*

Any hypothetical Title VII litigation based on claims of unconscious discrimination or claims of implicit bias is largely dependent on expert witness evidence.[130] Rule 702 limits the admissibility of expert witness testimony. Under Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[131] The scope of Rule 702 is broad in practice, and includes all individuals with specialized knowledge that may be qualified by knowledge, skill, experience, training, or education.[132]

Under the current practice and application of Rule 702, which was amended in response to the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[133] federal judges have the responsibility to act as gatekeepers of scientific expert witness testimony. Courts employ a two-pronged test to determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand,"[134] based not on the expert's conclusions, but on the "principles and methodology" used.[135] This two-pronged test mandates that whenever a judge is considering whether to admit expert witness testimony, the judge must make a preliminary determination about the validity of such testimony by considering whether the expert is testifying to "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."[136] In order to meet this standard, the Supreme Court ruled that the judge must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[137] In order to assist with this analysis, the Court suggested that judges could, yet did not need to, consider four factors: testability; peer review and publication; rate of error and standards for operation; and general acceptance.[138] Thus, under *Daubert*

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130 Lee, *supra* note 10, at 496.
131 FED. R. EVID. 702.
132 *Id.*
133 509 U.S. 579 (1993).
134 *Id.* at 597.
135 *Id.* at 595.
136 *Id.* at 592.
137 *Id.* at 592–93.
138 *Id.* at 593–94.

and Rule 702, if the judge finds that such evidence is not rooted in valid science, he or she will reject the evidence as inadmissible.[139]

C. *Possible Strategies Courts May Utilize to Recognize Unconscious Discrimination Under Title VII*

Advocates and scholars have argued that Title VII is not only intended to cover victims of unconscious discrimination, but it is also already equipped to target implicit bias as currently constructed.[140] Most legal arguments that suggest that Title VII can be currently employed to combat unconscious discrimination may be categorized into one of two broad claims: (1) the plain language of Title VII as it currently stands suggests a prohibition of unconscious discrimination deriving from implicit bias;[141] or (2) the legal framework under *McDonnell Douglas* already allows for a protection against unconscious discrimination in employment litigation.[142]

1. The Language of Title VII Supports the Inclusion of Claims of Implicit Bias in Employment Litigation

The most direct strategy for expanding the scope of Title VII is to argue that the law already supports the protection of victims from unconscious discrimination.[143] Proponents commonly suggest three interpretations of Title VII to support this claim. First, advocates point out that because there is no mention of unconscious discrimination or implicit bias in the statutory text, there is no statutory bar to recognizing implicit bias.[144] Essentially, they argue that Title VII's protections encompass unconscious discrimination because nothing in the text explicitly precludes consideration of implicit bias.[145] Second, advocates argue that because the only clear indicator of intent within Title VII is a prohibition against discriminating "because of" race, sex, and other protected classes, a broad interpretation of "because of" ought to include implicit bias-induced discrimination.[146] Finally, advocates argue that the proper scope of Title VII is to target any employment decisions that can "adversely affect" an employee's status.[147] As they argue, because implicit

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139 FED. R. EVID. 702; *Daubert*, 509 U.S. at 580.

140 *See* Cerullo, *supra* note 3, at 158; Hart, *supra* note 57, at 791; Lee, *supra* note 10, at 488.

141 42 U.S.C. § 2000e (2012).

142 Hart, *supra* note 57, at 768–69; Lee, *supra* note 10, at 497–98.

143 Cerullo, *supra* note 3, at 158; Faigman et. al., *supra* note 44, at 1394.

144 Cerullo, *supra* note 3, at 158.

145 *Id.*

146 *Id.* at 158–59.

147 *Id*. at 159.

biases may function to "adversely affect" one's employment or workplace experiences, it ought to be granted coverage under Title VII.[148]

2. The Framework Under *McDonnell Douglas* Properly Allows the Court to Incorporate Implicit Bias into Litigation

Another strategy used by advocates to extend application of Title VII is to argue that the *McDonnell Douglas* framework, wherein an employee has the burden to prove the presence of pretext, allows courts to consider implicit bias evidence.[149] Under the burden-shifting framework of *McDonnell Douglas*, if the plaintiff can establish a prima facie case of discrimination under Title VII and the employer can show a nondiscriminatory reason for an adverse employment decision, the plaintiff can then provide evidence to show that the employer's provided reason was *pretext* for discriminatory motives.[150] Therefore, as the First Circuit has accepted, a plaintiff may show that his employer's offered reason was merely pretext for implicit bias.[151] For example, if an employer promulgated some corporate procedure that only adversely affected African-Americans, and could show that it did so for objective reasons, a potential litigant and victim of the procedure could still argue that implicit bias against African-Americans significantly motivated the proffered reasons for the policy. Thus, by introducing evidence of implicit bias in the pretext stage of *McDonnell Douglas*, this would properly allow implicit bias to play a role in Title VII litigation.[152]

III. THE UNCONSCIOUS DISCRIMINATION PARADOX

A. *Social and Legal Trends Point Toward Expanding the Scope of Title VII*

In a social climate wherein a large focus has shifted toward race relations, gender equality, and sexual orientation tolerance, many advocates have turned to Title VII to further their goals of equality.[153] Advocates

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148 *Id.* at 160.

149 Hart, *supra* note 56, at 767, 769; Lee, *supra* note 10, at 497–98.

150 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

151 *See* Thomas v. Eastman Kodak Co., 183 F.3d 38, 56, 58 (1st Cir. 1999) (accepting this line of reasoning during the plaintiff's presentation of pretext, noting that the ultimate question was whether the plaintiff had suffered disparate treatment "because of race," irrespective of whether the employer "consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias").

152 Hart, *supra* note 56, at 772.

153 *See, e.g.*, Catherine E. Smith, *Looking to Torts: Exploring the Risks of Workplace Discrimination*, 75 OHIO ST. L.J. 1207, 1211–12 (2014).

supporting the protection of individuals from all types of discrimination (both conscious and unconscious) have argued that, given the current Title VII framework, a noncomprehensive dichotomy is formed in employment discrimination law when either (1) race, gender, or sex is an intentional or conscious factor in an employment decision or (2) it is not intentional or conscious, and thereby non-actionable.[154] However, as advocates argue, this "either-or" approach does not allow Title VII to comprehensively accomplish its legislative purpose of addressing and eradicating all forms of discrimination.[155]

As courts have become increasingly aware of the social climate surrounding these issues, they have in turn opted to extend the scope of Title VII in other contexts.[156] For example, within the last twelve years, courts across the country have extended Title VII protection to victims of sexual orientation and transgender discrimination,[157] involving two groups not traditionally protected under Title VII.[158]

In the wake of political and social pressures to expand Title VII protections, suggestions by some courts that Title VII can reach unconscious discrimination,[159] trending expansion of Title VII by courts,[160] and the

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154 *Id.* at 1212–13.

