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Undue Influence: Corporate Political Speech, Power and the Initiative Process

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NOTES

A POSSIBLE REMEDY FOR UNTHINKING DISCRIMINATION

"I know it's universal, . . . but the fact that it is universal doesn't mean that I'll accept it."¹

INTRODUCTION: WHY LAW CAN AND SHOULD ADDRESS UNTHINKING DISCRIMINATION

Racial inequality persists in the United States despite laws against racial discrimination. It might be that civil rights laws often go unenforced; it might be that current inequities spring from past prejudice and longstanding economic differences that are not entirely reachable by law; or it might be that the law sometimes fails to reflect, and consequently fails to correct, the barriers faced by people of color.² Probably all

¹ James Baldwin from JAMES BALDWIN & MARGARET MEAD, *A RAP ON RACE* 256 (1971).

² Commentators have argued that the law fails in various ways to address racial discrimination as it actually occurs. See, e.g., DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) (the United States Constitution is neither egalitarian nor color-blind; school-desegregation fails as the fulcrum for racial justice); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) (law fails to recognize and deal with American society's pervasive racism); Alexander T. Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060 (1990) (color-blind jurisprudence cannot correct racism in a color-conscious society); Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (the "single-axis" framework employed by courts to analyze barriers faced by black women as merely the sum of racism and sexism fails to describe their experience); Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (colorblindness is not a neutral princi-

three are true. This Note explores the third possibility.

Considerable evidence indicates that Americans continue to apply racial stereotypes without realizing that they are perpetuating racial inequality.³ Decisions to fire or promote an employee or to accept or reject a prospective tenant are likely to be influenced by this kind of unthinking prejudice.⁴ Yet, de-

ple, but rather encodes the perspective of whites in discrimination law); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discrimination law's "perpetrator perspective" delegitimizes the experience of victims of discrimination and ignores the actual status of Black Americans, and thus fails to reduce prejudice); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) (ignorance, fear, and denial create a legal blindspot about unconscious racism and thus inhibit the law from correcting racial disparities in criminal law, especially in capital cases); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (interpreting the Constitutional principle of equality to outlaw only purposefully discriminatory conduct overlooks and thus fails to correct unconsciously racist conduct); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (requiring purposeful intent in discrimination law excludes unconscious racist conduct that the Civil Rights Act of 1964 was enacted to outlaw); Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63 (1994) (by focusing on subjective intent, current equal protection law uses a distorted analysis of legislative decisionmaking, and fails to correct discriminatory laws); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 323 WM. & MARY L. REV. 1 (1990) (rhetorical moves used to justify racism in discredited nineteenth-century cases are still employed by the Supreme Court).

³ National opinion surveys indicate that while the vast majority of white Americans favor the principle of nondiscrimination in the abstract, more than half continue to believe that blacks are less intelligent, less hard-working and more violence-prone than whites. Oppenheimer, *supra* note 2, at 904-07. In another legal context, simulated jury deliberations, tests show evidence of bias along racial stereotypes. One researcher found that "stereotypic biases may occur automatically or without conscious awareness even by persons who would not endorse racist beliefs." Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY AND SOC. PSYCHOL. 726, 735 (1988) (citations omitted).

⁴ David R. Oppenheimer contrasts the findings of two opinion surveys. The surveys show that, on the one hand, 97% of white Americans polled believe that blacks "should have as good a chance as white people to get any kind of job," but on the other hand, majorities of whites believe that blacks are less intelligent (53%) and lazier (62%) than whites. Oppenheimer, *supra* note 2, at 904-09 (citing HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 74-75 tbl. 3.1 and 9 tbl. 1 (1988)). Oppenheimer points out that together these surveys predict that a white employer, while almost certain to espouse policies of nondiscrimination, is more likely than not to view black employees and job applicants as less intelligent and hardworking than whites. Oppenheimer, *supra* note 2, at 909.

spite growing recognition of the problem of "unconscious racism,"⁵ when individual decisions by employers or housing providers are challenged as discriminatory, the law is usually read to require proof of conscious racist intent in order to establish liability.⁶

This Note proposes interpreting existing discrimination law to encompass the unwitting⁷ application of racial stereotypes. The proposed approach broadens the concept of intentional discrimination to include a person's reliance on racial stereotypes, conscious or not. Maintaining some form of intentional standard for individual discriminatory behavior seems important. Without it, the alleged discriminatory action lacks the defining element of expressed racial meaning. Discriminatory intent, however, need not be in the discriminator's consciousness at the time of the action. Instead, the proposed theory locates discriminatory intent in the meaning of the stereotype applied.⁸

⁵ In his groundbreaking article, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, Charles R. Lawrence III identified the problem of unconscious racism. Lawrence analyzed remarks by public figures that appeared to invoke racial stereotypes unintentionally, and pointed out that putative compliments by whites, who tell black friends that they "did not think of them as Negroes," are examples of "unconscious racism." Lawrence, *supra* note 2, at 340-41. Lawrence cited the work of psychologist Joel Kovel, who developed a psychological profile of unconscious racism. Lawrence, *supra* note 2, at 335. Kovel described a psychology of "aversive racism," which involves an "intrapsychic battle" between racist sentiments and conscience by individuals who are only "more or less" aware of their belief in white superiority. JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY*, 54-55 (1970). Lawrence argued that such individuals regularly employ racist stereotypes in their thinking and act on them without knowing what they are doing. Lawrence, *supra* note 2, at 322.

⁶ In some claims for employment or housing discrimination, liability can be established by proving that facially neutral policies have a "disparate impact" on a protected class. *International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive . . . is not required under disparate impact."). Unless plaintiffs have access to comparative data that establishes a discriminatory pattern, however, they must proceed under a disparate treatment theory, which requires proof of intentional discrimination. For a more detailed explanation of the different theories currently used in housing and employment discrimination cases, see *infra* Section IB and accompanying notes 32-42.

⁷ I have chosen to use several adjectives to express the form of discrimination that this Note addresses. It is variously described as unwitting, unconscious, unthinking, unintentional, thoughtless, careless, and subliminal. I think that using different modifiers better expresses the shift and elusive nature of this problem than picking one inadequate descriptor and repeating it to give it authority.

⁸ Lawrence proposes using a "cultural meaning" test to trigger a more search-

An objective standard of intent for discriminatory treatment could create liability for employment and housing discrimination not captured by a subjective intentional standard. In so doing, it would also encourage increased awareness of the ways subtle attitudes about race drive prejudicial decisions that harm individuals and intensify racial conflict. Most important, a legal theory of unthinking discrimination would more accurately express the way much racial discrimination today really functions, i.e., through behavior that cannot be described as subjectively purposeful. Because unconscious as well as conscious race prejudice damages American society, laws encouraging self reflection about racial attitudes seem more likely to improve race relations than legal standards that reward individuals for denying the influence of race on their actions.

