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I. INTRODUCTION

> *Because I am a woman, I must make unusual efforts to succeed. If I fail, no one will say, "she doesn't have what it takes." They will say, "Women don't have what it takes."*[1]

Women's presence in the legal profession has gradually shifted from complete exclusion[2] to full integration in all sectors of the field. Women were first given a unique opportunity to work at large firms after World War II, likely due to either "sex-blind" hiring partners looking for talent fast or because they were hired temporarily and managed to stay on after the War.[3] After decades of virtually no movement, the number of women attorneys soared during the span of 1970 to 1980, from 13,000 to 62,000 (from 4 percent to 12.4 percent).[4]

The National Association of Women Lawyers recently sent 200 of the largest law firms in the Nation a survey regarding demographics of lawyers at varying levels, inquiring as to their partnership track structures and women's initiatives.[5] The results show that although women start in virtually

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1. KAREN DONNELLY, AMERICAN WOMEN PILOTS OF WORLD WAR II 23 (1st ed. 2009).

2. *See* Bradwell v. The People of the State of Illinois, 83 U.S. 130, 132 (1972) (upholding denial of Myra Bradwell's application to practice law in Illinois because "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws.").

3. Large law firms constituted the most impenetrable sector for women due to their elitist recruiting processes, unmatched global legal networks, and work on precedent-setting cases. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 176 (2d ed. 1983) (noting that an essential factor in the increase in women lawyers was the accompaniment of a general rise in personnel).

4. *Id*. at 5 (noting that women in law schools rose from four percent in the 1960s to eight percent by 1970, then to thirty-three percent by 1980).

5. *See* Destiny Peery, *Report of the 2018 NAWL Survey on Retention and Promotion of Women in*

equal numbers as their male counterparts, they do not correspondingly remain balanced at the partnership level.[6] As women rise in the ranks, top-level female representation rapidly declines, leaving women to make up forty-seven percent of associates and only thirty percent of partners.[7] Despite improvements in objective hiring practices, women still hit a *glass ceiling* and are unable to reach the highest levels of their employment potential.[8]

However, the number of female lawyers alone does not tell the complete story of how women progress in a traditionally male-dominated profession. Many law firm cultures promote meritocracy, meaning "everyone has an equal chance to advance and obtain rewards based on their individual merits and efforts,"[9] regardless of race or gender. Ironically, studies have shown that within organizations that *overtly* present themselves as meritocratic, employers still favor men over equally performing women in performance evaluations and compensation.[10] These findings are two-fold. First, inequality may persist despite diversity policies and training programs because firms arguably adopt such practices for symbolic reasons rather than for their stated purposes.[11] Second, employers are more prone to prejudiced attitudes when they feel that their "moral credentials" are satisfied vis-à-vis a meritocratic organization.[12] Both findings suggest that certain meritocratic mechanisms may encourage bias by discouraging a close examination of subtle signs of prejudice.

Another major impediment to women gaining more clout is that they are "sometimes steered away from major litigation, commercial matters, heavy client contact, extensive travel, or late night responsibilities . . . [and] are more likely to be relegated to supporting roles such as document preparation," even when they lead case preparation.[13] In a 1988 ABA Commission on Women in the Profession report, Hillary Rodham Clinton, the Commission's Chair at the time, urged the ABA "to recognize publicly

Law Firms, MANAGING PARTNER FORUM 1, 2 (Mar. 1, 2019), http://www.managingpartnerforum.org/tasks/sites/mpf/assets/image/MPF%20FEATURED%20WHITE%20PAPER%20-%202018%20NAWL%20Survey%20-%20PEERY%20-%203-1-19.pdf ("This year, 97 of 200 law firms completed all or significant portions of the survey.").

6. *See id*. at 3.

7. *See id*. at 7 (finding that women make up thirty percent of non-equity partners, which is unchanged from last year, and twenty percent of equity partners).

8. *See* Ann J. Gellis, *Great Expectations: Women in the Legal Profession, a Commentary on State Studies*, 66 IND. L.J. 941, 941 (1991).

9. Emilio J. Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543, 543 (2010).

10. *See id*.

11. *See id*. at 543–44.

12. *Id*. at 567.

13. *Report to the House of Delegates*, A.B.A. COMM'N ON WOMEN IN THE PROF. 11 (1988).

that gender bias [both indirect and overt] exists in the profession."[14] Although it is significant that many barriers to women's involvement in the law, such as explicit bias and lack of hiring,[15] have primarily disappeared, one serious obstacle that remains is implicit bias in promotional decision making.

The proper tool for measuring progress should instead rely on women's professional advancement. Diversity at the top-tiers of the legal field is not merely a "women's issue," but rather an advantage to both law firms' viability and their clients' success. The combination of both men and women's inherently different lawyering strategies and behaviors cover a broader array of approaches and etiquettes than at a male-dominated firm. However, without more, the seemingly subtle effects of implicit bias permeate the professional lives of women and observers, resulting in higher levels of stress, dissatisfaction, and intention to quit.[16] Law firms ultimately face the costs associated with lost productivity and loss of employees,[17] issues that the proper safeguards could avoid. It is the position of this Note that unaddressed implicit biases severely affect women's growth potential within a firm, and that growth in numbers within the field generally is not a sufficient metric of equality. Instead, women's career advancement should be the critical factor in measuring actual progress.

This Note examines the role that implicit biases play on sex-based promotions and employment decisions in large law firms, and the efficacy of current jurisprudence as a means of ameliorating these effects. This Note seeks to reformulate intentional disparate treatment theory to better address implicit bias so that disparate impact theory is not the only anti-discrimination doctrine that addresses unintentional employment discrimination. Part II investigates the implications of implicit gender biases on behavior and how such consequences ultimately affect employment opportunities for women. Further, this Note discusses employment discrimination jurisprudence and how it shapes current models of disparate treatment. Part III analyzes the various structures of implicit discrimination and the barriers a Title VII plaintiff faces when bringing a claim against her employer. Finally, Part IV proposes how to improve this situation by making fundamental changes to a law firm's culture, allowing plaintiffs' "enhanced

14. *Id*.

15. *See* DANA KABAT-FARR & LILIA M. CORTINA AS TOLD TO SUZY FOX ET AL., SELECTIVE INCIVILITY: GENDER, RACE, AND THE DISCRIMINATORY WORKPLACE IN GENDER AND THE DYSFUNCTIONAL WORKPLACE: NEW HORIZONS IN MANAGEMENT 109 (Cary L. Cooper ed., 2012) (explaining how "old-fashioned" overt sexism has undergone a radical decline in recent decades while contemporary forms of implicit bias persist).

16. *Id*. at 111.

17. *See* Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACAD. OF MGMT. REV. 55 (2008).

discovery" to set the level of judicial scrutiny, and shifting individual disparate treatment proof away from a presumption of invidiousness. If partners are not aware of their biases when promoting associates, the law firm lifestyle may not remain attractive to women and some men. Social cognition research and sociology research indicates that implicit bias is a significant source of employment discrimination, but current doctrine does not recognize nor redress it.

II. IMPLICIT BIAS AND LEGAL RESPONSIBILITY

This section first discusses the social cognition theory and how our brains create automatic categorizations. It then examines the complex issues that women in law firms experience in achieving high leadership roles. Next, it presents the disparate treatment theory in employment discrimination jurisprudence and the high hurdle of "intent" that plaintiffs must overcome. Lastly, it concludes with a discussion of judicial deference to professional employers and the jurisprudence that supports these findings.

A. THE SOCIAL SCIENCE OF IMPLICIT BIAS

The first question that people ask when they hear that someone just had a baby is, "Is it a boy or a girl?"[18] This first categorization shapes much of our lives. To function, every person must unconsciously design mental strategies for simplifying their environment and acting on incomplete information.[19] In part, we can survive by creating categories.[20] The repercussions of automatic categorizations are two-fold. First, people unconsciously perceive members of the same group as being more similar to one another, and members of different groups as more dissimilar to one another.[21] Categorization done this way is only meant to simplify the environment by sorting "fuzzy" differences into "clear-cut" distinctions.[22] Second, in determining whether an unfamiliar item is a member of a particular category, our brains automatically match it with a "typical" categorical prototype to assess its fit.[23] Only with additional mental

18. *Invisibilia: The Power of Categories*, NPR (Feb. 5, 2015), https://www.npr.org/2015/02/06/384104070/paiges-story.

19. *See* Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (2011).

20. Categorization helps people identify objects, make future predictions, infer the existence of unobservable traits, and attribute a causation of events. *See id*. at 1189.

21. *See id*.

22. *Id*.