155 *Id.*

156 *See, e.g.*, G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 723 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017) (holding that the district court failed to give appropriate deference to the U.S. Department of Education's interpretation of how its own sex discrimination regulation should apply to transgender students), *vacated and remanded*, 137 S. Ct. 1239 (2017); Muhammad v. Caterpillar, Inc., 767 F.3d 694, 701 (7th Cir. 2014) (denying plaintiff's petition for rehearing but amending its original decision to delete language that had stated sexual orientation-related discrimination claims are not actionable under Title VII).

157 *See, e.g.*, *Muhammad*, 767 F.3d at 701; Latta v. Otter, 771 F.3d 456, 476 (9th Cir. 2014) (holding that statutes and constitutional amendments in Idaho and Nevada prohibiting same-sex marriages and refusing to recognize same-sex marriages validly performed in other states violated the Equal Protection Clause); U.S. Equal Emp't Opportunity Comm'n v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d. 834, 842 (W.D. Pa. 2016) (denying motion to dismiss on the basis that Title VII does not prohibit discrimination based on sexual orientation, and noting that "[t]he Supreme Court's recent opinion legalizing gay marriage demonstrates a growing recognition of the illegality of discrimination on the basis of sexual orientation").

158 *See, e.g.*, G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d at 723–24; Glenn v. Brumby, 663 F.3d 1312, 1321 (11th Cir. 2011) (concluding that the defendant discriminated against the plaintiff based on her sex by terminating her because she was transitioning from male to female); Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (holding that Title VII prohibits discrimination against transgender individuals based on gender stereotyping); Smith v. City of Salem, Ohio, 378 F.3d 566, 571 (6th Cir. 2004) (applying Title VII's prohibition on sex stereotyping to harassment of a transgender individual); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001, 1011 (D. Nev. 2016) (finding that "weight of authority suggests that Title VII's use of the word 'sex' encompasses protections for discrimination against gender identity").

159 *See, e.g.*, Kimble v. Wisconsin Dept. of Workforce Dev., 690 F. Supp. 2d 765, 775–78 (E.D. Wis. 2010).

160 *See supra* notes 158–159.

increased scholarly focus on the issue of implicit bias in the law,[161] cases of unconscious discrimination on the basis of implicit bias represent another likely area of Title VII expansion. Nevertheless, even if including implicit bias within the context of Title VII furthers its legislative purpose of eradicating all discrimination, conscious and unconscious, the question must be raised whether this trend is in the best interest of the victims of unconscious discrimination. This phenomenon is what this Comment calls the "unconscious discrimination paradox."

It seems contradictory at first glance: how could the recognition of a widely-promulgated form of discrimination actually hurt victims of implicit bias and unconscious discrimination? Nonetheless, as the remainder of this Comment shows, including implicit bias in the context of Title VII will ironically make employment discrimination cases harder to bring against employers and will deter litigation in the long run. Even if courts do recognize the wide prevalence of unconscious discrimination, which theoretically will allow more discrimination cases to be brought, this will either: (1) fail to minimize discrimination given the high evidentiary burdens and difficulty of bringing unconscious discrimination claims; or (2) make discrimination worse for victims in the workplace.[162] Thus, given the evidentiary barriers posed by the Federal Rules of Evidence, potential harms to victims of unconscious discrimination, and the practical barriers that must be overcome by litigants, even if there are normative reasons to push for the recognition of implicit bias under Title VII, there are legal and prudential reasons to maintain the legal status quo and combat unconscious discrimination outside of litigation.

B. *Legal Barriers to Recognizing Implicit Bias under the Federal Rules of Evidence*

An unavoidable hurdle that courts would encounter by recognizing unconscious discrimination under Title VII is the challenge of determining the admissibility of implicit bias evidence under the Federal Rules of Evidence. The simplest solution for courts to deal with implicit bias in the context of Title VII litigation is to completely bar its inclusion. Courts can avoid the evidentiary burdens and administrative costs of determining whether or not implicit bias is present by limiting Title VII to "conscious" discrimination, or cases displaying overt signs of discrimination. By maintaining the legal status quo, not only can courts continue to combat discrimination in the workplace, but they can also avoid the ambiguous implications of implicit bias evidence in the context of the Rules.

Nevertheless, assuming that Title VII does gradually broaden in scope by either the doing of the courts, or even Congress, it is essential that

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161 *See supra* note 25.

162 *See* discussion *infra* Subsections III.C.1, III.C.5.

potential litigants and judges consider the evidentiary implications of such an expansion. As this Part shows, even if Congress expanded the scope of Title VII to incorporate unconscious discrimination, or the courts broadened the reach of Title VII, the inadmissibility of a potential litigant's evidence under the Rules could nevertheless effectively bar victims from proving unconscious discrimination. Thus, before courts consider expanding the scope of Title VII, they should consider the evidentiary burdens and concerns in light of the Rules to determine whether potential litigants would be able to provide any admissible evidence under the expanded standard.

If no evidence of implicit bias is admissible under the Rules, there are strong prudential motivations for courts to reject the expansion of Title VII into the realm of unconscious discrimination. Therefore, the real issues for proponents of implicit bias evidence in Title VII litigation become (1) whether such evidence would be admissible as relevant under Rules 401, 402, 403, and 404, and (2) how a court ought to construe the inevitable plaintiff reliance on expert witness testimony of implicit bias under Rule 702.

1. Is Implicit Bias Evidence Relevant?

The first hurdles in the admissibility of implicit bias evidence exist under Rules 401, 402, and 403, which specify the rules for relevance. Courts are likely to deem IAT data or expert witness testimony regarding IAT data relevant because they almost certainly would have the "tendency to make a fact more or less probable than it would be without the evidence."[163] A higher probability that an employer harbors implicit bias clearly denotes a higher probability that he or she may engage in unconscious discrimination.[164] Thus, at first glance, it does not seem to be at issue whether implicit bias evidence would satisfy both Rules 401 and 402.

Nevertheless, given the inherent nature of IAT data, it is possible that such evidence may be challenged under Rules 401 and 402 on the theory that it amounts to inadmissible "circumstantial" evidence.[165] Circumstantial evidence is defined as proof that does not actually or directly assert the point or proposition to be proved, but rather asserts or describes another point or proposition from which the trier may either reasonably infer the truth of the proposition or reasonably infer an increase in the probability that a proposition that is relevant to the case at hand is actually true.[166] Circumstantial evidence is not necessarily inferior to "direct" evidence, and is not always deemed inadmissible, but it may be excluded if the evidence is

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163 FED. R. EVID. 401.

164 *See* discussion *infra* Part III.C.5.

165 1 MUELLER & KIRKPATRICK, *supra* note 114, § 4:2.