Part I of this Note surveys the doctrinal development of intent standards in discrimination law and looks at how intent functions in individual discrimination cases under Title VII and Title VIII. Part II considers the possibility of using a negligence theory to address unthinking discrimination. A negligence approach seems promising at first, because negligence is a well-developed legal doctrine that assigns liability for unintentional actions.⁹ Ultimately, though, a negligence analysis is not well suited to determining liability that must still be based somehow on an action's meaning, if not on the actor's conscious purpose. Some form of intentional standard is needed to identify the behavior's discriminatory meaning.¹⁰ A negligence stan-

ing review of government actions in race-based equal protection claims. He suggests asking whether societal attitudes about race had influenced the governmental actor's decision. Lawrence, *supra* note 2, at 328. The inferred intent test proposed by this Note also boils down to an objective inquiry into the discriminatory meaning of the challenged action. I hope to show, however, that such a test can be developed out of the practical effect of the proof structure already in place in disparate treatment cases. See *infra* notes 114-123 and accompanying text. Conceptually, the inferred intent standard also springs from the analysis used in advertising claims in housing discrimination law. There, the test is whether an ordinary reader would understand the ad as suggesting a racial preference. *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir. 1991).

⁹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 28 (5th ed. 1984). In his recent article, Oppenheimer proposed creating a negligence action for employment discrimination. See Oppenheimer, *supra* note 2.

¹⁰ The need for an intentional standard reflects the view that an individual's discriminatory decision is always a violation of dignitary rights, a blow to an individual's humanity involving a lack of respect that seems necessarily intentional. See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 722-23 (1992) ("Usually

dard of discrimination would also raise problematic policy issues, because the definition of a reasonable standard of care would also entail a definition of nonnegligent, or "reasonable" discrimination.¹¹ Though ultimately unsatisfactory, the negligence analysis illuminates two key requirements for a workable objective standard to address individual unthinking discrimination. The standard must have a capacity to capture the expressive, or meaningful, quality of discrimination without resorting to subjective intent, and offer a principled way to assign liability for every identified instance of discrimination.

Part III suggests a way to develop a doctrine of objective discriminatory intent, by drawing on the "ordinary reader" standard applied by some courts in actions for discriminatory advertising.¹² The use of an objective standard for discrimination in the advertising context shows that it is possible, within current legal discrimination doctrine, to identify individual discriminatory actions without inquiring into subjective intent.

Part IV proposes an objective standard, inferred intent, to address individual employment and housing discrimination based on unconscious racial stereotypes. This part argues that a basis for applying an inferred intent standard is already in place in the form of the indirect proof structure now used in disparate treatment claims. This indirect proof structure may already encompass some unconscious discrimination as a basis for liability. Furthermore, the use of an indirect proof structure for disparate treatment is best explained by the fact that discriminatory intent is not always conscious. Discrimination law should substantively embrace the tendency of established disparate treatment procedure to assign liability for unconscious discrimination. Failing to acknowledge that the indirect proof structure sweeps in some cases of unconscious discrimination can only undermine confidence in that structure. It may then become more difficult for disparate treatment plaintiffs to

the real injury suffered by plaintiffs [in housing discrimination cases] is the deep humiliation of racial rejection that is no less painful because it is deemed to be an intangible harm. . . . Damage to the autonomy and freedom of action—the badges and incidents of citizenship—is the threshold damage which always occurs in a race discrimination case. . . .").

¹¹ KEETON, ET AL., *supra* note 9, § 31, at 170 ("conduct, to be negligent, must be unreasonable.").

¹² *Ragin v. New York Times*, 923 F.2d 995 (2d Cir. 1991).

prove conscious as well as unconscious discrimination.

Courts should recognize that a standard of inferred intent is evolving out of the indirect proof method already used in disparate treatment cases. Explicitly adopting this objective standard could create a socially responsive, principled cause of action for unthinking discrimination in housing and employment decisions.

I. BACKGROUND: THE ROLE OF INTENT IN DISCRIMINATION CLAIMS UNDER TITLE VII AND TITLE VIII

A person who believes an employer or landlord has discriminated against her because of race can bring suit under the Civil Rights Act of 1964 (Title VII)¹³ or the Fair Housing Act of 1968 (Title VIII).¹⁴ Title VII makes it illegal for an employer to fire, refuse to hire or promote, or in any way limit an employee's compensation or job conditions "because of such individual's race. . . ."¹⁵ Under Title VIII it is illegal "to refuse to sell or rent . . . or to otherwise make unavailable or deny, a dwelling to any person because of race. . . ."¹⁶

The Supreme Court gives the key phrase "because of race" two distinct meanings, each of which corresponds to a different theory of liability: disparate treatment, which requires proof of intent, and disparate impact, which does not.¹⁷ Disparate impact claims, however, often require statistical evidence to show

¹³ 42 U.S.C. §§ 2000e-2000e-16 (1988).

¹⁴ 42 U.S.C. §§ 3601-3619 (1970).

¹⁵ 42 U.S.C. § 2000e-2(a)(1) (1988).

¹⁶ 42 U.S.C. § 3604 (1988).

¹⁷ The Court described the two causes of action in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (saying that in disparate treatment, the defendant "simply treats some people less favorably than others because of their race. . . . Proof of discriminatory motive is critical," whereas, claims of disparate impact involve "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive. . . . is not required under disparate impact."). *Id.* at 335 n.15. The 1991 amendments to the Civil Rights Act of 1964 assert that "an unlawful employment practice based on disparate impact is established under this subchapter only if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2 (1988).

the differential effect of specific challenged policies on different racial groups.¹⁸ It takes considerable resources to gather and analyze the quantitative data generally needed to prove a discriminatory effect, and consequently disparate impact actions are less common than disparate treatment claims and often not pursued by individual discrimination plaintiffs.¹⁹ The person who believes that she has lost out on a job or apartment because of her race will ordinarily bring a disparate treatment claim, which entails proving discriminatory intent. The standard of intent that applies is thus a key question in most legal definitions of individual discrimination.

A. *The Intent Standard in Disparate Treatment Claims*

Disparate treatment claims are the garden variety cases brought by individuals who believe that an employer or landlord rejected them because of race.²⁰ To prove disparate treatment, a plaintiff must show that the defendant intentionally discriminated.²¹ In a disparate treatment action under either Title VII or Title VIII, a plaintiff can make out a *prima facie* case by proving that (1) she is a member of a racial minority; (2) she is qualified for the job or housing opportunity in question; (3) she was rejected; and (4) the employment or housing opportunity remained open after she was rejected.²² The law presumes that proof of these elements rules out the most common legitimate reasons for the plaintiff's rejection—that she

¹⁸ *Teamsters*, 431 U.S. at 339 ("our cases make it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue").