23. For instance, our brains carry images of the "typical letter 'd'," the "typical couch," and the "typical lawyer." *Id*.

processing can we identify these items as members of super- or subordinate categories.[24] Cognitive psychologists refer to these "private theor[ies] of the nature of reality" as "schemas."[25]

According to schema theory, schemas, prototypes, and stereotypes function as implicit information structures that organize "input into, storage in, and recall from memory."[26] However, the luxury of cognitive economy comes at a price: These categorical structures *bias* what we see, how we interpret it, and how we store it into memory.[27] In intergroup relations, such as within a law firm setting, theses biases—facilitated through perception, inference, and judgment—can cause discrimination "whether we intend it or not, whether we know it or not."[28]

Bias reduction research heavily draws upon a "dual-process model of social cognition" that creates a System 1/System 2 structure of automatic and controlled processing.[29] Both Systems of information processing represent the ways that individuals make sense of the world: System 1 is automatic, unconscious, and "demanding of few cognitive resources"; in contrast, System 2 is conscious, controlled, and "resource-intensive."[30] Although people tend to believe nearly all of their choices are deliberate, "[m]ost of a person's everyday life is determined not by their conscious intentions and deliberate choices but by mental processes that are put into motion by features of their environment that operate outside of conscious awareness and guidance."[31] More often than people care to believe or admit, we are operating in a System 1 structure. For example, social psychologist Henri Tajfel and his colleagues designed the "minimal group paradigm" experiment that grouped subjects according to what they were told and then asked each subject to evaluate members within their group and members within the other group.[32] Some groups were divided based on being labeled "blue" or "green."[33] Other times, subjects were told they were grouped

24. *Id*. at 1190.

25. David E. Rumelhart, *Schemata and the Cognitive System, in* 1 HANDBOOK OF SOCIAL COGNITION 161, 166 (1984).

26. Krieger, *supra* note 19, at 1209.

27. *See id*. at 1190.

28. *Id*.

29. PAUL BREST & LINDA H. KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 334 (2010).

30. *Id*. at 334–34 (noting that we can observe neurological substrates underlying this distinction through functional magnetic resonance imaging ("fMRI")).

31. John Bargh & Tanja Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 462 (1999).

32. *See generally* Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCHOL. 1 (1982).

33. *Id*. at 23.

according to whether they under or overestimated the size of dots.[34] The results showed that once the concept of "groupness" was introduced,[35] people perceived ingroup members as being more similar and outgroup members as being more dissimilar to themselves. Within the employment context, the "conscious [and] deliberate" desire to exclude women has declined,[36] but both social psychologists and courts are seeing more implicit discrimination, often absent an intent to disfavor outgroup members.[37] The various forms of these implicit biases will be discussed in the following subsection.

Although there are two measures to assess bias, direct and indirect, researchers are reluctant to rely on direct measures because individuals may worry about the social consequences of admitting their bias,[38] and consequentially, the results may not be reliable. For example, even if a person says that men and women are equally good at science, they may associate science more strongly with men without being actively aware of it. Many people who advocate for the egalitarian norm that men and women are equal inadvertently harbor negative associations about women at the same time.[39] Though it is difficult to reliably identify whether a person will discriminate based on their own stated beliefs or values, any such bias is best identified by understanding how a person implicitly categorizes information. Following the actions of the decision maker that lacks outward discriminatory intent is one reason why System 1 measures have become critical in the field of social cognition. Such measures assist psychologists in understanding categorization as a cognitive mechanism that simplifies the task of processing and storing information about others into memory. Unlike direct measures, indirect measures do not require verbal reporting of attitudes or beliefs; instead, a researcher infers whether a bias exists from a pattern of responses.[40] For example, a "blind audition" study demonstrated that implementing blind auditions for orchestra seats improved a woman's chances of getting hired by up to twenty-five percent.[41]

34. *Id*.

35. In each experiment, group assignment was arbitrary.

36. Krieger, *supra* note 19, at 1241; *see also* Tajfel, *supra* note 32, at 22 (arguing that to blame the "cause" of society's issues solely on the evil intentions of individual actors is a "conspiracy theor[y]," because intergroup functions must be acknowledged and attributed, as well).

37. *See generally* Tajfel, *supra* note 32.

38. Gregory Mitchell, *An Implicit Bias Primer*, 25 VA. J. OF SOC. POL'Y AND THE L. 28, 31 (2018) (arguing that current research on implicit bias has not improved our capability to predict and prevent discrimination).

39. *See* Anthony G. Greenwald & Linda H. Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 951 (2006).

40. *See* Mitchell, *supra* note 38, at 32.

41. Claudio Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 734–37 (2000). Researchers found that "the screen

If a person has been made aware of and rejects stereotypes or attitudes associated with an outgroup member, social psychologists have found that those stereotypes and biases do not just disappear.[42] There are various measures for studying implicit biases, but the Implicit Association Test ("IAT") is by far the most popular.[43] The IAT is a research tool that assesses cognitive associations by measuring how closely individuals' brains link concepts.[44] Participants are required to categorize stimuli that briefly appear on a computer screen as quickly as they can.[45] The brevity of the stimuli deliberately activates System 1 processing so participants cannot stop to think about the reasoning behind their choice. Individuals' cognitive associations may be benign ("dogs and cute") but may also be prejudicial ("women and passive"). The purpose of the experiment is to understand how schemas may distort new, incoming information about members of different groups and thereby lead to categorization of in- and outgroup membership. In the example above, what determines what incoming information will prime which schema rests on the participant's memory of "dogs" and "women." Since gender is often apparent, and social contexts emphasize categories, gender-based schemas are likely to be implicated in the processing of information about other people. Social psychologists believe that these cognitive associations lead to implicit bias, which can influence subtle forms of discrimination.[46]

For example, in the gender-career IAT, participants are presented with four types of stimuli: words representing career (e.g., salary, management, business), words representing family (e.g., marriage, home, children), pictures of male individuals, and pictures of female individuals. If participants respond more quickly to the portion of the test that associates "female" and "family" rather than "male" and "family," then the Harvard research tool infers that the test-taker holds an implicit negative bias towards females and career associations. It indicates that participants do not need to resolve any tension when stimuli are compatible rather than when stimuli are incompatible. IAT studies have shown that both men and women tend to link "female" with "family" and "male" with "career."[47] The IAT is a powerful tool that demonstrates the existence of unconscious, automatic biases.

increases by [fifty] percent the probability that a woman will be advanced from certain preliminary rounds and increases by several-fold the likelihood that a woman will be selected in the final round." *Id*. at 738.

42. *See* BREST & KRIEGER, *supra* note 29, at 335.

43. Beth Azar, *IAT: Fad or fabulous?*, 39 AM. PSYCHOLOGICAL ASS'N 44, 44 (2008) (noting that IAT has received more than five million visits to its website).

44. *Id*.

45. *See* Mitchell, supra note 38, at 32.

46. *See* Azar, *supra* note 43.

47. Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101, 105, 108–09 (2002).

B. THE UNIQUE STRUCTURE OF SEX DISCRIMINATION

One wonders why the basis of women's inequality remains outside the confines of legal solutions. This limitation can be explained by means of the *glass ceiling* metaphor. It portrays an invisible and unauthorized barrier in a seemingly nondiscriminatory law firm that prevents women from securing top professional positions.[48] The additional obstacles that some women face, however, perhaps as a minority[49] or a mother,[50] may feel more like a labyrinth, where they must combat new obstacles at every turn.[51]

In recent years, legal research began looking to implicit bias to explain workplace discrimination. Extrapolation of the many masks that implicit bias wears is advanced by Professor Joan Williams and the Center for WorkLife Law at the University of California, Hastings College of the Law, a research and advocacy center that seeks to "interrupt" racial and gender bias in the legal profession.[52] Researchers surveyed 2,827 participants either working in-house or at law firms.[53] Findings report four distinct patterns of gender bias, each denoting their own particular set of challenges and implications.

First, "Prove-It-Again!" ("PIA") is a descriptive bias that depicts the need for women to repeatedly work harder "in order to be seen as equally competent" as their male counterparts.[54] A person's underlying assumptions about the "typical woman"[55] are preserved by the principle that information supporting preexisting stereotypes is perceived and remembered while contradicting information is unnoticed and ultimately forgotten.[56] In Williams's study, white women report at rates twenty-five percent higher than white men for having to go "above and beyond" to get the same recognition as others, and forty-four percent higher for receiving messages that they "do not fit in" with the image of a lawyer.[57] In comparison, women

48. Carol Hymowitz & Timothy D. Schelhardt, *The Glass-Ceiling: Why Women Can't Seem to Break the Invisible Barrier that Blocks Them from Top Jobs*, WALL ST. J., March 24, 1986, at 1–3.

49. *See Executive Summary on You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF. 9 (2018) (noting that women of color report the highest levels of bias of any group).

50. *See id*. at 8 (indicating a significant bias against mothers and fathers who take parental leave).

51. *See generally* ALICE H. EAGLY & LINDA L. CARLI, THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS (2007).

52. *Bias Interrupters*, CENTER FOR WORKLIFE Law, https://biasinterrupters.org/ (last visited Feb. 26, 2020).

53. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 29, at 7.

54. *Id*. at 3.

55. Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Stereotyping in Sex Discrimination*, 5 PSYCHOLOGY, PUBLIC POL'Y, AND L. 665, 671 (1999).