166 *Id.*

insufficient to prove a point.[167] For example, courts may exclude circumstantial evidence if it is necessary for an additional fact to be proven to support the point for which the evidence was offered.[168]

It is possible that courts will find implicit bias evidence—specifically, IAT data—to be "merely circumstantial" evidence for two reasons.[169] First, merely proving an individual's propensity to implicit biases through IAT testing does not necessarily prove that he or she will engage in unconscious discrimination.[170] It is feasible for an employer to harbor these measured implicit biases without ever acting on them. To suggest otherwise is dangerous, as it would threaten to collapse the necessity to establish a prima facie case of unconscious discrimination under Title VII into proving unconscious discrimination through IAT testing. Second, given the documented criticisms of the viability of implicit bias research, IAT data is arguably circumstantial until further research can establish that IAT testing is viable and scientifically valid.[171] Researchers administer the IAT in a non-workplace testing environment, yet plaintiffs try to apply its data to a real workplace. Without confidence that IAT testing actually proves the existence of implicit bias, however, the scientific validity of the IAT is a necessary additional fact that the plaintiff must show to make any conclusions regarding IAT data. Thus, in the end, while implicit bias evidence seems clearly relevant, courts could potentially exclude it as inadmissible circumstantial evidence under Rules 401 and 402.

Furthermore, implicit bias must clear the hurdle set by Rule 403, such that the court must find that the "probative value" of admitting IAT data is "substantially outweighed by a danger" of "unfair prejudice, confus[ion] [of] the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[172] Under Rule 403, courts may exclude evidence when its admission would lead to litigation of collateral issues, thereby creating a side issue which might distract the jury from the main issues.[173]

Again, the nature of implicit bias evidence makes it open for several challenges under Rule 403. First, given the broad sweeping implications of implicit bias studies for all people, it is very likely that an individual juror would respond negatively to being told that he, individually, might hold implicit biases. This in itself could feasibly result in a level of juror self-denial, to the point that it further confuses the issues for jurors. Second, because plaintiffs will present implicit bias data to jurors as "empirical" or

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167 *Id.*

168 *Id.*

169 Mitchell & Tetlock, *supra* note 25, at 1083–84, 1094.

170 *Id.*

171 *Id.* at 1094.

172 FED. R. EVID. 403.

173 United States v. Dennis, 625 F.2d 782, 796–97 (8th Cir. 1980).

the product of social science "research," it will likely be accorded unfair value by unfamiliar and easily swayed jurors, who may be overly deferential to information characterized as "science."[174] Third, given the central nature of implicit bias data in an unconscious discrimination suit, parties will inevitably debate about the viability and reliability of IAT data, arguing side issues such as the reliability of the methodology behind the IAT. With this inevitable debate, there is a significant risk that a jury member will be distracted from the actual issues of the case; namely, the actual presence or absence of implicit bias in a given relationship or interaction. With the inevitable confusion of issues that implicit bias evidence can cause, and the prejudicial effect that it may have on a potential plaintiff, a court would be justified in barring such evidence under Rule 403.

2. Is Implicit Bias Evidence "Character Evidence"?

Another hurdle for the admissibility of implicit bias data exists under Rule 404(a). As stated, the Rules provide that "evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[175] The problem with IAT data, or any other method of measuring implicit bias, is that the data will be offered to describe a particular aspect of a person's character or "trait of his character."[176] The very purpose of collecting IAT data or providing implicit bias data to the fact finder is to suggest that the specific employer at issue was acting in conformity with the general "character" of being susceptible to stereotyping, in-group favoritism, or implicit bias.[177] By definition, knowledge of an individual's implicit biases allows the fact finder to calculate the probability that the plaintiff is engaged in unconscious discrimination in a particular instance, or that he or she acted in a certain way on a given occasion, placing this evidence squarely within the purview of Rule 404. Therefore, because the purpose of IAT data, or related expert opinions, is to further the argument that an employer has a particular propensity to engage in unconscious discrimination, such implicit bias evidence could be inadmissible as character evidence under Rule 404(a).[178]

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174 Walker & Monahan, *supra* note 113, at 576.

175 FED. R. EVID. 404(a).

176 *Id.*

177 Sarine, *supra* note 26, at 1365.

178 *Cf.* Jinro America Inc. v. Secure Investments, Inc., 266 F.3d 993, 1009–10 (9th Cir. 2001), *reh'g denied*, 272 F.3d 1289 (9th Cir. 2001) (finding that expert testimony that most Korean businesses were corrupt was inadmissible as more prejudicial than probative in support of defendant's claim that the plaintiff South Korean corporation had attempted to circumvent Korean currency laws, since the corporations' status as Korean business begged the jury to draw inferences adverse to it based entirely on its ethnic identity or national origin).

Nevertheless, a court could find that there is no issue under Rule 404 by deciding that IAT data is not even "character evidence" in the first place. Unlike traditional forms of "character evidence," which are based on the prior acts of a particular party, IAT data is not based on the self-conscious acts of a party. Neither does IAT data depict any real-world actions that have actually taken place. Instead, IAT data is based on experimental choices that a test subject makes in a laboratory setting.[179] It is difficult to argue that the "choices" or "picks" that occur during these IAT examinations can be accurately characterized as "prior acts" in the context of Rule 404, as they do not reflect actions in a real-world setting.

A court may also find issue with characterizing an individual's test results as evidence of his "character." Because an individual may potentially consciously skew his own test results, knowing that his defense hinges on favorable results in their IAT examination, the evidence could be inaccurate in the context of unconscious discrimination suits.[180] Given the supposedly "subconscious" nature of IAT results, even taking the IAT "under oath" would not curb this issue, as there would be no other way to measure whether one's subconscious IAT results are accurate.[181]

How Rule 404 would apply in the context of unconscious discrimination litigation is thus unclear. What is certain is that admissibility under Rule 404 would present tightly contested problems for the courts. Just as easily as a court might find that IAT results represent inadmissible character evidence, courts also might be hesitant to characterize IAT data as demonstrative of one's true "character."

3. Accounting for Implicit Bias Through Expert Witness Testimony

As was the case in *Wal-Mart*, given the elusive and subconscious nature of implicit bias, it is likely that most, if not all of the evidence supporting a theory of unconscious discrimination would be based on either evidence of IAT results or expert witness testimony regarding the validity of IAT results.[182] This poses yet another evidentiary obstacle for the courts, as they would have to determine whether this expert witness testimony is admissible under Rule 702.

Under *Daubert*, before considering the factors of Rule 702, the court should first make a preliminary determination regarding whether the

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179 Mitchell & Tetlock, *supra* note 25, at 1033–34.

180 Sarine, *supra* note 26, at 1365.

181 *See* Anthony G. Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. PERSONALITY & PSYCHOL. 1464, 1464 (1998).