¹⁹ For instance, in *Teamsters*, the government brought statistical evidence to show that the employer engaged in system wide discrimination, comparing the number and percentage of various types of jobs held by race and ethnicity with the racial/ethnic breakdown of the population in several different cities where the company operated. *Id.* at 337-38 & n.17.

²⁰ Intent is also needed for all discrimination claims brought under the constitutional theory of equal protection. *Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) ("even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose").

²¹ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

²² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

was not qualified or that there actually was no job or housing opportunity available.²³

Once a plaintiff proves a prima facie case of disparate treatment, she is entitled to a rebuttable presumption that the defendant made the challenged decision because of race.²⁴ The employer or housing provider must provide an alternative legitimate reason for the decision, or else the plaintiff is entitled to judgement. The defendant, however, can merely proffer the explanation; he is not required to prove his alternate reason in order to prevail at this point.²⁵ Once the defendant offers a legitimate reason for the challenged decision, the plaintiff must still prove that, despite what defendant says, the decision in fact was based on intentional race discrimination.²⁶ To understand the importance and the ambiguity of the standard of intent that is applied in these cases, one needs to examine how the role of intent has changed as discrimination law has developed.

B. *The Doctrinal Development of Discriminatory Intent*

Legal definitions of discrimination have not always centered on intent. In 1954, when *Brown v. Board of Education*,²⁷ finally overturned the rule of "separate but equal,"²⁸ the

²³ *Teamsters*, 431 U.S. at 358 n.44. ("Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.").

²⁴ See *Teamsters*, 431 U.S. at 361.

²⁵ *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

²⁶ *Id.* See *infra* notes 114-118 and accompanying text regarding the nature and effect of the shifted burden of production in disparate treatment cases.

²⁷ 347 U.S. 483 (1954).

²⁸ In *Plessy v. Ferguson*, 163 U.S. 537 (1896), a black man was arrested for riding in the whites-only car of a Louisiana train. *Plessy* thus concerns a law that today would be the paradigm of discrimination because it explicitly uses the category of race to limit conduct. The infamous *Plessy* ruling, however, upheld the law of "separate but equal" accommodations because the Court disclaimed any evidence that segregation sprang from the ill will of whites or created objectively unfavorable conditions for blacks. *Id.* at 551. In other words, the Court found neither discriminatory intent nor discriminatory effect. Instead the Court located the dis-

Court stressed the stigmatic effect segregated schools had on black children.²⁹ The *Brown* opinion cited extensive empirical evidence for its finding of psychological injury, with no mention of discriminatory intent.³⁰ Nevertheless, it is clear that this kind of stigmatic effect could not exist without the intentional, or at least the meaningful, message from the schools to the children that segregation was a response to black inferiority.³¹

It was the first Supreme Court case under Title VII that articulated a clear distinction between effect and intent as different doctrinal bases of liability. In that case, *Griggs v. Duke Power Co.*,³² a 1971 employment discrimination action, effect analysis temporarily took precedence.³³ Emphasizing

criminary meaning of the law entirely in the minds of the excluded black citizens: "We consider the underlying fallacy of the plaintiffs argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*

²⁹ *Brown*, 347 U.S. at 494.

³⁰ *Id.*

³¹ Even though the Court in *Brown* did not explicitly locate the stigmatic meaning of school segregation in the conscious subjective intent of the school board members, it is clear that those board members, and by extension the local governments they represented, bore responsibility for the discriminatory message conveyed. If the discriminatory meaning of segregation was entirely located in the fantasies of the affected children and their parents, the Court could not have ordered redress no matter how bad the psychological effects were.

³² 401 U.S. 424 (1971).

³³ *Griggs* was a class action brought by black workers at a North Carolina power plant. Before the Civil Rights Act of 1964, the plant officially segregated workers by race. The year after the Act passed, the company instituted two new requirements for jobs in the previously all-white categories: a high-school diploma and a company-administered aptitude test. The plaintiffs brought evidence to show that in North Carolina only 12% of black men had graduated from high school, as compared with 34% of their white counterparts. 401 U.S. at 430 n.6. Thus, the company's educational requirements disadvantaged blacks.

The Fourth Circuit concluded that despite the proven obstacle for black employees created by the new requirements, the employer had not discriminated under Title VII. *Griggs v. Duke Power Co.*, 420 F.2d 1225 (4th Cir. 1970). That court said that in determining liability under Title VII, "a subjective test of the employer's intent should govern . . . and that in this case there was no showing of discriminatory purpose. . . ." *Griggs*, 401 U.S. at 428. A unanimous Supreme Court overturned the decision below. The Court held that "[t]he [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Griggs*, 401 U.S. at 431.

Despite its emphasis on discriminatory effect, the *Griggs* opinion stopped short

the centrality of unequal effect for determining discrimination liability, the court declared that the Civil Rights Act was directed at "the consequences of employment practices, not simply the motivation."³⁴ The dominance of impact analysis, however, was brief. In a 1976 employment case, *Washington v. Davis*,³⁵ the Court ruled that liability for discriminatory effect without evidence of intent did not apply in equal protection cases,³⁶ and the intentional standard of *Davis* was soon extended to claims of discriminatory treatment brought under Title VII and Title VIII.³⁷ The standard of intent required,

of holding that intent plays no part in this type of case. The Court cautioned that, "[w]e do not suggest that [the courts below] erred in examining the employer's intent," and stressed that the company in this case had been purposefully discriminating on the basis of race prior to the Civil Rights Act's passage. *Id.* *Griggs* forbids "unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* The question is whether that invidiousness comes strictly from the barrier's economic impact on blacks and segregative effect on the workforce or also from a presumed discriminatory intent on the part of the employer who put the barriers in place.

There is no question that *Griggs* holds that *proof* of intent is not needed to create liability in a disparate impact case. In terms of the legal definition of discrimination, though, the interesting question is why such proof is not required: Is it because the negative effect on the black workers itself constitutes discrimination? Or is it because, in the absence of a justification of business necessity, that effect indicates the likelihood that the employer is intentionally, or at least knowingly, acting to disadvantage blacks?

Another case the Court decided the same year as *Griggs* emphasized the triumph of effect analysis over intent in the definition of discrimination. In *Palmer v. Thompson*, 403 U.S. 217 (1971), the Court examined a decision by the city of Jackson, Mississippi to close down all its public swimming pools, rather than integrate them. The Court openly acknowledged that the city council had a discriminatory motive, but held that the policy affected blacks and whites equally. The Court decided that discriminatory motive alone did not make the council's decision a violation of equal protection. *Id.* As one commentator has remarked, with the *Palmer* decision, "[e]ffect was at its zenith." Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1157 (1991).

³⁴ *Griggs*, 401 U.S. at 432.