56. *See* JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK: FOUR PATTERNS WORKING WOMEN NEED TO KNOW 24–25 (2014).

57. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 7–8 (noting that

of color report at rates thirty-two percent higher than white men for being held to higher standards and at rates of fifty percent higher for being mistaken for administrative or janitorial staff.[58]

Second, "Tightrope" is a prescriptive bias that originates from beliefs about how women *should* behave.[59] The tightrope signifies the fine line women must walk between behaving in a traditionally feminine manner, thus exacerbating PIA problems, and acting in a traditionally masculine manner and receiving backlash for it.[60] The consequence of conflating masculinity and femininity with biological sex is that women must make a choice: Do I want to be liked but not respected or be respected but not liked?[61] Since traditionally feminine behaviors "signal deference and subordination,"[62] undervalued work is often given to women who display such traits (e.g., no client contact or rainmaking opportunities), administrative work (e.g., taking notes or scheduling meetings), emotional work (e.g., "he's upset, can you help?"), and literal housework (e.g., party planning).[63] White women report at rates twenty-one percent higher than white men for doing administrative tasks and women of color reported at rates eighteen percent higher for doing office housework.[64] Not wanting to appear uncooperative or unsupportive, women may feel bound to agree to such tasks.[65] In a study on the *glass ceiling*, Morrison described the professional women paradox:

> It was essential that they contradict the stereotypes that their male executives and coworkers had about women—they had to be seen as different, "better than women" as a group. But they couldn't go too far, to forfeit all traces of femininity, because that would make them too alien to their superiors and colleagues. In essence, their mission was to do what *was not* expected of them, while doing enough of what *was* expected of them as women to gain acceptance. The capacity to combine the two consistently, to stay within a narrow band of acceptable behavior, is the real key to success.[66]

percentage points are calculated against that of white males).

58. *See id*. at 7.

59. *Id*. at 8.

60. *See* WILLIAMS & DEMPSEY, *supra* note 56, at 61.

61. *See* Susan T. Fiske et al., *(Dis)respecting versus (Dis)liking: Status and Interdependence Predict Ambivalent Stereotypes of Competence and Warmth*, 55 J. OF SOC. ISSUES 473, 476 (1999).

62. WILLIAMS & DEMPSEY, *supra* note 56, at 65.

63. *Id*. at 65–70.

64. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 8.

65. WILLIAMS & DEMPSEY, *supra* note 56, at 68.

66. ANN M. MORRISON ET AL., BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS? 54, 54–55 (1992) [emphasis in original].

Third, "Maternal Wall" describes the professional marginalization of women once they have children, resulting in low-quality assignments, being passed over for promotions, being paid less, and being stigmatized for working part-time.[67] Maternal Wall consists of both prescriptive bias, like women should be at home or working less, and descriptive bias, stemming from strong negative assumptions about the competence of and commitment from mothers.[68] For example, white women reported at rates thirty-six percent higher than white men for having their competence or commitment questioned after having kids.[69]

Fourth, "Tug-of-War" portrays the divide among women within a law firm as they each confront and adapt to masculine traditions in the workplace.[70] A typical example of this pattern is the idea that there is only room for one woman at the top, so a rivalry ensues.[71] It is not to say that men don't experience office politics too, but rather that "gender bias against women often fuels conflicts among women."[72]

While implicit bias may appear subtle at first, its effects permeate the lives of working women, often as a manifestation of incivility.[73] This pattern is particularly true with the rise of policies that strictly prohibit gender discrimination. One can mask discrimination, even unintentionally, behind every day acts of incivility and continue to project an unbiased image.[74] Several studies have indicated that as employees experience greater incivility—such as direct and physical types of hostile behavior—their reported levels of stress, dissatisfaction, and intention to quit increase.[75] In turn, observers of subtle incivility—such as rude or impolite behavior—report lower job satisfaction and higher turnover intentions.[76] The costs associated with the loss of employees, and lost productivity as a result,

67. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 8.

68. *See* WILLIAMS & DEMPSEY, *supra* note 56, at xxi.

69. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 8.

70. *Id*. at 3.

71. *See* WILLIAMS & DEMPSEY, *supra* note 56, at 179.

72. *Id*. at 180.

73. *See* KABAT-FARR & CORTINA, *supra* note 15, at 111.

74. Lilia M. Cortina, *Unseen Justice: Incivility as Modern Discrimination in Organizations*, 33 ACAD. OF MGMT. REV. 1, 55 (2008).

75. *See* Christine M. Pearson et al., *Assessing and Attacking Workplace Incivility*, 29 ORGANIZATIONAL DYNAMICS 123 (2000); Christine M. Pearson et al., *When Workers Flout Convention: A Study of Workplace Incivility*, 54 HUMAN REL. 1387 (2001); Lilia M. Cortina et al., *Incivility in the Workplace: Incidence and Impact*, 6 J. OF OCC. HEALTH PSYCHOLOGY 64 (2001); Lilia M. Cortina et al., *What's Gender Got to Do with It? Incivility in the Federal Courts*, 27 L. AND SOC. INQUIRY 235 (2002).

76. Kathi Miner-Rubino & Lilia M. Cortina, *Working in a Context of Hostility Toward Women: Implications for Employees' Well-Being*, 9 J. OF OCCUPATIONAL HEALTH PSYCHOLOGY 107 (2004) (finding that gender-based incivility affects employees even in the absence of personal experiences).

ultimately fall on employers.[77] These studies serve as reminders not only of the prevalence and automaticity of the implicit biases that affect professional women and group norms but of the ample room for interference and improvement.

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

Upon navigating the implicit impediments of a workplace, women must begin navigating the intricacies of a courtroom. This subsection first discusses employment discrimination jurisprudence and the three models of proof that resulted. Next, it examines the judiciary's unwillingness to interfere with decisions made by upper-level employers, as opposed to entry-level employers. This subsection highlights that the unworkable burdens placed on Title VII plaintiffs ultimately encourage them to settle rather than allow them to effectuate real change.

1. Proving "Discriminatory Intent" in Individual Disparate Treatment Cases

Gender is a dominant force in the employment discrimination jurisprudence context. The prohibition of workplace discrimination based on sex is one of the fundamental repercussions of the Civil Rights Act of 1964 ("Title VII").[78] Although Congress initially passed the Act to redress widespread racial discrimination, Title VII also prohibits employment practices that limit individuals based on "color, religion, sex, or national origin."[79] The law is intended to do more than resolve disputes; it is designed to "alter social conditions."[80] However, the employment discrimination jurisprudence initially designed to address overt and explicit discrimination has not updated to reflect modern types of discrimination. While the Supreme Court has rejected old models of proof, it has notably done so without overturning a single case.[81]

In *Griggs v. Duke Power Company*,[82] the Supreme Court recognized

77. *See* Cortina, *supra* note 17, at 55.

78. *See* 42 U.S.C. § 2000e-2(a)(1) (2012).

79. *Id*.

80. Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, G.W. LAW FAC. PUB. & OTHER WORKS 1, 3 (2014).

81. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); AT&T v. Hulteen, 556 U.S. 701 (2009); Ricci v. DeStefano, 557 U.S. 557 (2009); Wal-Mart Store, Inc. v. Dukes, 131 S. Ct. 2451 (2011).

82. *See* Griggs v. Duke Power Company, 401 U.S. 324 (1971) (holding that Title VII was intended to prohibit not only open discrimination but also neutral employment practices that, regardless of intent, result in discrimination on the basis of a protected trait).

two forms of discrimination: disparate treatment and disparate impact. While disparate treatment refers to treating equally qualified women differently than men, disparate impact occurs when a facially neutral practice affects both men and women differently.[83] In the landmark case *McDonnell Douglas v. Green*, the Court set forth the pretext model of disparate treatment for proving intentional discrimination in scenarios where only circumstantial evidence is accessible.[84]

Title VII plaintiffs establish a prima facie case for employment disparate treatment by showing that: (1) they are members of a class protected by Title VII; (2) they are qualified for the job; (3) despite being qualified, they were denied the promotion; and (4) the employer continued to seek applicants with the plaintiff's qualifications.[85] If the plaintiff establishes a prima facie case, the burden shifts to the employer to refute it by stating a "legitimate, nondiscriminatory reason"[86] for their decision not to promote the employee. If successfully rebutted, the burden shifts back to the plaintiff to demonstrate that the employer's justification was merely a "pretext or discriminatory in its application."[87] At its core, plaintiffs must prove that the employer's justification was a pretext—not the actual reason—for a discriminatory decision. Disparate treatment jurisprudence tends to favor employers because they merely have to point to a legitimate justification for their decision.[88]

In *Price Waterhouse v. Hopkins*, the Supreme Court gave qualified acknowledgment to the concept of mixed-motive theory in a case involving a woman who was refused partnership.[89] Plaintiffs can succeed in mixed-motive cases if they can prove that employment decisions can, and do, rest on both "legitimate and illegitimate" reasons.[90] In *Price Waterhouse*, partners could submit written comments on each candidate elected for partnership; there were no fixed guidelines for the comment procedure and the recommendations and comments were weighed heavily by the Admissions Committee.[91] Of the eighty-eight individuals nominated for

83. *See* Linda H. Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. OF SOC. ISSUES 835, 835 (2004).

84. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

85. *See id*. at 802.

86. *Id*.

87. *Id*. at 807 (noting that a plaintiff may include relevant evidence to any showing of pretext including, but not limited to, an employer's treatment of the employee during employment, the employer's policies for minority employment, and statistics of the employer's policies and practices).

88. SUSAN G. MEZEY, ELUSIVE EQUALITY: WOMEN'S RIGHTS, PUBLIC POLICY, AND THE LAW 77 (2003).

89. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) [hereinafter *Price Waterhouse*].

90. MEZEY, *supra* note 88, at 77.

91. *See* Price Waterhouse, 490 U.S. at 232.

partnership, Ann Hopkins was the only woman.[92] While Hopkins was praised for securing more significant contracts for the accounting firm than any other nominee, partners described her as "macho" and "overcompensate[ing] for being a woman."[93] To "improve her chances for partnership," Hopkins was advised to "walk more femininely, wear make-up, have her hair styled, and wear jewelry."[94]

The Court relied on social psychologist Doctor Susan Fiske's expert testimony regarding the partnership selection process. According to Fiske, Hopkins' uniqueness as the only woman candidate and the subjectivity of the promotion process in allowing "sharply critical remarks" likely fostered an environment for "sex stereotyping."[95] Fiske reviewed not only overtly sex-based comments but also gender-neutral comments[96] made by partners who barely knew Hopkins, yet were highly critical of her.[97] The Court held that once a plaintiff proves that her gender is *a* motivating factor—as opposed to the *sole* motivating factor—in an employment decision, the employer must then show, by a preponderance of the evidence, that it would have made the same decision even if her gender was not taken into account.[98] Employers in a mixed-motive case must provide "objective evidence"[99] that a legitimate reason was present at the time of the employment decision, a benefit to employees who rarely have enough evidence to prove that their gender was *the* critical factor.[100] As a result, *Price Waterhouse* allows women legal relief for discrimination based on a failure to conform to stereotypical gender norms.

92. *See id*. at 233.

93. *Id*. at 235.

94. *Id*. at 235–36 (observing that because female partnership candidates were evaluated in sex-based terms in previous years, candidates were viewed more favorably if they "maintained their femin[in]ity," rather than being identified as a "women's lib[b]er").

95. *Id*.

96. The amount of Title VII cases acknowledging unconscious bias are exceedingly small. *See* Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 113-12 (1st Cir. 1979) (affirming judgment for plaintiff because the decision not to promote her was "determined by a subtle, if unexpressed, bias against women"); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1343 (9th Cir. 1981) (noting that "disdain for women's issues…is evidence of a discriminatory attitude towards women.").

97. *See* Price Waterhouse, 490 U.S. at 235.

98. *See id*. at 258.

99. After Justice O'Connor's Price Waterhouse concurrence urging mix motive theory to only apply to cases involving direct evidence, the Civil Rights Act of 1991 broadened the standard from "the motivating factor" to "a motivating factor." 42 U.S.C. § 2000e-2(m); *see also* Desert Palace v. Costa, 539 U.S. 90 (2003) (determining that the Civil Rights Act of 1991 intended to encompass circumstantial evidence, not just direct evidence).

100. *See* Price Waterhouse, 490 U.S. at 252.

2. Litigation Impediments: A Reluctant Judiciary

Even if a woman can establish a prima facie case for a disparate treatment claim, she faces a judiciary reluctant to interfere with her employer's professional judgment.[101] While courts are more vigorous in scrutinizing employment decisions for entry-level positions, they give considerably more deference to employment decisions made by upper-level or professional employers. An argument that entry-level decisions are more objective, such as measuring the output of a product, than professional choices, such as candidates' collegiality and leadership skills, does not justify abandoning Title VII's prohibition against employment discrimination.[102] The judiciary's unwillingness to inspect the merits of a case or the standards used to evaluate an employee's work creates an unsettling and nearly impossible burden for plaintiffs.[103]

Given the courts' reluctance to insert themselves into substantive decision-making, "victorious" plaintiffs either settle or win on procedural grounds. In *Hishon v. King & Spalding*,[104] a female associate was hired by a well-known firm that assured her that partnership candidates are considered on a "fair and equal basis" after five or six years.[105] After seven years and two partnership rejections, Hishon filed a Title VII claim.[106] King & Spalding argued that partnership is a voluntary association, and applying Title VII to its decisions implicates its First Amendment right to freedom of association.[107] The Supreme Court rejected the employer's argument by holding that Title VII bars discriminatory employment decisions concerning "term[s], condition[s], or privilege[s] of employment."[108] The case settled before Hishon could establish a prima facie case.[109] Although *Hishon* is a

101. *See* Tracy A. Baron, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 268 (1994); *see also* Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 U. COLO. L. REV. 1, 28 (2018) (attesting to Baron's findings that gender bias in the judiciary is well-documented and can have a real impact on decision marking); Terry Carter, *Implicit Bias is a Challenge Even for Judges*, ABA J. (Aug. 5, 2016, 9:58 PM), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges (identifying de-biasing solutions for judges is essential in the application of justice because such outcomes can be "just as harmful as if they were explicit biases.").

102. *See* Baron, *supra* note 101, at 268.

103. *See* MEZEY, *supra* note 88, at 159.

104. *See* Hishon v. King & Spalding, 467 U.S. 69 (1984).

105. *Id*. at 71–72.

106. *Id*.

107. *See id*. at 80.

108. *Id*. at 75.

109. While Hishon's case was pending before the Supreme Court, partners at King & Spalding held a swimsuit competition for its female summer associates, awarding a prize to the female "body [they'd] like to see more of." Rita E. Hauser, *Do Not Approach the Bench Miracle on Grub Street*, N.Y. TIMES (Nov. 9, 1986), https://www.nytimes.com/1986/11/09/books/do-not-approach-the-bench-miracle-on-

victory for women pursuing partnership, courts' hesitation to interfere in law firm's decision-making process remains intact.

Courts' adherence to the *McDonnell Douglas* model of disparate treatment proof essentially requires the plaintiff to prove that the employer lied to the court by offering a "pretext" for discrimination.[110] In *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, a female associate was put on partnership track despite being told that she did not fit the mold "since she was a woman."[111] Notwithstanding receiving partners' positive evaluations and never working more than 500 hours on a single matter,[112] Ezold was assigned smaller, less complicated civil matters; one of her more significant assignments was reassigned to a male associate.[113] Significantly, a partner described Ezold as being trapped in a catch-22: The department "would not assign her complex cases, yet she received negative evaluations for not working on complex cases."[114] The District Court found the employer's reason for denial to be a pretext for discrimination in light of the above circumstances.[115] The Third Circuit reversed, however, finding that the District Court "impermissibly substituted its own subjective judgment for that of Wolf in determining that Ezold met the firm's partnership standards."[116] Now, the trier of fact shall only consider the legitimacy of the employer's justification, not explore the reasons behind it.[117] In effect, the appellate court shielded employer justifications by restricting a court's examination to a firm's subjective standards and necessarily requiring plaintiffs to produce a "smoking gun."[118]

In short, in applying current disparate treatment theory to cases involving professional subjective decision-making, plaintiffs will find themselves in a difficult position. While judges will use the model to grant broad discretion to high-level employers, its application will ultimately place severe and unworkable burdens on employees by encouraging them to settle.

grub-street.html.

110. Krieger, *supra* note 19, at 1178.
111. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175, 1177 (E.D. Pa. 1990).
112. As opposed to the 600 hours minimum performed by male associates. *Id*. at 1778.
113. *See id*. at 1178.
114. *Id*. at 1179.
115. *Id*. 1192.
116. Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 512-513 (3d Cir. 1992).
117. *Id*.
118. MEZEY, *supra* note 88, at 168.

III. ANALYSIS: WHAT DOES IT TAKE FOR A PLAINTIFF TO SUCCEED?

This section first analyzes the pretext model as it requires a plaintiff to portray her employer as a liar. It then examines mixed-motive theory and its shortcomings in addressing implicit bias absent discriminatory animus. Next, it analyzes how judicial deference to employers impacts employment discrimination jurisprudence. This section concludes that, in light of recent social cognition research, disparate treatment cases are best understood as to increase claim uncertainty and courts should reevaluate the current models of proof in search of a more cohesive framework for future litigation.