182 *Wal-Mart Stores*, 564 U.S. at 354 (noting that the parties disputed whether the expert witness, who offered testimony regarding social frameworks and stereotypes, met the standards for the admission of expert testimony under Rule 702 and *Daubert*, 509 U.S. at 592–94).

proposed expert witness testimony is reliable according to the non-exhaustive factors outlined by the Supreme Court.[183] Acting as a "gatekeeper," the court should consider several factors to gauge the evidence's reliability and relevance, including: whether a theory or technique can be or has been tested; whether it has been subjected to peer review and publication; whether a technique has a high known or potential rate of error and whether there are standards controlling its operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.[184] This Comment assumes that, given the widespread use of the IAT in social science, such evidence would pass this preliminary level of scrutiny.[185]

Thus, assuming that the expert witness evidence can satisfy these preliminary factors, the court should proceed to consider the five-factor test of Rule 702. Because the factors are conjunctive, expert witness testimony must meet all five requirements to be admissible, including: (1) being a witness who is qualified as an expert by knowledge, skill, experience, training, or education; (2) having the ability to, through his or her scientific, technical, or other specialized knowledge, help the trier of fact to understand the evidence or to determine a fact in issue; (3) providing testimony that is based on sufficient facts or data; (4) providing testimony that is the product of reliable principles and methods; and (5) reliably applying the principles and methods to the facts of the case.[186] Thus, failure to prove any one of these prongs by a preponderance of the evidence renders expert witness testimony inadmissible.[187]

The first three prongs of Rule 702 will likely not pose any problems for courts. Courts have been, and are well equipped to construe whether witnesses are of sufficient acumen to serve as experts.[188] Further, any expert relying on IAT data will likely be providing testimony that is "based on sufficient facts or data."[189] However, the larger problem of admissibility of IAT data lies within the fourth and fifth prongs of the Rule 702 inquiry. These

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183 *Daubert*, 509 U.S. at 592–94.

184 *Id*.

185 Because the IAT is the leading method to detect implicit bias in current social science, it will be the only method discussed in the context of this Comment. It must be noted that although the IAT serves as the evidentiary template for this Comment, the concepts provided may be applied to any relevant scientific data or test that may be used in the future to measure implicit biases.

186 FED. R. EVID. 702.

187 Jones v. Natl. Council of Young Men's Christian Ass'ns of the United States, No. 09 C 6437, 2013 WL 7046374, at *6 (N.D. Ill. Sept. 5, 2013), *report and recommendation adopted sub nom.* Jones v. Natl. Council of Young Men's Christian Ass'ns of the United States, 34 F. Supp. 3d 896 (N.D. Ill. 2014).

188 FED. R. EVID. 702 advisory committee's note to 2000 amendment.

189 FED. R. EVID. 702(b).

are two separate evidentiary barriers that current iterations of implicit bias data cannot overcome, as courts have shown.[190]

The widely acknowledged problems surrounding the acquisition of IAT data provide a significant obstacle for experts who must show that their "testimony is the product of reliable principles and methods."[191] From a methodological standpoint, the IAT has many recognized weaknesses that should affect its reliability from an evidentiary standpoint. Critics of IAT data have shown that results are often inaccurate and vulnerable to failure.[192] For example, in a study conducted by Mitchell and Tetlock, false accusation rates of implicit bias during the IAT ranged between 60 and 90 percent.[193] Mitchell and Tetlock also found that the wider significance of IAT data can be artificially inflated and skewed because implicit bias researchers often fail to consider the possibility that results are be driven by a small number of extreme IAT scorers.[194] Further, critics have shown that results on the IAT are largely dependent on the specific stimuli chosen for the sorting.[195]

Even beyond the methodological drawbacks of the IAT and implicit bias research, the more troublesome development is the method by which experts are often inclined to use IAT data in their expert witness statements. For example, in *Karlo v. Pittsburgh Glass Works, LLC*,[196] the plaintiff's implicit bias expert witness, Dr. Anthony Greenwald, examined deposition material, and from his examination determined whether there was evidence of prejudicial activity embedded into the employer's practices.[197] The district court rejected this expert witness testimony under Rule 702 because Dr. Greenwald merely "recite[d] his credentials, review[ed] the literature, and attempt[ed] to highlight flaws in the employment practices of PGW (its so-called 'collection of absences') which he gathered after *reviewing one deposition* in full and excerpts of others—all of which were selected and supplied to him by counsel for Plaintiffs."[198]

Even more problematic for experts relying on IAT data is the final prong of Rule 702, which requires that the expert "reliably applied the principles and methods to the facts of the case."[199] As the Advisory Committee Note to

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190 *See* Karlo v. Pittsburgh Glass Works, LLC, No. 2:10-CV-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015); *Jones*, No. 09 C 6437, 2013 WL 7046374, at *7. *But see* Samaha v. Washington State Dept. of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *4 (E.D. Wash. Jan. 3, 2012) (admitting evidence of implicit bias evidence under FED. R. EVID. 702).

191 FED. R. EVID. 702.

192 Mitchell & Tetlock, *supra* note 25, at 1101.

193 *Id*.

194 *Id.* at 1103.

195 *See* Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553, 553 (2005).

196 No. 2:10-CV-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015).

197 *Id.* at *5.

198 *Id.* at *7 (emphasis added).

199 Fed. R. Evid. 702.

the 2000 amendments to Rule 702 denotes, "[e]ven opinions about general principles have to be logically related to the factual context of a case to be admissible."[200] The problem with experts relying on IAT data is that IAT results are derived solely from laboratory testing that does not remotely approximate real-world conditions or, even more narrowly, the actual conditions of a specific case.[201] As a district court in Illinois noted, an expert's testimony that suggests an individual's propensity to spontaneously react to a given stimulus through the IAT does not at all provide concrete information about the workplace at issue.[202] Expert evidence that proposes that unconscious discrimination may be possible in a given environment does not provide concrete evidence that implicit bias actually exists or was present in a particular case.

4. The Proper Evidentiary Recourse for Courts

Given the significant difficulties that IAT evidence faces under Rules 401, 402, 403, 404, and 702, courts should look upon such evidence with scrutiny. Nevertheless, as courts face the imminent threat of Title VII expansion, the most prudential solution for courts is to only admit such evidence under a narrowed set of circumstances.

As discussed, because the IAT produces results that are only questionably applicable to the workplace environment, results may not accurately reflect the factual circumstances of a specific case.[203] Thus, to conform with Rules 401, 402, and 403, the courts should demand that either the parties at issue directly produce IAT data (i.e., measure the IAT data of the specific defendant(s) of the case), or that experts provide a new scientific test beyond the IAT that can provide reliable data from real-life circumstances. Discerning implicit bias from the text of a deposition, or even from the confines of a laboratory environment, ignores the complexities of the workplace and how implicit biases can affect one's propensities. Potential litigants may not avoid problems of relevance under Rules 401, 402, and 403 until these problems are solved in the scope of IAT data collection.

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200 Jones v. Natl. Council of Young Men's Christian Ass'ns of the United States, 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014) (citing FED. R. EVID. 702).