³⁵ 426 U.S. 229 (1976).

³⁶ *Id.* at 242 (stating that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.").

³⁷ The *Davis* decision was reaffirmed in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which held that a white suburb's refusal to rezone in order to allow developers to build a low-income housing project could not violate equal protection solely because of the zoning decision's segregative effect. *Id.* On remand, the 7th Circuit held that under the disparate impact theory, the Village was liable for discrimination under Title VIII. *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir.

however, remained uncertain until 1979, when *Personnel Administrator v. Feeney*³⁸ supplied this last piece of the intent doctrine.

Feeney involved a Massachusetts statute that created an absolute civil service job preference for veterans, thereby disadvantaging women, who were much less likely to have served in the armed forces.³⁹ Though the legislature had knowingly sacrificed women's interests, the Court held that it had not purposefully discriminated.⁴⁰ The Court explained that "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁴¹ It is this standard of purposeful intent—rather than a passive awareness of discriminatory effect—that currently applies in disparate treatment actions.⁴²

C. Purposeful Intent and the Treatment/Effect Dichotomy

The narrow deliberate-purpose definition of intent may be necessary to maintain the distinction between disparate treatment and disparate impact claims. This is certainly true if the intentional standard is a subjective one. If courts applied a broader tort standard of subjective intent, then "knowledge to substantial certainty" that a policy or decision would have a

1975). The Court identified four factors that were important in Title VIII impact cases: (1) the strength of the evidence of effect; (2) evidence of intent; (3) defendant's interest in making the challenged decision; and (4) whether plaintiff sought positive action by defendant to provide them with housing or merely to stop defendant from blocking their own housing efforts. *BELL*, *supra* note 10, at 794. Note that with the second criterion, the Court again refused to entirely remove intent as a condition for liability in a disparate impact case.

³⁸ 442 U.S. 256 (1979).

³⁹ *Id.* at 259.

⁴⁰ *Id.* at 279.

⁴¹ *Id.*

⁴² Although proof of intent is not required in disparate impact actions, some concept of implied intent may also underlie liability in these cases. Proof of disparate impact is sometimes conceived of as simply a proxy for proof of intent. That is, where a strong pattern of disparate impact is found, discriminatory intent is sometimes assumed. *But see* *United States v. City of Blackjack*, 508 F.2d 1179, 1185 (8th Cir. 1974). ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.")

discriminatory effect would also constitute discriminatory intent.⁴³ In the current structure of discrimination law, this broader definition could conflate discriminatory effect with intent and collapse disparate impact and disparate treatment claims back into a single theory.

The *prima facie* case for a disparate impact claim generally consists of statistical evidence that something an employer or housing provider is doing tends to disadvantage members of one racial group. Imagine that instead of going straight to court with their statistical evidence, disparate impact plaintiffs first showed it to the employers or housing providers whose actions were implicated. Because proven disproportionate impact constitutes a form of discrimination, once the companies are made aware of it, under a tort standard of knowing intent, they are guilty of intentional discrimination if they continue the same behavior. Since they *know* that their actions are having a disparate effect, they are intentionally discriminating.⁴⁴

Currently, defendants in cases brought on a disparate impact theory can escape liability for proven discriminatory effects by showing that the policies creating the harm can be justified as a "business necessity."⁴⁵ If, however, defendants' knowledge of discriminatory impact converted their actions into intentional discrimination, it would be difficult to justify such immunity. The courts have never held that a business rationale, however pressing, can cancel liability for intentional discrimination.⁴⁶ Thus, limiting liability for subjective discriminatory intent to active purpose, rather than mere knowledge of an action's certain results, maintains a sharp distinction between discriminatory effect and treatment. That distinction, in turn, immunizes policies which may severely disadvantage a particular racial group but which are "necessary" for the sake of business. As long as the intent standard is con-

⁴³ RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965). "Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Id.*

⁴⁴ *Id.*

⁴⁵ 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1988).

⁴⁶ The Court has suggested that the lack of a business justification for an ostensibly neutral policy that has a discriminatory effect may indicate intentional discrimination. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

ceived of as purely subjective, any attempt to cover unthinking discrimination by adopting a broader standard of knowing intent is likely to be stymied by courts' unwillingness to collapse disparate treatment and disparate impact claims.

D. *Judicial Recognition of Unconscious Discrimination*

While the Supreme Court has come to define discriminatory intent very narrowly as discriminatory purpose, the Court has occasionally acknowledged the existence of unconscious discrimination. Fifty years ago, three members of the Court joined in a dissenting opinion advocating the removal to federal court of certain cases in which federal officers were defendants. The justices explained that these defendants should be shielded from the hazards of "conscious or unconscious discrimination or hostility."⁴⁷ A 1950 Supreme Court case extended the concept of unconscious discrimination to race, when Justice Jackson argued in dissent that a racially exclusive jury is unfair in part because jurors are "influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh."⁴⁸

In more recent cases involving the problem of racially biased jury selection, justices have expressed similar concern about unconscious racial prejudice on the part of both prosecutors and jurors. In the case establishing that the equal protection clause precludes prosecutors from using peremptory challenges to exclude potential jurors because of race, *Batson v. Kentucky*,⁴⁹ Justice Marshall argued in a concurring opinion that peremptory challenges should be barred entirely. Justice Marshall explained that conscious racial prejudice was not the only issue. Instead, because of common racial stereotypes

[a] prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen", or "distant", a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or un

⁴⁷ *Screws v. United States*, 325 U.S. 91, 145 (1945) (Justices Roberts, Frankfurter, and Jackson, dissenting).

⁴⁸ *Cassell v. Texas*, 339 U.S. 282, 302 (1950) (Jackson, J., dissenting).

⁴⁹ 476 U.S. 79 (1986).

conscious racism may lead him to accept such an explanation as well supported.⁶⁰

Members of the current court continue to worry about the impact of unconscious racism. In the 1992 case that extended the equal protection prohibition on racial challenges to defendants, *Georgia v. McCollum*, Justice O'Connor argued in dissent that the decision might wind up disadvantaging minority defendants. She warned that if minority defendants could not use their peremptory challenges to secure minority representation on the jury, they would face discrimination because "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials."⁶¹ Most recently, Justice Ginsburg articulated the pervasive problem of unthinking bias. In a dissent joined by Justice Souter to the Court's decision in *Adarand Constructors, Inc. v. Peña*, applying strict scrutiny in all affirmative action cases, Justice Ginsburg pointed to "the persistence of racial inequality."⁶² She went on to assert that "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."⁶³

In the area of Title VII claims, the Supreme Court has sometimes indicated that the disparate impact theory itself was meant to create liability for unconscious discrimination. For instance, a 1988 case held that disparate impact analysis is applicable not only to standardized employment tests but

⁶⁰ *Batson*, 476 U.S. at 106 (1986) (Marshall, J., concurring).