A. THE PRETEXT MODEL OF PROOF "DOUBLE BIND"

Courts have historically construed Title VII to require proof of intent to discriminate in disparate treatment cases where only circumstantial evidence is available. This section argues that the pretext model of proof, derived from *McDonnell Douglas*, rests on two flawed assumptions: that (1) decision makers are self-aware; and (2) it is not feasible for a decision to be both driven by an employer's expressed reasoning *and* tainted by intergroup bias. As the Seventh Circuit noted: "Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trial demonstrating it; and because most employment decisions involve some discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible."[119]

Once a plaintiff establishes a prima facie case under the *McDonnell Douglas* model of disparate treatment proof, the burden of production shifts to the defendant to articulate a nondiscriminatory reason. After the defendant states a legitimate reason for its decision, the plaintiff can only prevail by proving that the employer's reasoning was not the actual reason, but a pretext for discrimination.[120] The Court's reasoning in *McDonnell Douglas* is based on an inclination to presume discriminatory intent from a finding of pretext.[121] Although this presumption of intent was never mandatory per se, the Supreme Court has treated it as such.[122] By implicitly equating an

119. Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

120. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

121. *See generally* Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

122. *See* Furnco Construction Corp. v. Water, 438 U.S. 567, 577 (1978) (finding the *McDonnell Douglas* model of proof to be a "sensible, orderly way to evaluate the evidence in light of common experience"); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) (agreeing with

employer's reasoning as a pretext for intentional discrimination, pretext analysis rests on two flawed assumptions.

First, the normative framework of Title VII's command "not to discriminate" rests on the assumption that without discriminatory animus, employers will not and cannot discriminate.[123] It assumes that employers possess "transparency of mind" during decision-making and that they are aware of all possible reasons for choosing one employee over another.[124] Pretext analysis further assumes that ill-intentioned employers consciously decide to take gender into account, purposefully make their decisions based on that awareness, and then design pretexts to avoid liability.[125]

Issues with this first assumption stem from a disconnect with cognitive social psychology. Often, the legal framework overlooks a decision maker's self-awareness because it assumes that people have open access to the content of their own mental processes, such as their perception, classification, interpretation, and memory.[126] However, empirical investigations support the view that "people initially accept as true every proposition they comprehend and then go about deciding whether to 'unbelieve it.'"[127] This assessment is especially true when people are mentally preoccupied or unable to engage in meaningful and deliberate processing.[128] The belief that discriminatory decision-making is separate from our automatic processes is erroneous. There is virtually no evidence to support the idea that people possess access to their high-level perceptual and memorial processes.[129] Instead, cognitive biases in social decision-making are automatic, rather than resulting from an intent to discriminate, yet controlling these biases can be done through subsequent "mental correction."[130] If viewed this way, unconscious bias may be understood and used to provide employers with the proper tools to understand and correct for their automatic mental processes.

Second, in requiring proof that an employer's submitted reason was

the Court in *Furnco* in that a compelling prima facie case raises an inference that inexplainable acts are more likely than not based on consideration of intolerable factors).

123. Krieger, *supra* note 19, at 1181.

124. *Id*. at 1185.

125. *Id*. at 1185.

126. *See*, *e.g*., RICHARD PASSINGHAM, COGNITIVE NEUROSCIENCE: A VERY SHORT INTRODUCTION 11–26, 27–41 (2016).

127. Krieger, *supra* note 19, at 1210.

128. *See id*.

129. *See id*. at 1214.

130. According to this view, after an unconscious, automatic process called "characterization," a deliberate adjustment or "mental correction" occurs, but only with effort. *See* DANIEL T. GILBERT AS TOLD TO JAMES S. ULEMAN ET AL., THINKING LIGHTLY ABOUT OTHERS: AUTOMATIC COMPONENTS OF THE SOCIAL INFLUENCE PROCESS IN UNINTENDED THOUGHT 189 (James S. Uleman & John A. Bargh eds., 1989).

merely a pretext for discrimination, the *McDonnell Douglas* model of proof essentially requires plaintiffs to find that an employer lied not only to the plaintiff but to the court.[131] Within this double bind, it is not feasible for a promotional decision to be both driven by the employer's expressed reasoning *and* tainted by intergroup bias—the trier of fact must pick one.[132] Since "smoking gun" evidence seems highly unlikely, a plaintiff's "best shot" is to show that the proffered reason either appears implausible or because it is inconsistent with internal precedent.[133] Regardless, requiring a plaintiff to portray her employer as an "intentional wrongdoer who was lying to the court"[134] ignores the automatic cognitive processes of many well-intentioned decision makers. It is perfectly understandable for an employer, whose biased perceptions cause him to discriminate against a female employee, to honestly believe that a nondiscriminatory reason supports his judgment and the subsequent decision.[135]

Though current disparate treatment doctrine assumes that discriminatory decision-making is somehow separate from the conscious and memorial processes that precede it, social cognition theory provides a different explanation. Cognitive social psychologists hypothesize that stereotypes are just specific instances of categories, schemas, and other processes "we adopt and apply to make sense of an otherwise impossibly complex perceptual environment."[136] While often providing helpful "rules of thumb," stereotypes can also lead to unintentional poor judgment.[137] That is, stereotypes can result in discrimination by biasing how people process information about others and, as a result, how decisions are made based on that information.[138] For example, a decision maker may attribute a mistake made by a female employee to stable dispositional causes associated with her being female, yet be wholly unaware that her gender influenced his decision-making.[139] For employment discrimination case law to truly address implicit biases, courts must understand decision-making through this

131. *See* St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2764 (1993) ("The majority's scheme, therefore, leads to the perverse result that employers who fail to discover nondiscriminatory reasons for their own decisions to hire and fire employees not only will benefit from lying but must lie to defend successfully against a disparate-treatment action.") (citations omitted) (Souter, J., dissenting).

132. *See*, *e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1012 (1st Cir. 1974) ("If an employer were to *Prove* that a legitimate reason motivated him, there would be no room left for showing that reason was a 'pretext,' as pretext is 'a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.'") (emphasis added) (citation omitted).

133. Krieger, *supra* note 19, at 1179.

134. *Id*. at 1181.

135. *See* Krieger, *supra* note 83, at 839.

136. BREST & KRIEGER, *supra* note 29, at 306.

137. *Id*. at 307.

138. *See* Krieger, *supra* note 19, at 1199.

139. *See id*. at 1206-07.

social cognitive lens: The law can hold employers liable without making insinuations about their virtue or character.[140]

B. THE MIXED-MOTIVE THEORY FAÇADE

On the surface, mixed-motive theory appears to be the best approach for courts to address claims of employment discrimination. After the passage of the Civil Rights Act of 1991, scholars applauded it as "best reflecting the reality of actual workplace decisions where it is unlikely that a single motive underlies a complicated employment decision."[141] However, beneath the surface, mixed-motive theory has not been instrumental in exposing subtle discrimination as a result of implicit bias for two predominant reasons.[142]

First, as in pretext cases, liability in mixed-motive case law still depends on the presence of conscious discriminatory animus.[143] Justice Brennan wrote that mixed-motive plaintiffs need only prove that their gender "played a motivating part" in the adverse employment decision.[144] He went on to define "play[ing] a . . . part" as, "if we asked the employer at the moment of the decision what its reasons were . . . *one of those reasons* would be that the . . . employee was a woman."[145] Under Justice Brennan's definition, a plaintiff still must prove the conscious inclusion of her gender in the decision-making process. Since the plaintiff must connect discriminatory intent and the use of stereotypes, she will only establish a claim where decision-making was the product of conscious or normative constructs. In *Price Waterhouse*, the Court acknowledged subtle stereotypes affecting decision-making, yet the stereotypes at play, in that case, were not exactly subtle.[146] There, partner evaluations described Ann Hopkins as "macho," advised her to "take a course in charm school," and suggested she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[147] The partners' blatant and egregious behavior helped Ann Hopkins' case but did not do much for plaintiffs subjected to subtler forms of discrimination.

140. *See* Amelia M. Wirts, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 BOS. COLLEGE L. REV. 809, 855 (2017).

141. Selmi, *supra* note 80, at 45; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks,* 93 MICH. L. REV. 2229, 2315-17 (1995) (critiquing single-motive theory as an unrealistic depiction of the modern workplace); Krieger, *supra* note 19 (advocating for greater use of the mixed-motive model).

142. *See* Selmi, *supra* note 80, at 45.

143. *See* Krieger, *supra* note 19, at 1172 (emphasis added).

144. Price Waterhouse v. Hopkins, 490 U.S 228, 250 (1989).

145. *Id*.

146. *See id*. at 235.

147. *Id*.

Second, mixed-motive theory affords an employer the chance to prove that he would have made the same choice despite, even absent, a discriminatory motive, which frequently results in limited remedies for plaintiffs.[148] If a plaintiff establishes that discrimination was a motivating factor in an employer's decision and the employer successfully establishes it would have made the same choice anyway, the remedies are limited to attorney's fees and injunctive relief, such as reinstating the employee or any other affirmative action the court deems appropriate.[149] Seeing as though a plaintiff "wins" to the extent she recovers attorney's fees and goes back to work for a (now) potentially adversarial employer, mixed-motive theory has not been as effective a tool of addressing subtle discrimination as many had hoped.[150]

C. THE GOLDILOCKS PARADOX: TOO MUCH JUDICIAL DEFERENCE[151]

Employers are more likely to succeed in employment discrimination cases when judges use organizational structures (i.e., policies and practices) to rationalize whether discrimination occurred without scrutinizing the sufficiency of those structures.[152] Judicial deference can occur when judges: (1) do not consider the sufficiency of organizational structures, (2) offer "mere lip service" to the adequacy of those structures, or (3) use structures to infer nondiscrimination even while admitting to the structural insufficiency.[153] A study on federal equal employment opportunity cases has shown that judges have become much more likely to defer to organizational structures.[154] This issue stems from judges assuming that nondiscrimination is the norm and discrimination only happens when employers do something immoral and irrational.[155]

The trouble naturally lies with employer judgment being based solely on subjective criteria. In *Ezold*, the candidate evaluation process at the firm was highly personal and required partners at the firm, not just those the

148. *See* Selmi, *supra* note 80, at 47.