201 *Id.*

202 *Id.* ("All Dr. Greenwald can tell us is that people who spontaneously react to virtual strangers in laboratory settings whom they will never meet or see again, with nothing at stake, will tend to make unconscious associations that are not favorable to blacks. . . . In this lawsuit, by contrast, we are considering deliberate business decisions in the workplace—not split second decisions in a laboratory—by individuals who know the people for whom they are making important decisions concerning their pay, promotions, and performance evaluations, in a setting where the decisionmakers operate in a supervised environment and under the constraints of EEO policies and laws, the violation of which has serious consequences, including individual liability.").

203 *Id.*

To conform with Rule 404, courts should only admit such evidence if the parties provide it with more than a generalized notion that an employer was acting with a certain "character" of intolerance or discriminatory behavior. Courts must carefully scrutinize whether the IAT data is sufficiently predictive of discriminatory behavior at the time of the alleged unconscious discrimination. Without this sufficient causal link, the general use of IAT data to establish a general "propensity" to engage in unconscious discrimination collapses into non-admissible character evidence under Rule 404.

Finally, to ensure that the presentation of implicit bias research and data by expert witnesses conforms with Rule 702, the court must be particularly receptive of three details focusing on the nature of the expert witness's conduct in the scope of the particular case. For one, the court must determine that the expert is making case-specific opinions regarding the nature of the employer/employee relationship, not generalized statements regarding the state of implicit bias in society. Second, the court must be especially critical of the methodology of the expert's data production. Data procured from a sample of individuals who are entirely dissimilar to the employer population will not accurately reflect the factual circumstances of the case.[204] For example, if the sample size is too small, or it is limited to a population of individuals who have never held managerial positions, this will be an inaccurate representation of implicit bias in a given workplace. Third, the simple use of an expert witness to review depositions and determine whether there are indicators of unconscious discrimination or implicit bias is insufficient to satisfy the requirements of the fourth prong of Rule 702. Thus, for a court to find expert witness testimony adequate in the context of implicit bias evidence, the testimony must be based on direct interpersonal contact, based on actual IAT data from the parties involved in a case, or involve some other form of valid testing for implicit bias.[205] To allow an expert to merely find implicit bias—a completely subconscious and otherwise undetectable or unnoticeable facet of one's psyche—in the text of a deposition, would cast serious doubt as to whether the testimony is actually the product of "reliable principles and methods."[206]

The courts ultimately have two possible recourses in dealing with implicit bias data. They could either: (1) attempt to admit the evidence under the narrowest of circumstances as outlined above, or (2) bar outright all implicit bias data. Because of the current nature of IAT data collection and the way that experts are used to examine and opine as to the applicability of the IAT data in a particular case, the most prudential solution for the courts is to bar all forms of implicit bias evidence under the Rules until new and scientifically viable methods of measuring implicit bias become available.[207]

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204 Mitchell & Tetlock, *supra* note 25, at 1033.

205 Fed. R. Evid. 702.

206 *Id.*

207 Cerullo, *supra* note 3, at 144.

C. *Prudential Reasons Why the Courts Must Deny the Expansion of Title VII to Accommodate Unconscious Discrimination and Implicit Bias*

Proponents of the movement to expand Title VII to recognize implicit bias point to the normative value of protecting victims of unconscious discrimination who lack proper legal recourse.[208] Nevertheless, beyond the clear evidentiary issues that courts would face under the Rules, there remain several prudential reasons for courts and lawmakers to deny such an expansion of Title VII.

1. Increased Evidentiary Burdens Will Be Disproportionally Borne by the Victims

Ironically, while implicit bias provides a new weapon to deter employment discrimination, given the evidentiary problems under the Rules that potential litigants must overcome, its inclusion in the context of Title VII provides an advantage for defendant-employers.[209] By allowing victims of unconscious discrimination to bring a cause of action under Title VII (although this will surely broaden the scope of potential employment discrimination cases), this legal "solution" will spawn an evidentiary burden that will be disproportionally borne by the very victims the statutory expansion would purportedly help.

It is significantly more burdensome for a victim of discrimination to prove unconscious, rather than conscious discrimination.[210] Cases of conscious or overt discrimination often rely on evidence of a "smoking gun," or explicit discriminatory statements or clear pieces of evidence that show the presence of discriminatory attitudes.[211] In contrast, victims of unconscious discrimination will likely not have the discriminatory attitude-indicative "smoking gun."[212] Circumstantial evidence would not be a viable solution in unconscious discrimination cases because, given the already subtle and otherwise invisible nature of implicit bias, courts would be reluctant to consider elusive unconscious discrimination claims without any tangible evidence.[213]

The lack of methods to prove implicit bias therefore puts victims of unconscious discrimination at a severe disadvantage. Since they are left with few options, victims of unconscious discrimination *must* rely on IAT

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208 *Id.* at 130.

209 Wax, *supra* note 25, at 1134.

210 Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1042 (2017).

211 Cerullo, *supra* note 3, at 144.

212 *Id.*

213 Hart, *supra* note 56, at 766.

evidence, along with expert witness testimony regarding implicit bias, to provide the best proof that their employers harbored implicit biases that caused unconscious discrimination. However, since the IAT is of questionable reliability in the scientific community, the court will look at such evidence with heightened awareness of the test's limitations in the context of employment litigation. [214]

Herein lies the crux of the problem: in the end, this onerous burden to prove the reliability of implicit bias evidence must be inevitably borne by the plaintiff. This burden, however, is made even more arduous given the nature of the harm that victims of unconscious discrimination experience. Implicit bias is often a moving target that is neither easy to identify in a case nor simple to measure.[215] As has been discussed, while researchers have argued that the IAT is effective in determining whether an individual harbors implicit biases, critics have questioned the validity of its findings, arguing that its results are inconclusive and unreliable, and that these tests are hardly "scientific."[216] Nevertheless, because the IAT is the primary test to determine the presence of implicit bias, it will be among the sole tools for the potential litigant to prove the existence of implicit bias in a particular case. At this point in implicit bias research, there exist no other evidentiary avenues for victims of unconscious discrimination to prove implicit bias. Thus, victims are forced to rely on a test of questionable reliability as the sole means to establish their claims.

Therefore, because a defendant will never simply admit that he or she harbors implicit biases, short of the IAT and expert witness testimony, proving the presence of implicit bias in the context of a specific adverse employment decision will be difficult, if not impossible, for most potential litigants. Thus, if a litigant knows that he or she faces the difficult and inevitable evidentiary hurdle of proving the existence of the elusive implicit bias, he or she will be greatly disincentivized from bringing a case on the basis of unconscious discrimination. Given the already documented barriers for litigants bringing claims under Title VII,[217] these heightened evidentiary burdens may only prove to further deter victims from bringing claims against employers.

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214 Reshma M. Saujani, *"The Implicit Association Test": A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 412 (2003).

215 Pedersen, *supra* note 10, at 105.

216 Cerullo, *supra* note 3, at 142-43; Tolson, *supra* note 7, at 363–64.

217 Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, 2015 Harv. J. Racial & Ethnic Just. Online 1, 12–15.