⁶¹ *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (J. O'Connor dissenting). Other members of the current Court have acknowledged the possibility of unconscious prejudice, though they have also expressed doubt about the utility of explaining racial inequities as a result of it. In their dissent to a decision that upheld an affirmative action policy used by the FCC, Justices Kennedy and Scalia noted that a possible explanation for why the majority group "disadvantaged by the preference should feel no stigma at all," was that "racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage minority groups." They added, however, that "this is not a proposition that the many citizens, who to their knowledge 'have never discriminated against anyone on the basis of race,' [] will find easy to accept." *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (Kennedy, J., and Scalia, J., dissenting).

⁶² 115 S. Ct 2097, 2135 (1995) (Ginsburg, J., dissenting).

⁶³ *Id.*

also to subjective interviewing and promotion criteria used by employers.⁵⁴ In a plurality opinion, Justice O'Connor suggested that one of the reasons for submitting these individualized discretionary decisions to disparate impact analysis was to address "the problem of subconscious stereotypes and prejudices" that might not be "adequately policed through disparate treatment analysis."⁵⁵ Elsewhere in the same opinion, however, Justice O'Connor asserted that both disparate impact and disparate treatment cases were intended to attach liability for the same concept of discrimination. She explained that "[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."⁵⁶

Justice O'Connor's suggestion that disparate impact procedure would be appropriate for revealing unconscious discrimination, coupled with her assertion that the "ultimate legal issue" in both disparate treatment and disparate impact cases is identical, opens up the possibility that a disparate treatment case could properly assign liability for unconscious discrimination if it were proved. Elsewhere, however, one can find direct statements by the Court that the intent standard employed in disparate treatment is a subjective one.⁵⁷

Recent decisions by appellate courts reflect this ambiguity about whether it is permissible to assign liability for unconscious discrimination in a disparate treatment case. In a hiring practice case, for example, the Ninth Circuit refused to grant summary judgment to an employer who claimed that the plaintiff simply performed poorly in a job interview. The court said that to grant summary judgment based on this general explanation of the challenged decision "would immunize from effective review all sorts of conscious and unconscious discrimination," indicating that unconscious discrimination could be a proper basis for disparate treatment liability.⁵⁸ In another

⁵⁴ *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988).

⁵⁵ *Id.*

⁵⁶ *Id.* at 987.

⁵⁷ See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989) (Under disparate impact theory, "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case.").

⁵⁸ *Thomas v. California State Dep't of Corrections*, No. 91-15870, 1992 WL

disparate treatment case, however, the Seventh Circuit was unwilling to go so far. Nevertheless, the court acknowledged the possibility of liability for unthinking discrimination. Affirming a grant of summary judgment despite evidence that the employer had deviated from its disciplinary rules when it fired the plaintiff, the appellate court noted that, arguably, "failure to adhere to the rules opens the way to subjective determinations likely to reflect unconscious racial bias, but if so there would be evidence of systematic rather than random disfavoring of blacks."⁵⁹ Thus, at least in theory, unconscious racial bias could meet the intent standard of a disparate treatment case, even in the Seventh Circuit, provided that the plaintiff offered some kind of "systematic" evidence of bias. A Third Circuit panel faced the issue directly when a disparate treatment plaintiff argued that he was the victim of unconscious prejudice. Ultimately, though, the court put aside "the question of whether, as a matter of law, a plaintiff in a disparate treatment case may prevail based on evidence of 'unconscious' discrimination." The court merely remarked that, in the case before it, "reliance on this unconventional theory substantially diminished the probative value of the evidence. . . ."⁶⁰

If conscious discriminatory purpose is a requirement for disparate treatment liability, individual discrimination claims cannot address the issue of unconscious prejudice.⁶¹ Broadening the subjective intent standard, however, to include knowledge of discriminatory effect would collapse the distinction between disparate treatment and disparate impact claims.⁶² If instead, some kind of objective standard of intent were used to define disparate treatment, the current structure of discrimination law could be maintained. An objective theory of discrimination liability would also respond to the increasingly common

197414 (9th Cir. Aug. 18, 1992).

⁵⁹ *Bush v. Commonwealth Edison*, 990 F.2d 928, 931-32 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1648 (1994).

⁶⁰ *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 200 (3d Cir. 1994) (en banc).

⁶¹ One statistical study of intentional discrimination claims found that perhaps the most important effect of the stringent intent requirement was to depress the volume of claims litigated, presumably for lack of evidence sufficient to prove intent. Eisenberg & Johnson, *supra* note 33.

⁶² See *supra* notes 43-46 and accompanying text.

perception that much discriminatory behavior takes place unconsciously, or at least thoughtlessly.⁶³

II. CONSIDERING A NEGLIGENCE ACTION FOR DISPARATE TREATMENT

At a recent meeting of the Congressionally mandated Glass Ceiling Commission,⁶⁴ Labor Secretary Robert B. Reich declared that "subtle but pervasive patterns of discrimination dominate the public, private and nonprofit sectors of society because of a 'myopia' on the part of many white male managers who 'unthinkingly discriminate' without having any idea they are doing so."⁶⁵ There is growing acknowledgment of the kind of discriminatory barriers identified by Labor Secretary Reich,⁶⁶ yet the behavior he describes may not be against the law. If disparate treatment requires subjective intent, Reich's myopic managers cannot be made liable, because their thoughtless decisions were not consciously discriminatory. At the same time, the practices behind the patterns Reich describes may be too subtle and pervasive to be sufficiently quantifiable for a disparate impact action, even if an individual plaintiff had the resources for such an analysis.

If, instead of racism, managers were carelessly allowing some physical danger to harm employees, their employers might find themselves defending negligence actions brought by the injured workers. Employers are required by law to use due care to protect employees' health and safety; failing to do so will expose them to negligence liability.⁶⁷ A negligence theory

⁶³ There have been a number of proposals for objective standards that could support alternative legal theories of individual discrimination, including a recent article suggesting a Title VII action based on negligence. Oppenheimer, *supra* note 2.

⁶⁴ The Commission was created by the 1991 Amendments to the Civil Rights Act. This kind of discrimination is usually quite apparent to those who come up against it as they attempt to rise to higher levels of employment. Since it is actually invisible only to those who create it from above, shouldn't this discriminatory barrier rather be called the "glass floor"?

⁶⁵ Catherine S. Manegold, "Glass Ceiling' Is Pervasive Secretary of Labor Con-tends." N.Y. TIMES Sept. 27, 1994, available in LEXIS, NEWS Library, NYT file.

⁶⁶ See *supra* notes 3-5.