149. *See* 42 U.S.C. § 2000e-5(g).

150. *See* Selmi, *supra* note 80, at 47 (noting that most mixed-motive cases have resembled traditional employment discrimination cases).

151. The Goldilocks Paradox refers to the search for judicial deference that is "just right."

152. *See* Linda H. Krieger, Rachel K. Best & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 L. & SOC. INQUIRY 843, 844 (2015).

153. *Id*. at 851.

154. *See id*. at 859 (finding that in district courts, deference increased from twenty to thirty percent in the 1970s and 1980s to over thirty-five percent by 1999; in circuit courts, deference was not seen before 1980 but rose to almost thirty percent by the mid-1990s).

155. Ironically, liberal judges' cases were decided more like conservative judges, supporting the theory that the trappings of due process may overshadow their pro-plaintiff tendencies. *Id*. at 862.

plaintiff worked with, to evaluate her progress.[156] Unlike *Hishon*, however, there was no "smoking gun" of discriminatory statements for her to use as evidence of sex-based discrimination. Instead, plaintiff Ezold was not assigned complex cases and was later criticized for not working on such matters. Further, she watched as her male peers were promoted to partnership despite their inferior evaluations.[157] Nancy Ezold was given overall evaluations of "exceptionally good," "top-notch,"[158] that she will make a "fine partner."[159] Despite all the evidence of disparate treatment, the court of appeals reversed the lower court's finding of pretext. It instead stated that the trier of fact need only consider the legitimacy of the employer's proffered reason for the decision, not explore all possible motives for it. The appellate court disregarded the firm's assertion that it based partnership decisions on analytical ability and that all male associates scored higher than the plaintiff. In effect, the judges shielded the firm's subjective processes from judicial review by only examining whether *any* standards were in place.[160] Rather than taking into account the effectiveness of existing policies before granting discretion, the appellate court essentially immunized upper-level jobs from disparate treatment scrutiny.[161] The *Hishon* and *Ezold* holdings depict the discretion granted to the mere presence of subjective employer criteria, without any exploration of all possible reasons behind the decision. As a result, "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive it feasible to do."[162]

D. THE DISPARATE TREATMENT DISCONNECT WITH SOCIAL COGNITION THEORY

As it stands, current disparate treatment theory assumes that discriminatory employment decisions result from discriminatory motives rather than from "normal cognitive processes and strategies that tend to bias

156. When considering a male associate for partnership, the hiring committee ignored allegations brought against him. *See* Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175, 1188 (E.D. Pa. 1990).

157. *See id*. at 1191–92.

158. *Id*. at 1182.

159. *Id*. at 1183.

160. *See* Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 527 (3d Cir. 1992) (denying judicial deference because "subjective promotion decisions … are not insulated from judicial review for unlawful discrimination").

161. *See* James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POLITICAL BEHAV., 7, 9 (1983).

162. *Id*.

intergroup perception and judgment."[163] According to psychologist Linda Hamilton Krieger, a law professor specializing in social cognition theory in civil rights law, there are three repercussions for this gap between employment discrimination jurisprudence and the reality it attempts to represent.

First, the disconnect between employment jurisprudence and reality stems from the nonexistence of the Title VII models of liability in the latter, which remain as academic abstractions.[164] Without a more consistent application to employment discrimination cases, the various theoretical models will continue to fail in their potential utility as a framework.[165] Second, this disjointedness could increase the uncertainty of case outcomes and related costs.[166] With such a complex structure in place, plaintiffs may not know what model of liability will govern until well into the litigation. With each model comes different requirements of proof and, as a result, dissimilar discovery and analysis costs follow. For example, under the pretext model of proof where a plaintiff must control for all potential causal factors, her lawyer must engage in extensive discovery or else potentially face a legal malpractice claim.[167] Third, this gap in jurisprudence and reality may intensify existing intergroup tensions.[168] Courts' "colorblindness" approach[169]—a legal duty to not consider gender, race, or ethnicity—does not address judicial, nor defendant, implicit categorical processes. Social psychologists have found that a colorblind decision maker coupled with a culture in which gender, race, and ethnicity are salient, even the well-intentioned will inescapably categorize along gender, racial, and ethnic lines. Krieger describes the decision maker not as colorblind, but as "color-clueless," meaning he is likely unaware that cognitive sources of intergroup bias are distorting his "perceptions, judgments, and decisions."[170] Consequently, the proscriptive approach in disparate treatment jurisprudence has proven to be inefficient. It may serve to deepen existing intergroup tensions akin to the Tug-of-War behavioral pattern described by Professor Williams and the Center for WorkLife Law.

163. Krieger, *supra* note 19, at 1217.
164. *Id*.
165. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 52–65 (2d ed. 1970).
166. Krieger, *supra* note 19, at 1217.
167. *See id*. at 1238.
168. *See id*. at 1217.
169. *See* Thomas Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1068 (1991).
170. Krieger, *supra* note 19, at 1217.

IV. PROPOSALS FOR REFORM

This section first discusses the strategies that employers can adopt to encourage System 2 processing when making decisions. It then suggests that judges should only grant deference once they take into account the effectiveness of the existing antidiscrimination structure or policies. It further proposes that in doing so, plaintiffs should carry the burden of production during an "enhanced discovery" phase. This section concludes that an actuating factor model of proof that no longer equates causation with intentionality should replace the pretext model of proof.

A. EMPLOYER STRATEGIES

Although white men have long dominated law firm environments, a powerful incentive now exists to shift business models of the legal profession: Large corporate clients are demanding an increase in women, minority associates, and partners. For example, Facebook has required its outside counsel to "actively identify and create clear and measurable leadership opportunities for women and minorities" while representing the company.[171] Wal-Mart dropped two law firms due to their dissatisfaction with the firms' lack of diversity.[172] Law firms must invest in employees to reflect the increasing demand for diversity—not just for their clients, but for employee retention and satisfaction, as well.

Yet we cannot stop our brains from activating certain categorical assumptions. Application of these categories, however, can be regulated by controlling whether we act on those assumptions. Thus, the following proposal, loosely built on the Center for WorkLife Law's bias interrupter "toolkit,"[173] will only be effective if the following three requirements are met. Employers must have the *motivation* to reflect on initial characterizations, the *cognitive resources* (processing capacity, time) required to reflect, and *information* to supply a reasoned corrective decision.[174] Despite the inescapability of automatic activations,[175] individual methods exist to make promotional practices more objective and merit based.

171. Christian King et al., *Diversity's Next Step: Developing Minority Partners*, LAW360 (Jan. 17, 2019, 5:52 PM), https://www.law360.com/articles/1119265/diversity-s-next-step-developing-minority-partners.

172. Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES (July 21, 2006), https://www.nytimes.com/2006/07/21/business/21legal.html.

173. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 14–28.

174. *See* BREST & KRIEGER, *supra* note 29, at 335.

175. *See* KEITH B. PAYNE & BERTRAM GAWRONSKI, A HISTORY OF SOCIAL COGNITION: WHERE IS IT COMING FROM? WHERE IS IT NOW? WHERE IS IT GOING? IN THE HANDBOOK OF IMPLICIT SOCIAL COGNITION: MEASUREMENT, THEORY, AND APPLICATIONS 2 (Keith Payne et al. eds., 2010).

1. Use Metrics

Metrics for performance evaluations are advantageous in that they help firms identify implicit bias and track the effectiveness of the measures taken thus far.[176] The Center for Worklife Law suggests specific ways to identify and track demographic patterns in accordance with certain tools to analyze those metrics.[177] In reviewing performance evaluations, supervising attorneys should first ask themselves: Are there consistent disparities by demographic group? "Do the same performance ratings result in different promotion or compensation rates for different groups?"[178] For example, Reed Smith supplements its annual reviews and options to request constructive feedback with an online and mobile app that allows for "continuous, detailed feedback from every lawyer with whom an associate works."[179] This type of metric collection would allow supervising attorneys, the human resources department, and trained corporate psychologists to compare data using their varying levels of professional and objective expertise.

Upon establishing these metrics, supervising attorneys should look for patterned differences between men, women, men of color, and women of color.[180] For example, an attorney who identifies similar performance ratings by a white male and a woman of color should review each person's vertical growth since they began working at the firm. This data has the opportunity to highlight disparities at the department- and firm-level without interrupting firms' unique business models. Since comparisons are made among underrepresented groups and not between older and newer employees, new law firms are not at a disadvantage. Such metrics would accept the unavoidable human margin of error while still assessing performance evaluations objectively.