2. Overly Broad Power to the Plaintiff Under Title VII

At the other extreme, assuming that a plaintiff is able to overcome his or her evidentiary burden of proving implicit bias, allowing unconscious discrimination to be actionable under Title VII gives potential plaintiffs a dangerously broad cause of action that threatens the adversarial nature of antidiscrimination suits.

Should courts allow unconscious discrimination to be an actionable offense, almost every employer would be in danger of liability under Title VII, as most (if not all) people harbor at least some of these latent discriminatory or stereotyped attitudes.[218] From a practical perspective, if individuals are unable to mitigate the effects of these unconscious biases, employers are at a constant risk of liability due to something they cannot control. Because of the ever-present nature of implicit bias—a facet of an individual's character that cannot be controlled in its development or effect on one's decisions—to concede any presence of implicit bias in the workplace would be to necessarily concede that it had an effect on a given adverse employment decision.

The defendant-employer is also left without proper defenses. Because implicit biases will theoretically underlie every action, a defense by the employer that "implicit bias existed, yet did not serve as a motivating factor of an adverse employment decision" will not be a viable defense. Further, given the *McDonnell Douglas* framework, it will be nearly impossible for any defendant to argue that his or her client does not harbor implicit biases because they are not only uncontrollable, but constantly evolving.[219] A defendant will be hard-pressed to argue that his legitimate employer actions are devoid of "pretext" if a plaintiff can always claim that the pretext is implicit.

Both employers and the courts will feel the consequences of this newfound power to plaintiffs. Even in the midst of the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[220] and *Ashcroft v. Iqbal*,[221] after which the Court mandated that pleader must demonstrate "enough facts to state a claim to relief that is plausible on its face,"[222] plaintiffs will have a demonstrable advantage over employer defendants. Given the hidden and fleeting nature of unconscious discrimination and implicit biases, it will always be "plausible" that implicit biases played some role in an adverse employment decision. Thus, because the plausibility of implicit bias cannot be challenged without commencing discovery, courts will be unlikely to

218 Cerullo *supra* note 3, at 138.

219 *Id.*

220 550 U.S. 544 (2007).

221 556 U.S. 662 (2009).

222 *Twombly*, 550 U.S. at 570.

dismiss any unconscious discrimination suit on a Federal Rules of Civil Procedure 12(b)(6) Motion to Dismiss.

Even if *Twombly* and *Iqbal* function to create a more demanding "plausibility pleading" standard[223]—representing the Supreme Court's value of "early case deposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits"[224]—the recognition of unconscious discrimination suits will impair these efforts toward judicial economy. Since only IAT examination or expert witness testimony can prove implicit bias, potentially every unconscious discrimination suit would have to go to discovery to establish a plaintiff's case.[225] This would only function to put unnecessary burdens on the employer, who would face the threat of full litigation after any employee faces some variety of adverse employment decision. This would also have massive consequences for courts, who risk a massive flood of unconscious discrimination suits.

The result of this ongoing threat of litigation would create societal inefficiencies. As a result of this constant fear of suit, employers would likely respond by overinvesting in measures that might potentially reduce their exposure to liability,[226] yet would not necessarily cause a proportionate reduction in the amount of group-based unconscious bias in their discrimination practices.[227] This would not only be inefficient, but socially undesirable.

3. Disproportionate Reliance on Expert Witness Testimony to Establish a Case

Given the hidden and elusive nature of unconscious discrimination, much of the evidence of implicit bias in a given case will be presented to jurors in the form of expert witness testimony, which in itself raises substantial concerns.[228] While Rule 702 and the Supreme Court's holding in *Daubert* have provided procedural safeguards for the admissibility of evidence, much scholarship has been devoted to the problems of a heavy reliance on expert witness testimony in the litigation process.[229] As this

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223 Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010).

224 *Id.* at 10.

225 Cerullo, *supra* note 3, at 138.

226 Wax, *supra* note 25, at 1133.

227 *Id.* at 1182.

228 *See* Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1069 (2017).

229 *See, e.g.*, Ronald J. Allen & Esfand Nafisi, Daubert *and Its Discontents*, 76 BROOK. L. REV. 131, 136 (2010); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1593 (1998); L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1389 (1995); Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 3 (2013).

scholarship suggests, an over-reliance on expert witness testimony can have deleterious effects on the adversarial process, and present prejudicial harm to both parties.[230]

One such controversy pertains to the incentives underlying the relationships between lawyers and expert witnesses. For example, scholars point to the lawyer's motivations that go into choosing the "right" expert witness, which transforms into a process of "shopping" for the right expert witness who will be most effective in front of a jury. [231] Rather than choosing the most knowledgeable or respected expert in a given field, lawyers search for an expert wh will work with the lawyer to develop his or her opinions. [232] This in turn transforms selection of expert witnesses into a sport and does not embody the truth-seeking function of courts and juries.[233]

In the same vein, expert witnesses themselves act in a self-interested manner throughout the expert-searching process. Many expert witnesses use their opportunities to testify in court as a means to supplement their income, as they can make substantial money through consulting. [234] Thus, just as lawyers strive to find the best expert witnesses to further their case, expert witnesses aim to develop relationships with these lawyers to ensure that they will be retained again in the future.[235] With this promise of future compensation or retained relationships, it is unsurprising that experts will tend to testify to conclusions more definitively than they might typically assert or bias their opinion in favor of the lawyer's client.[236]

This form of expert witness bias carries heavy implications, especially in the realm of unconscious discrimination, because implicit bias can neither be properly identified nor measured without experts fluent in social sciences.[237] If an expert witness is retained solely to find implicit bias in an employee-employer relationship or interaction, the expert witness is strongly motivated to find such implicit bias.[238] This is particularly worrisome, as this threatens to turn a search for implicit bias in the workplace into simply a search for the right expert witness.

On top of the motivations that expert witnesses will have to find implicit bias in a given relationship, scholarship further highlights the concerning impact that expert witnesses can have on jury decisions.[239] For example, scholars suggest that juries will often overvalue expert witness testimony

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230 Brewer, *supra* note 229, at 1539.

231 Perrin, *supra* note 229, at 1415.

232 *Id.* at 1415.

233 *Id.* at 1414.

234 *Id.* at 1415.

235 *Id*.

236 *Id.* at 1414.

237 Harriet M. Antczak, *Problems at* Daubert*: Expert Testimony in Title VII Sex Discrimination and Sexual Harassment Litigation*, 19 BUFF. J. GENDER L. & SOC. POL'Y 33, 34 (2010).