⁶⁷ RESTATEMENT (SECOND) TORTS, *supra* note 43, § 314B. David Oppenheimer has suggested that Title VII imposes an analogous affirmative duty on employers to exercise due care not to expose employees to discriminatory treatment.

would conceive racism as a kind of social danger, analogous to familiar technological hazards that employers currently have a duty to control. As the preeminent legal standard for judging unintentionally harmful behavior, negligence doctrine at first seems a likely source for a liability standard for unconscious discrimination. Indeed, negligence liability for the unthinking use of racial stereotypes appears to make sense in a world of glass ceilings carelessly erected by managers who then fail to recognize the barriers they have built.⁶⁸ As it turns out, though, a negligence analysis is ultimately unsatisfactory as a legal theory for unconscious racism, primarily because it cannot respond to the meaningful quality of individual discriminatory acts. Nevertheless, investigating the pros and cons of a negligence theory helps clarify what sort of standard is needed for a coherent legal action for unthinking discrimination.

A. *Elements of an Action for Negligent Discrimination*

Under a theory of negligent discrimination, an employer would have a duty to keep employees reasonably free of discriminatory treatment, just as she must reasonably protect them from hazardous equipment or faulty wiring.⁶⁹ David Oppenheimer has suggested that, when "an employer fails to act to prevent discrimination which it knows, or should know, is occurring, which it expects to occur, or which it should expect to occur, it should be held negligent."⁷⁰

The elements of a cause of action for negligent discrimination would presumably follow the classic negligence scheme. A plaintiff would have to prove that the defendant had a duty to use reasonable care to avoid discrimination and had breached that duty, i.e., had failed to conform to the standard of reasonable care. In addition, to attach liability, a plaintiff would have

Oppenheimer, *supra* note 2. This theory is attractive because it promises to respond to the behavior Secretary Reich pointed out, conduct other commentators have described as "unconscious racism." See Lawrence, *supra* note 2.

⁶⁸ KEETON ET AL., *supra* note 9, § 32, at 184. "[A]n individual will not be excused when the individual denies knowledge of the risk; and to this extent, at least, there is a minimum standard of knowledge, based upon what is common to the community." KEETON, ET AL., *supra* note 9, § 32, at 184.

⁶⁹ See Oppenheimer, *supra* note 2 at 967.

⁷⁰ Oppenheimer, *supra* note 2, at 969.

to draw a reasonably close causal connection between the defendant's discriminatory negligence, i.e., lack of care, and the discriminatory injury, and show that this negligence had resulted in actual loss or damages.⁷¹ If all of these elements were present, there would be no need to investigate subjective intent at all, let alone to prove that the defendant had acted out of conscious racial animus. A theory of negligent discrimination could thus provide damages to plaintiffs injured by unthinking racism. It also promises social benefits.

B. *The Benefits of a Negligence Standard for Discrimination*

A cause of action for negligent discrimination would provide a legal basis for recovery for injuries widely recognized to result from racial prejudice, but largely overlooked by current discrimination law. Equally important, a negligence theory more accurately expresses the way in which much racial discrimination today really functions, that is, through decisionmakers' lack of consciousness of the role race plays in their decisions.⁷²

The current law paints all race-consciousness as bad, i.e., potentially discriminatory, and all ignorance and denial of racial factors in decisions as good, i.e., colorblind, innocent.⁷³ This dichotomy may actually discourage employers and housing providers from acknowledging, let alone actively investigating, the risks of their own unconscious racism. They receive no credit for doing so and may subject themselves to greater potential liability. In contrast, the emphasis on an affirmative duty of care in a negligence theory of discrimination should alleviate some of the legal pressure for potential defendants to remain ignorant of their own racism.

A negligence theory would tend to treat racism as a widespread problem not limited to a few malevolent individuals.⁷⁴ It could thus assign responsibility for discriminatory actions without demonizing and isolating the person who negligently

⁷¹ See KEETON, ET AL., *supra* note 9, § 130, at 136 (outlining the cause of action for negligence).

⁷² See *supra* notes 3-4.

⁷³ Many commentators have criticized this aspect of discrimination law. See, e.g., BELL, *supra* note 2; Aleinikoff, *supra* note 2; Flagg, *supra* note 2.

⁷⁴ Oppenheimer, *supra* note 2, at 971-72.

discriminates.⁷⁵ In theory, anyway, the moral stigma of a finding of intentional discrimination should not attach to negligent discrimination, because acting negligently is simply not considered as blameworthy as causing intentional harm. Perhaps, though, this conclusion overstates the reality-shaping power of legal forms.⁷⁶ The ongoing history of race in our society is loaded with moral judgment, shame and outrage. In that context, changing the modifying adjective from "intentional" to "negligent" is not likely to drain the word "discrimination" of its moral stigma. What seems more important is the negligence view of racial discrimination as a widespread social problem.

Few of us see ourselves as deliberately hateful, but most of us know that we are sometimes careless. The law of negligence calls our attention to our potential for causing "accidents" in various areas of our lives and our responsibility to limit that potential by being careful.⁷⁷ As long as individual discrimination is defined as deliberate animus, most people can assume that they have nothing to watch out for. In this way, the intent standard helps ensure that unconscious discrimination is overlooked not only in lawsuits, but in everyday life. A negligence analysis would change the legal picture of racism from a portrait of a few malevolent individuals to a view of ordinary people coping with a pervasive social problem.

In fact, resistance to applying a negligence standard to racism may reflect a societal unwillingness to acknowledge the pervasiveness of racism, even unconscious racism, and our collective lack of control over racial judgements. As long as we define discrimination as necessarily conscious, we can limit our view of both who is injured and who causes discriminatory in-

⁷⁵ Oppenheimer, *supra* note 2, at 971-72.

⁷⁶ It may also understate the role of moral judgment in negligence law. Commentators disagree about this. Compare the utilitarian/economic based view of Richard Posner in, e.g., *The Concept of Corrective Justice in Recent Theories of Tort Laws*, in *FOUNDATIONS OF TORT LAW* 59 (Saul Levmore ed., 1994) with the view (criticized by Posner) of George P. Fletcher that liability should be based on a principle of reciprocity. George P. Fletcher *Fairness and Utility in Tort Law*, in *FOUNDATIONS OF TORT LAW* *supra*, at 48.

⁷⁷ One goal of the tort system is deterrence of behavior deemed risky and thus potentially costly. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 26 (1970). But c.f., Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, in *FOUNDATIONS OF TORT LAW* 265, *supra* note 76 (criticizing the view that law must be at the center of the regulation of social behavior).

jury. Although a negligence theory minimizes the moral stigma for racial stereotyping, it magnifies the sense of racial prejudice out of control. Thus, though negligent racism may be more ordinary, and less vicious, it is in some sense more threatening than deliberate racial malice, because it cannot be confined to the bad acts of a few pathological individuals.