2. Distribute Assignments

More than eighty percent of white male lawyers—but only fifty-nine percent of white women lawyers—report having the same access to desirable assignments as their colleagues.[181] This distribution is more common among

176. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 22.

177. *Id*.

178. *Id*.

179. *Reed Smith Launches Game-Changing Associate Life Initiative*, REED SMITH (May 30, 2018), https://www.reedsmith.com/en/news/2018/05/reed-smith-launches-game-changing-associate-life-initiative.

180. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 22 (noting that other underrepresented groups the firm tracks, such as LGBTQ people, individuals with disabilities, or military veterans, should be analyzed for patterned differences).

181. *See id*. at 18 (finding that only fifty-three percent of women lawyers of color and sixty-three

firms that distribute assignments in an "informal, unmonitored manner."[182] By offering a partnership track and hiring people onto it, a firm must have two tasks to ensure it complies with Title VII. First, firms should implement a formal procedure for identifying high- and low-profile assignments prior to assignment distribution. This task involves convening relevant managers to identify such work, based on complexity and novelty, and create a typology for the assignments.[183] The Center for WorkLife Law suggests distributing an "Office Housework Survey" to employees to gauge who is doing "glamour" work, "office housework," and the amount of time spent on each.[184] Should the typology show that a supervising attorney is disproportionately allocating work, their superior should discuss with them whether the available pool is diverse and not being fully tapped, or if only a few people have the requisite skills for the assignment.[185]

Second, performance evaluations based on those assignments should require the supervising attorney to indicate specific evidence and consider performance and potential separately.[186] Rather than writing "[s]he is quick on her feet," partners should be required to explain their ratings, such as "[i]n March, she argued X motion in front of Y judge on Z case, answered his questions effectively, and was successful in getting the optimal judgment."[187] Additionally, performance and potential should be assessed separately because men are often judged on potential while women are judged on performance.[188] Under this step, a partner with little to no interaction with the employee should not evaluate her—psychologists have found that biases are stronger where an employer has not had an opportunity to observe the employee.[189] Notably, all evaluations should be in writing and preserved by the firm in the event of a potential disagreement.[190]

percent of male lawyers of color reported the same access to desirable assignments as their colleagues).

182. Baron, *supra* note 101, at 312.

183. *See* Kim Elsesser, *Female Lawyers Face Widespread Gender Bias, According to New Study*, FORBES (Oct. 1, 2018, 3:34 PM), https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#16f4bb4c4b55.

184. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 18 (available at Bias Interrupters.org).

185. *See id*. at 20.

186. *See id*. at 23.

187. *Id*.

188. *See id*. (adding that personality and performance should be separated, as well); *see also* ABA COMM. ON WOMEN IN PROFESSION, FAIR MEASURE: TOWARDS EFFECTIVE ATTORNEY EVALUATIONS 32 (2d ed. 1997).

189. *See* WAYNE F. CASCIO, APPLIED PSYCHOLOGY IN PERSONNEL MANAGEMENT 66 (3d ed. 1987).

190. *See* Baron, *supra* note 101, at 313.

3. Assign Mentors

Adopting mentorship policies that pair a partner or senior associate and an associate at the outset of the associate's career could likely reduce the chances of in- and outgroup behavior. Evidence shows that mentors, whether acting formally or informally, assist women in appearing more influential and can help them win promotions.[191] Diversity consultant Verna Myers said, "diversity is being invited to the party; inclusion is being asked to dance."[192] Structured mentorship policies will move beyond symbolic diversity initiatives and allow for a human connection between associates and partners that may not otherwise occur. Such pairings can be made during orientation if the associate is committed to a particular practice group. If the pairing is not useful or the associate is unsure of their practice group, a supervising attorney should discuss possible mentorship options with the associate. Cravath, Swaine & Moore implemented a mentorship rotation system that allows associates to work closely with several partners within their practice group or office.[193] This model would not only help women break into the "old boy networks"[194] by being asked to dance, but also assist with long-term succession planning for partnership.

4. Rotate "Housework"

To remedy the Tightrope bias women face while taking on higher loads of non-career enhancing "office housework," firms must develop office schedules for nonlegal tasks.[195] A firm's office manager can create a rotational schedule for menial tasks, such as taking notes during a meeting or ordering lunch, that assigns associates on a rotating basis to prevent responsibility from falling on one person's shoulders.[196] As this method may not solve the problem overnight, Professor Williams suggests that female associates pair this technique with snappy comebacks when they are *still* asked to do such tasks. For example, by saying, "I'm not sure you want someone with my hourly rate making coffee," a woman is dodging backlash

191. *See id*. at 277.

192. Marlen Whitley, *BigLaw Doesn't Have a Diversity Problem*, LAW360 (Mar. 30, 2018, 11:10 AM), https://www.law360.com/articles/1027240/biglaw-doesn-t-have-a-diversity-problem.

193. *Mentoring & Training*, CRAVATH, SWAINE & MOORE LLP, https://www.cravath.com/mentoringandtraining/ (last visited Feb. 22, 2020).

194. Baron, *supra* note 101, at 278.

195. Caroline Spiezio, *Improving Diversity In-House: 4 Tips From the MCAA's New Report*, LAW.COM (Sept. 10, 2018, 12:42 PM), https://www.law.com/corpcounsel/2018/09/10/improving-diversity-in-house-4-tips-from-the-mccas-new-report/?slreturn=20200123200242.

196. *See* AM. BAR ASS'N COMM'N ON WOMEN IN THE PROF., *supra* note 49, at 19–20.

by doing something masculine (saying no) in a feminine way (being nice).[197] A crucial aspect of rotating housework is to ensure that a firm is not asking for volunteers because it can undercut a woman's authority and also take time away from more valuable work.

B. JUDICIAL DEFERENCE: "JUST RIGHT"

Although some amount of subjectivity may be necessary when selecting candidates for partnership, judges should not blindly grant firms discretion merely because they have policies and structures in place. Instead, when employers introduce their policies as evidence of nondiscriminatory decision-making, judges should first consider whether the structures are "adequate, even-handedly applied, and effective in preventing discrimination."[198] This Note proposes that once a plaintiff's claim survives a motion to dismiss, she will have the burden of production during an "enhanced discovery" phase that provides the judge with data showing the ineffectiveness of the law firm's existing policies. The discovery phase is "enhanced" because the plaintiff will gain access to sealed information customarily considered outside the scope of the case, such as names of people who left the firm or similar claims. This procedural enhancement would only benefit those with a well-pleaded complaint after surviving a motion to dismiss. Out of fear of the enhanced discovery phase, defendants would be incentivized to settle. This data will compel the judge to take into account the effectiveness of the firm's existing policies before he or she determines how much deference the employer's decision deserves.[199]

Under the "enhanced discovery" approach, employers are incentivized to implement adequate procedures and policies to receive considerable deference. This reward-system is not new. For example, when determining an employer's liability for one employee's sexual harassment of another employee, courts consider whether the employer took adequate steps to prevent it, such as company policies and grievance procedures.[200] If so, courts may lessen or eliminate the employer's liability altogether.[201] Further, when deciding whether a corporation's directors or officers satisfied their duty of care, courts examine all relevant factors, including the processes and steps taken to eliminate self-interest. Once the court determines that the

197. Allison Kernisky, *Rejecting Office Housework Is Hard but Necessary*, ABA (May 27, 2014), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2014/rejecting-office-housework-is-hard-but-necessary/.

198. Krieger, Best & Edelman, *supra* note 152, at 861.

199. *See* Baron, *supra* note 101, at 309.

200. *See id*. at 316.

201. *See id*.

corporation exercised informed judgment, only then does it reduce scrutiny under the business judgment rule.[202] Just as judges reward careful reflection and structured processes in both sexual harassment claims and under the business judgment rule, so too should they extend such deference to Title VII plaintiffs suing professional employers.

Removing the scrutiny exemption for upper-level and professional employers would not prove to be a burden, as critics suggest. Judges are seemingly deterred from thoroughly scrutinizing upper-level employment decisions because they (i) lack expertise and (ii) upper-level jobs are considered more essential than lower-level jobs.[203] With vague criteria used to assess the performance of professionals, judges are reluctant to inquire into the standards used to evaluate employee performance. However, a lack of expertise should not pose a more significant problem for upper-level cases than for lower-level cases because judges are likely more familiar with law partnerships than with construction crews, for example.[204] If upper-level jobs are considered more critical than lower-level jobs, then judges should feel even more obligated to intrude into personnel decisions about professional qualifications to ensure effective policies are in place. The "enhanced discovery" phase will allow a plaintiff to produce evidence of a firm's current policies and, only then, will the judge determine the breadth of discretion to be granted.