238 Brewer, *supra* note 229, at 1539.

239 Allen & Nafisi, *supra* note 229, at 132.

beyond their actual intrinsic epistemic worth.[240] The concern is that, because judges and jurors themselves lack the relevant expertise in a given area, they will be unable to distinguish genuine expert witness testimony from that which is misleading or does not support the evidence.[241] Given their lack of expertise, jurors may be unable to differentiate legitimate expert witness testimony from "junk science."[242] Scholars have also highlighted the relative difficulty among jurors to even comprehend the presented scientific evidence.[243] These findings are especially startling in the context of implicit bias, given the widely studied anchoring effects that expert witnesses can have on jury decision-making, or the notion that "jurors, impressed and misled by the jargon of an apparently knowledgeable witness with an extensive resume, will uncritically accept the expert's claims."[244]

It must be noted that other scholars have suggested that these concerns regarding expert witness testimony are significantly overblown.[245] For example, some studies have suggested that most jurors are skeptical of expert witnesses at the onset of the trial, aware that experts were called as part of the adversarial process, instead of blindly accepting their testimony and taking it as truth.[246] Other studies have suggested that jurors tend to be biased against the plaintiff and plaintiff's attorney, and will often view the corporation as a victim of frivolous litigation.[247] Furthermore, some scholars suggest that the concern about overvaluation of expert testimony is unfounded because jurors are less prone to over-persuasion when there is an opportunity for opposing parties to cross-examine and present their own contrary evidence or opposing expert witnesses.[248]

Nevertheless, despite this countervailing scholarship, the concern remains that since the presence of implicit bias in a given employment relationship can presently only be detected or supported through expert witness testimony, the lawyers of potential plaintiffs in unconscious

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240 *See, e.g.*, Allen & Nafisi, *supra* note 229, at 132; Brewer, *supra* note 229, at 1538–39.

241 *See* Allen & Nafisi, *supra* note 229, at 132; Brewer, *supra* note 229, at 1538–39. *But see* Schauer & Spellman, *supra* note 229, at 13–14.

242 E. Donald Elliott, *Toward Incentive-Based Procedure: Three Approaches for Regulating Scientific Evidence*, 69 B.U. L. REV. 487, 491 (1989).

243 Rebecca K. Helm & James P. Dunlea, *Motivated Cognition and Juror Interpretation of Scientific Evidence: Applying Cultural Cognition to Interpretation of Forensic Testimony*, 120 PENN ST. L. REV. PENN STATIM 1, 14–15 (2016).

244 Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 719 (2006).

245 *See* Sanja Kutnjak Ivkovic & Valerie P. Hans, *Juror's Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 L. & SOC. INQUIRY 441, 478–79 (2003); Joseph Sanders, *Jury Deliberation in a Complex Case:* Havner v. Merrell Dow Pharmaceuticals, 16 JUST. SYS. J. 45, 51 (1993); Schauer & Spellman, *supra* note 229, at 15–16.

246 Ivkovic & Hans, *supra* note 245, at 478–79.

247 Benjamin F. Barrett Jr., *Changes in Juror Bias After September 11*, 2 ANN. 2002 ATLA-CLE 2097 (2002).

248 Schauer & Spellman, *supra* note 229, at 15–16.

discrimination cases are armed with psychological weapons capable of severely skewing jurors' abilities to decide cases based on evidence.[249]

4. Potential Lack of Receptivity by Jurors to Evidence of Implicit Bias

Beyond the potential prejudicial effect of expert witness testimony on juries, another issue is how receptive jurors will be to the notion of the widespread prevalence of implicit biases. It is unlikely that juries will harbor a *positive* view of the notion that everyone, including the individual juror, is a "closet-racist" or "closet-sexist." In a society where racism has become increasingly taboo, it will be unlikely that a juror reacts in the plaintiff's favor upon being told that these feelings are uncontrollable and omnipresent. Scholars have developed significant literature regarding the role of emotion and jury response,[250] consistently finding that emotions can directly affect how people make particular kinds of judgments, such as attributing blame.[251] Although no literature has thus far focused on the effects of implicit bias evidence on a jury, it is plausible that the mere suggestion that all individuals, including the jurors, are susceptible to the taboo notion of racism or sexism could negatively affect a plaintiff's prospects in a jury trial.

5. Increased Litigation Will Perpetuate Discrimination

Even if a victim of unconscious discrimination succeeds in a suit against an employer, the reality is that such suits will not solve the prevalence of implicit bias in society. In contrast, it is even more likely that such increased litigation will either fail to eradicate discrimination or even perpetuate discriminatory attitudes toward minority groups.

For one, any monetary awards that a victim of unconscious discrimination may win through litigation cannot compensate for deeper systemic issues that result from discrimination in the workplace.[252] No amount of money can make up for a lack of mentorship and guidance, or deeper feelings of exclusion and discomfort within the workplace.[253] These

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249 *See generally* Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 481–83 (1987).

250 Victoria Estrada-Reynolds, Kimberly A. Schweitzer & Narina Nuñez, *Emotions in the Courtroom: How Sadness, Fear, Anger, and Disgust Affect Jurors' Decisions*, 16 WYO. L. REV. 343, 344, 357 (2016).

251 Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959, 963 (2003).

252 El-Amin, *supra* note 217, at 17–18.

253 *Id*.

losses and inherent disadvantages for victims are not quantifiable, and money damages cannot adequately compensate them.[254]

Additionally, with increased litigation among certain minority groups, there is a greater chance for what academics have called "litigation-induced group bias effects."[255] Litigation-induced group bias is derived from the resulting hard feelings that a defendant employer has toward a plaintiff-employee.[256] Given the monetary burdens that litigation puts on employers, employees who have sued the employer often face disapproval, hostility, and resentment.[257] As an extension of these hostile attitudes toward the plaintiff, it is not uncommon for an employer to subsequently harbor the same resentful attitudes toward all other employees of the same protected class.[258] The anti-retaliation provisions of Title VII may not protect against this disparate treatment of third parties.[259] Thus, because allowing employees to bring unconscious discrimination suits under Title VII will inevitably increase the number of suits brought against an employer, this threatens to perpetuate implicit biases to minority groups protected under Title VII.

Lastly, there is an inherent irony in creating more opportunities for suit under Title VII. Paradoxically, in an attempt to recognize the continued presence of implicit bias in society, including unconscious discrimination in the purview of Title VII will encourage employers to deny the occurrence of implicit bias.[260] In the adversarial system of litigation, a defendant-employer would not want to admit that he was committing a wrong.[261] Instead, this will likely drive the employer to deny his own implicit biases, or the fact that implicit bias exists in his particular workplace environment.[262] These precise attitudes would only perpetuate the problem that advocates seek to address because employers will be incentivized to deny that implicit bias effects exist at all.[263]

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254 *Id.*

255 Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 334–35 (2008).

256 *Id.* at 341.

257 *Id.*

258 *Id.* at 351.

259 *Id.* at 354–55.

260 *Id.* at 369.