To the extent that a negligence action for discrimination would bring the law more in line with everyday experience, it might be better able than a narrow theory of intentional racism to support positive social change. This aspect of the negligence theory is the source of its considerable promise. But a negligence approach to discrimination also has substantial problems.

C. *Problems with a Negligence Theory of Discrimination*

A theory of negligent discrimination presents problems that focus around two elements of any negligence action: standard of care and injury.⁷⁸ What constitutes a reasonable effort to prevent racial prejudice beyond which racism is excused from liability? Even asking this question seems strange, but it must be answered if liability for racial prejudice is really going to be based on negligence.⁷⁹ The answer cannot be "as much care as it takes," for then the standard is no longer negligence but strict liability.⁸⁰ Thus, a negligence theory of discrimination would not only broaden the liability standard, it would create a category of legal, i.e., non-negligent, discrimination. As it now stands, the law does not recognize unintentional individual discrimination as discrimination at all. Without a standard of knowing intent, even recognized disparate racial impact does not count as intentional discrimination.

The current sharp legal distinction between discriminatory treatment and discriminatory effect may reflect resistance to immunizing harm that is caused by racial bias. It is one thing to excuse broad policies that happen to have some negative effects for one racial group. It is quite another proposition to ap-

⁷⁸ KEETON, ET AL., *supra* note 9, § 30 at 164.

⁷⁹ RESTATEMENT (SECOND) OF TORTS, *supra* note 43, § 282 (stating that "negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.").

⁸⁰ KEETON, ET AL., *supra* note 9, § 75 at 536.

prove as reasonable an individual decision to fire or refuse to rent a home to a particular individual because of race, whether or not the decisionmaker realized that his decision was based on racial prejudice. Creating an explicit category of "reasonable" discrimination might cause more social conflict than it corrects.

Apart from its policy ramifications, a standard of care for positive race consciousness is difficult to define in practical terms. Very little is known about what sorts of education or policies could prevent conscious or unconscious racism. Ultimately, the difficulty in defining discriminatory injury and a standard of care may only be resolved by abandoning a negligence approach and shifting to a different kind of objective standard.

1. The Problematic Injury of Negligent Discrimination

Absent conscious intent to discriminate or comparative evidence of group disadvantage, what defines discriminatory injury? That is, if discrimination involves distinguishing between one person or group and another "because of race," such a distinction can only appear through a showing of a differential outcome between races or a showing that racial difference was some meaningful part of the challenged decision. Otherwise it is hard to see how discrimination can be said to have caused injury.

In a typical tort analysis of accidental injury, it is possible to identify some force or object—electricity, a car, a golf club—that was the instrument of the injury. In a negligence analysis, the question is whether or not the alleged tortfeasor handled the instrumentality with reasonable care.⁸¹ When one asks the person who swung the golf-club that connected with the girl's head or the electrician who crossed the wires that caused the fire why he did it, each may say "I did not mean to," to which one can reply—"it does not matter whether you meant to or not, you should have known better."⁸² The task of a negligence theory of racism is to justify exactly this answer when a defendant says she did not mean to discriminate.

⁸¹ See KEETON, ET AL., *supra* note 9, § 31.

⁸² See RESTATEMENT (SECOND) OF TORTS, *supra* note 43, § 289.

It is against the law for a person to deliberately crash his tractor-style lawn mower into his neighbor's shed, smashing the shed to bits because he dislikes his neighbor. And it is also against the law to mow carelessly so that the mower goes out of control and ends up demolishing the shed by accident. In the latter scenario, the fact that the tortfeasor despised his neighbor might suggest that an "unconscious intent" to injure him underlay the "accident" with the mower. But in the cause of action for negligence, such an unconscious intent would be irrelevant, and no psychological inquiry would be necessary.⁸³ In the cause of action for negligent racism this also would be true. Negligence instead requires an evaluation of a danger: the risk of harm if the lawnmower goes out of control; a duty and standard of care—the mower driver's responsibility to take reasonable steps to control the mower; a breach of that duty—his failure to exercise reasonable care while mowing, and a causal connection between that failure and the injury—the fact that but for his carelessness, the neighbor's shed would still be intact.⁸⁴ The problem in a theory of negligent racism is to identify the lawnmower. Of course, if the mower driver were an intentional tortfeasor, he would have both a harmful mower and a harmful intent. The problem of discrimination as a tort is that these two "engines" of injury collapse together. In the legal theory of disparate treatment, the mower may not exist without subjective intent.⁸⁵ Because it does not include either subjective intent or any element of expressive meaning, a theory of negligent racism has trouble conceiving of a way for the harm of discrimination to get from the careless discriminator to the person she discriminates against without the mower of intent.⁸⁶

⁸³ Except perhaps to ask what the individual knew that might have alerted him to the risk of the accident. But, generally, "[n]egligence is conduct and not a state of mind." KEETON, ET AL., *supra* note 9, § 31, at 169.

⁸⁴ KEETON, ET AL., *supra* note 9, § 31, at 69.

⁸⁵ In tort law, similar problems arise when plaintiffs attempt to recover for emotional suffering caused by negligent behavior that did not inflict physical injury. See WILLIAM L. PROSSER, ET AL., *CASES AND MATERIALS ON TORTS* 392-409 (8th ed. 1988).

⁸⁶ As Professor Gudel has pointed out concepts of "cause" "motive" and "intent" are frequently difficult to disentangle in courts' discrimination decisions, in part because these classic tort categories are not particularly useful for interpreting the reason for, or the meaning of, someone's actions. Paul J. Gudel,

2. Standard of Care

However a negligent injury is defined, it can only occur through a breach of care.⁸⁷ In order to have a breach, however, one must first have a standard of care that a defendant can either meet or fail to reach.⁸⁸ Defining a standard for avoiding racial discrimination is problematic. The mowing man who demolishes his neighbor's shed would not be held liable for negligence (no matter how hateful a person he was), if he could show that he had exercised reasonable care to avoid the accident.⁸⁹ Under a negligence theory, Title VII and Title VIII create a duty to exercise reasonable care not to discriminate.⁹⁰ But what is it that individuals would be expected to do in order to meet that duty?

The theory of negligent discrimination proceeds from an assumption that increased consciousness of race would decrease discrimination. Thus, the aim of a negligence standard should be to require employers and landlords to ask themselves—or, if they are organizations, to ask their agents—whether thoughtless adherence to racial stereotypes is affecting their decisions, and, if it is, to stop relying on those stereotypes. A true negligence standard would thus give individual employers and housing providers an affirmative duty to make inquiries and take steps to control unthinking racism, but they would only have a duty to do so much.⁹¹ Following

Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law, 70 TEX. L. REV. 17 (1991).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ David Oppenheimer first defines liability for negligent discrimination as triggered by a failure "to act to prevent discrimination which [an employer] knows, or should know, is occurring, which it expects to occur, or which it should expect to occur." Oppenheimer, *supra* note 2 at 969. He goes on to describe an assignment of liability, though, in circumstances that sound more like strict liability: "Where an employer has created job screening procedures which fail to correct for unconscious discrimination, and such discrimination influences the process, the employer ought to be subject to negligence liability." Oppenheimer, *supra* note 2 at 970. In other words, Oppenheimer gives no indication of a limit to the employer's investment in preventing discrimination beyond which the employer can claim that it has acted reasonably. This appears to be a de facto strict liability standard, not negligence at all.