C. ACTUATING FACTOR MODEL OF PROOF

Recent research underlying the social cognition theory has substantially destabilized the fundamental assumptions of Title VII's disparate treatment theory.[205] Title VII's disparate treatment doctrine exposes a model of gender bias that assumes discrimination is only deliberate, conscious, and intentional action by animus-driven employers who know that they are discriminating.[206] Under this interpretation, a plaintiff who is victimized by an employer's decisions, such as receiving office housework or continually being denied partnership, will have no remedy unless she can convince the court that the discrimination was intentional.[207] As this Note has attempted to demonstrate, discrimination can be both automatic (System 1 cognitive effects) and intentional (System 2 motivational sources), with the former

202. *See id*. at 317.
203. *See id*. at 307–08.
204. *See id*. at 307.
205. *See* Krieger, *supra* note 19, at 1211.
206. *See* Krieger, *supra* note 83, at 843–44.
207. *See* Krieger, *supra* note 19, at 1239.

frequently being "beyond ordinary conscious self-awareness."[208] Without amending Title VII, there are ways to fine-tune the disparate treatment doctrine to address biases stemming from "social categorization and cognitive distortions."[209] To fill the gap between employment discrimination jurisprudence and cognitive sociology, Krieger proposed eliminating the pretext model of individual disparate treatment proof and replacing it with a "motivating (actuating) factor" model of proof, loosely built on the *Price Waterhouse* mixed-motive framework.[210] Rather than requiring the impossible task of disproving every nondiscriminatory reason articulated by an employer, this model would focus on the contamination of intergroup bias on an employer's decision-making, such as schematic information processing, the automaticity of in-group favoritism, and the salience of gender and other social categories.[211]

To establish liability in a cognitive bias-based disparate treatment claim, a plaintiff would be required to prove that her gender *played a role* in causing the employer's decision, rather than showing intentionality.[212] Although the same evidence of an employer's irrational and unjust decision-making would still be critical in proving the occurrence of discrimination, it would be interpreted differently. For example, a showing that a female associate was treated less favorably than male associates would be relevant to prove that her gender affected the supervising attorney's decision-making, not to show that the decision maker's proffered reasons for the assignment distribution were lies or cover-ups for a *real* discriminatory motive. Comments reflecting gender stereotypes would be relevant to show that the female associate's group membership biased a decision maker's perception and memory of decision-relevant events. The comments would not be offered as proof of discriminatory animus. Reformulation of the disparate treatment doctrine would better reflect the reality that discrimination can occur without intent.[213]

Under this proposal, the critical inquiry is whether an employee's status "made a difference" in the decision, not whether the employer intended for it to make a difference.[214] The importance of the "actuating factor" model of proof is two-fold. First, it distinguishes motive and intent, two terms that are often conflated and, as a result, cause adjudicatory confusion. As the Seventh

208. *Id*. at 1239.
209. *Id*. at 1241.
210. *Id*.
211. *See id*. at 1241–42.
212. *Id*. at 1242 ("The critical inquiry would be whether the applicant or employee's group status 'made a difference' in the employer's action, not whether the decisionmaker intended that it make a difference.").
213. *Id*.
214. *See id*.

Circuit aptly noted, "motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted."[215] By understanding the term "actuating factor" as something that causes a person to act, courts may begin to construct a more accurate and adaptable model of disparate treatment discrimination jurisprudence.[216]

Second, courts should differentiate between intentional and unintentional forms of disparate treatment discrimination in a clearer way. Krieger suggests implementing a Title VII two-tier liability system, similar to the method currently used in Age Discrimination in Employment Act ("ADEA") cases.[217] Under first-tier disparate treatment liability, a plaintiff must prove that her protected class "played a role" in causing the employer to decide as he did.[218] This Note proposes that unless the defendant can prove he would have made the same decision absent the group status' biasing effect, the plaintiff should be entitled to choose between either (a) general and individualized injunctive relief, such as ordering the defendant to prevent harm and allowing the plaintiff to continue working,[219] or (b) a corrective statement issued by the firm and equitable relief, such as attorney's fees and back and front pay.

A plaintiff might choose the latter option out of fear of becoming a "social pariah" if she continues to work at the firm. Under this remedy, the firm must pay for and issue a public statement or advertisement declaring that it did not previously understand implicit bias and that it unintentionally discriminated based on sex. Although people may criticize this remedy as destroying a firm's reputation, it effectively puts the burden on law firm to convince current and future clients of its changed and improved anti-discrimination measures. A major tenant of Title VII is to compensate victims of sexism, and "victims of implicit bias are no less harmed" than victims of conscious sexism.[220]

To restore Title VII's efficacy of shaping social norms,[221] courts should provide corrective "public shaming" remedies to cognitive bias-based disparate treatment plaintiffs. Such a judicial ruling is not new. In *United States v. Philip Morris USA Inc.*,[222] the U.S. Department of Justice sued

215. Burlew v. Easton Corp., 869 F.2d 1063, 1066-69 (7th Cir. 1988) (quoting BLACK'S LAW DICTIONARY 727 (5th ed. 1979) (finding that intentional discrimination does not necessarily indicate a "conscious, deliberate state of mind" in an Age Discrimination in Employment Act claim).

216. *See* Wirts, *supra* note 140, at 849–50.

217. *See* Krieger, *supra* note 19, at 1243.

218. *Id*.

219. *Id*. (noting that these are the same remedies available in a disparate impact case).

220. Wirts, *supra* note 140, at 850.

221. *See id*.

222. *See* United States v. Philip Morris USA Inc., 566 F.3d 1095 (D.C. 2009), *aff'g*, 449 F. Supp. 2d 1 (D.D.C. 2006).

several major tobacco companies for deliberately misleading the public about the dangers of smoking. In finding the tobacco companies guilty, the district court ordered each company to create "corrective statements" warning the public of the hazards of smoking tobacco, along with an admission that the companies intentionally designed cigarettes with enough nicotine to create and sustain addiction.[223] If this remedy were to apply to cognitive bias-based disparate treatment cases, it is reasonable to predict that decision makers would endeavor to alleviate the hardships of perceived injustices that befall outgroup members.

Lastly, if a plaintiff can prove that discriminatory decision-making resulted from conscious animus, or tier-two liability, she should *also* be entitled to compensatory and punitive damages as stipulated by the Civil Rights Act of 1991.[224] By limiting compensatory and punitive damages to cases concerning conscious and deliberate discrimination, courts can better serve the overarching goal of "improving intergroup relations and minimizing both cognitive and motivational sources of discrimination."[225] Categorization and other cognitive biases predispose us towards unintended, and often undesired, discriminatory byproducts of essential mental processing. Attaching the risk of substantial financial liability to social cognitive judgment will only heighten intergroup anxieties.[226] Therefore, assigning these remedies to first-tier disparate treatment liability would ultimately be counterproductive.

Under the actuating factor model of proof system, courts can finally achieve the goals of Title VII by understanding disparate treatment theory to include cognitive bias. By eliminating the pretext model of disparate treatment, plaintiffs and defendants can avoid the false dichotomy between whether an employer's justification is "real" or "phony."[227] Instead, the actuating factor model would require a plaintiff to prove that her gender *played a role* in the decision-making process, not that the employer intended it to do so. Lastly, this model would shift disparate treatment jurisprudence away from the long-held proscriptive duty not to discriminate. In alignment with social cognition theory, this model would grasp the principle of nondiscrimination as a prescriptive duty to "identify and control for errors in social perception and judgment which inevitably occur, even among the well-intended."[228]

223. *Id*. at 1138.
224. *See* 42 U.S.C. §1981(b)(1).
225. Krieger, *supra* note 19, at 1244.
226. *See id*.
227. *Id*. at 1178.
228. *Id*. at 1245.

V. CONCLUSION: MOVING UP THE RANKS

Diversity among the top ranks of the legal profession is not just a benefit to women, but their firm and clients. While there may be inherent differences in how men and women conduct themselves, as detailed above, these distinctions when combined cover more lawyering strategies and behaviors than a male-dominated enterprise. Without more, the legal structure does not address the effects of implicit bias on gender discrimination in the workplace.[229] By taking an approach at the individual level, employers are better suited to mitigate implicit bias during the promotional decision-making process. At the judicial level, judges can still defer to employers' decisions granted that the firm's structures and policies survive the "enhanced discovery" phase. Lastly, on the theoretical level, shifting disparate treatment theory towards disparate impact theory by addressing unintentional discrimination will better reflect the salience of gender categories and social stereotypes in the workforce. Due to the prevalence of implicit bias in the legal profession, necessary changes must reflect both social cognition theory and reality.

there are mountains growing
beneath our feet
that cannot be contained
all we've endured
has prepared us for this
bring your hammers and fists
we have a glass ceiling to shatter
let's leave this place roofless[230]

229. CHARLOTTE BUNCH, PASSIONATE POLITICS, ESSAYS 1968-1986: FEMINIST THEORY IN ACTION 140 (1987) (noting that breaking down biases and social cognition will take more than "add[ing] women and stir[ring].").

230. RUPI KAUR, THE SUN AND HER FLOWERS 231 (2017).