261 Fink, *supra* note 255, at 369.

262 *Id.*

263 *Id.*

IV. PRACTICAL STRATEGIES TO COMBAT IMPLICIT BIAS

A. *Litigation is Not the Answer to Eradicate Implicit Bias*

While advocates of an expansion of Title VII to protect against cases of unconscious discrimination may be rightly motivated by notions of justice, equality, and the effort to eradicate society of negative implicit biases, there are strong prudential reasons to reject the expansion of Title VII to include unconscious discrimination. Short of completely reforming the process by which expert witnesses are selected, prepared, and presented,[264] or perhaps mandating that only court-appointed expert witnesses may be admitted to provide evidence of implicit bias,[265] the problems associated with a disproportionate reliance on expert witness testimony in the context of potential unconscious discrimination cases are unavoidable. In the end, given evidentiary and prudential concerns, litigation may not provide the most practical avenue to eliminate all types of discrimination.

While prudential and evidentiary concerns do not weigh in favor of employing litigation tactics to fully combat implicit bias, there remains a concern about the effect this will have on potential litigants. The concern is based on the notion that, if potential litigants are unable to bring these suits altogether, employers will be less incentivized to monitor or eliminate implicit bias in the workplace. Thus, as the argument might go, courts should allow the expansion of Title VII to cases of unconscious discrimination because it would provide the best form of protection and deterrence from employer discrimination in all forms.

This critique nevertheless falls short for two reasons. First, it ignores the status quo in Title VII litigation, wherein causes of action purely brought under claims of unconscious discrimination or implicit bias are not presently recognized under Title VII. Nevertheless, employers today still exercise general restraint from outward discrimination, as the current scope and litigation threat of Title VII deter them from such activity. Second, the critique assumes that litigation can solve the problems of implicit bias in society. To the contrary, as previously addressed, litigation encourages an employer to further deny the presence of implicit bias in a workplace—a process that is counterproductive to the full recognition and eradication of the effects of implicit bias.

B. *Non-Litigation Solutions to Addressing Implicit Bias*

While litigation strategies may not prove to be effective, non-litigation strategies may be viable and potentially more successful in eradicating

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264 Perrin, *supra* note 229, at 1440–45.

265 *See, e.g.*, Elliott, *supra* note 242, at 501–04.

societal discrimination. Although increased pressure has been put on litigation means, given the foreseeable problems and burdens on potential litigants and victims, the best solution remains in the non-litigation realm of combatting implicit bias. Thus, for advocates of social equality and expansion of Title VII protection, the best way to combat society-wide implicit bias is outside the courtroom.[266] Because of the inherent complexities and evidentiary problems that exist with concepts as elusive as implicit bias, unconscious discrimination can be most effectively addressed through in-house employer procedures, as well as education reform.

1. In-House Employer Solutions

A strategy to better address the prevalence of implicit bias in the workplace is not an effort to protect employers from the threat of suit, but efforts to combat stereotypes and biases before any discriminatory acts happen.[267]

One such example is implicit bias training.[268] By providing employees primers on the pervasiveness of implicit biases, and helping employees to understand their own implicit biases, individuals can learn about their own feelings in a context where they are not encouraged to deny their own propensities.[269] In these trainings, employers could even provide IAT testing for their employees. While the IAT may have its own drawbacks,[270] it could be useful for both management and other employees who wish to find their own biases and understand them. By taking such tests, individuals making hiring decisions will be better aware of their own biases during the hiring process.[271] These trainings will allow employers to foster direct dialogue on an otherwise uncomfortable subject and will allow employees to personally reflect on their own biases and how to combat them.[272]

Another such example would be to continue to push diversity initiatives in all workplaces in an attempt to foster comfort and equality among social groups, not solely to meet any government-induced quota.[273] The challenge

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266 *See, e.g.*, Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1941–56 (2009); El-Amin, supra note 217, at 20–26; Tolson, supra note 7, at 396.

267 El-Amin, *supra* note 217, at 20–26.

268 *Id.* at 21.

269 *Id.*

270 Cerullo, *supra* note 3, at 142–43; Tolson, *supra* note 7, at 363–64.

271 Another solution would be to consider providing IAT testing during the job application process. This would help screen applicants that themselves hold negative implicit biases. Nevertheless, with high administrative costs, this could be less than preferable for employers.

272 El-Amin, *supra* note 217, at 21.

273 *See* Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 Wash. L. Rev. 1473, 1473, 1510–11 (2017).

for companies enacting diversity programs is that the wrong goals (e.g., perceived business imperative for a competitive advantage) often motivate them.[274] Instead, diversity programs should be enacted solely to foster normalcy in diversity, which is a moral imperative and societal goal.[275] Diversity programs should not be driven by an attempt to meet a quota because, if employers allow such intuitions to affect hiring decisions, employers are not hiring on the basis of talent, but on the basis of the same implicit biases they are attempting to combat.[276]

Notwithstanding the monetary burdens these efforts may pose on businesses, or the disproportionate pressures that might burden smaller businesses, in-house efforts provide legitimate solutions to the prevalence of implicit biases in the workplace.

2. Educational Efforts

An even more effective means to combat implicit bias in society would be to target its development at its inception, mitigating the effects of societal implicit biases, and discouraging unconscious discrimination. Specifically, by targeting implicit biases in the classroom among students, educators would be able to combat unconscious discrimination in the workplace before individuals enter the work force.[277]

Studies have suggested that education allows for the conscious mitigation of implicit biases, since increased exposure to strong figures of authority belonging to minority social groups can significantly decrease implicit bias against that category.[278] For example, studies have shown that even mere exposure to images of Tiger Woods or Martin Luther King can result in decreased implicit biases against African-Americans.[279] Thus, if educational institutions, from elementary schools to graduate level schools, can hire faculties of greater diversity, there is a possibility of discouraging implicit biases from forming. By increasing student exposure to strong minority leaders such as professors or instructors, their development of implicit biases may shift away from negative social stereotypes. By making diversity the status quo for students, decreased levels of implicit bias could slowly become the societal norm.

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274 *Id.*

275 *Id.*

276 *Id.*

277 Kang & Lane, *supra* note 25, at 501.

278 *Id*. at 501–02.

279 Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 802–05 (2001).

CONCLUSION

Ignoring the real issues of implicit bias inhibits societal progress and perpetuates discriminatory attitudes. Although implicit bias is a clear, pervasive problem in society, that does not mean that litigation is the proper vehicle for combatting these unconscious and innate attitudes. Paradoxically, if courts open the door for plaintiffs to bring claims of unconscious discrimination under Title VII, there will be several evidentiary and practical barriers that in the long run may actually deter future litigants and further harm victims of implicit bias. This is the "unconscious discrimination paradox." Thus, because expanding Title VII to include unconscious discrimination threatens to disproportionately burden plaintiffs and make discrimination potentially worse for victims of implicit bias, it is in society's best interest to maintain the legal status quo.

Advocates for anti-discrimination movements must consider strategies beyond the courtroom and focus their efforts on the workplace or classroom. Through education, and by allowing individuals to encounter their own implicit biases, extra-judicial strategies can be an effective vehicle for real social change. Only when society can rid itself of its own ignorance of implicit biases can we hope to take real steps toward eradicating all forms of discrimination—conscious and unconscious.