⁹¹ KEETON, ET AL., *supra* note 9, § 31, at 170; RESTATEMENT (SECOND) OF

the usual negligence standard, they would only be required to make "reasonable" efforts to control unconscious racism.⁹²

The difficulty of envisioning what steps employers would need to take to avoid negligence liability for unthinking racism may point to a basic conflict within a theory of negligent discrimination. On the one hand, there are similarities between unthinking discrimination and the sort of physical carelessness that negligence classically addresses. In both cases, a lack of attention to the likely effects of one's actions may lead to injury. Likewise, in both cases, if the tortfeasor had realized that her carelessness was about to cause injury, she would not have proceeded to act as she did. On the other hand, though, in some important ways unthinking adherence to racial stereotypes is not at all like neglecting machine maintenance or forgetting to replace the burned-out light over the stairs. If the person who has carelessly failed to keep control of the physical environment is confronted with evidence that her carelessness led to harm, she is likely to recognize, at least, that some sort of injury took place. She may even acknowledge that her action—or inaction—was a cause of the injuries, while still insisting that she was reasonable in acting as she did. In contrast, the person whose unthinking use of racial stereotypes is exposed may not even agree that any sort of discriminatory injury took place, let alone that his action caused the damage because it was unconsciously racist. Even were the law to explicitly recognize careless racism, individual defendants' unexamined racial stereotypes are likely to remain far less accessible to their own understanding and correction than their inattention to physical safety.⁹³

Setting a standard of care for negligent racism suffers from another problem as well. There is a surprising lack of available information about how to reduce any sort of racism; surprising, that is, considering how much damage racism does in American society. There are professional consultants whose

TORTS, *supra* note 43, § 291 cmt. b. ("Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable.").

⁹² KEETON, ET AL., *supra* note 9, § 31 at 170.

⁹³ Julie Kowitz pointed this out to me. Of course, the law's emphasis on deliberate racial animus as the *sine qua non* of individual discrimination is part of the reason unthinking racial discrimination is so hard for individuals to recognize.

business it is to advise corporations on creating "diversity awareness" in the workplace.⁹⁴ But there is little published information on the effectiveness of any given technique these people employ. Without this sort of information, judges or juries would have difficulty deciding whether a given company was doing what it should to prevent racist decisionmaking. How could the costs and benefits of any existing program be assessed? Finally, trying to define a level of care beyond which employers or housing providers would not be held liable for some instances of unthinking racism meets with bedrock resistance to immunizing any identifiable discriminatory behavior as "reasonable."

3. Lessons from the Negligence Analysis

The main problems with a negligence theory of discrimination are the difficulty of defining the source of a discriminatory injury without reference to some meaningful or expressive aspect of the challenged action and a reluctance to excuse any identified discriminatory act as reasonable. The fact that these problems spring from basic defining concepts of negligence theory suggests that a negligence approach may not be the best way to assign liability for unthinking racism. Ultimately, the poor fit of a negligence analysis to discrimination probably traces back to the problematic equation of *reasons* for decisions with *causes* of the physical events that are at the core of negligence law.⁹⁵

Examining a negligence theory, however, sheds light on two requirements for an objective standard that could respond effectively to the problem of thoughtless discrimination. Like a negligence standard, an objective standard for unthinking racism must assign liability without reference to subjective intent. Unlike negligence, though, the objective standard must be capable of taking into account the meaningful aspect of the challenged action that identifies it as discriminatory. In addi-

⁹⁴ A recent newspaper story describes one such program run by consultants in the U.S. Department of Transportation that was suspended after 11 years of operation due to worker complaints that it was abusive. U.S. Offered Unusual Class on 'Diversity,' N.Y. TIMES, Apr. 2, 1995 at A34.

⁹⁵ Some commentators complain that existing discrimination law suffers from this problem. See, e.g., Gudel, *supra* note 86.

tion, in order to reflect the law's formal commitment to a non-discriminatory society, the objective standard must assign liability in a principled way for all identified instances of discrimination. The following sections look to existing discrimination law for concepts and structures from which to fashion a workable standard of liability for unthinking discrimination.

III. A MODEL FOR AN OBJECTIVE STANDARD EXISTS IN CURRENT DISCRIMINATION LAW

An objective standard of discriminatory meaning could define individual conduct as discriminatory, without relying on subjective intent. Since the trigger for liability would be the discriminatory message conveyed by the challenged action, liability would attach to all identified instances of this kind of discrimination. The use of an objective standard of discriminatory meaning is not a novel idea.⁹⁶ In fact, in at least one area of discrimination law, suits for discriminatory housing advertising under Title VIII, several federal circuit courts apply this kind of standard.⁹⁷ A similar concept could be applied in disparate treatment cases.

A. *An Objective Standard of Discriminatory Meaning: Ragin v. New York Times*

Besides outlawing discrimination in housing sales or rentals, the Fair Housing Act (FHA) also makes it illegal "[t]o make, print, or publish . . . any notice, statement, or advertise-

⁹⁶ In his landmark article, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, Charles Lawrence suggests that a social meaning test be used to decide racial challenges on the basis of equal protection. Lawrence was the first to define clearly and in detail the problem that a subjective intent standard excludes much of the conduct through which racism today operates. His focus on a psychological theory of the subjective unconscious as the source of this unmindful racism, however, especially his emphasis on Freud, tends to thrust the definition of racial discrimination even deeper into the mind of the individual defendant. That is why the standard of liability he ultimately proposes, the objective social meaning test, seems strangely disconnected from the theory of unconscious subjectivity articulated in the first part of his article. Nevertheless, he does propose such a test and describe its function in some detail. See Lawrence, *supra* note 2. The notion of assessing the meaningful component of discrimination as a sort of intent is clearly indebted to his analysis.

⁹⁷ See *infra* notes 98-101 and accompanying text.

ment, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race"⁹⁸ Every circuit that has heard a claim under this section has held that no subjective discriminatory intent is required to assign liability for a discriminatory statement or advertisement.⁹⁹ Instead, courts apply an objective standard first adopted by the Fourth Circuit in 1972 when it held that an advertisement for an apartment in a "white home" was discriminatory, because it would be understood as racially exclusive by an "ordinary reader."¹⁰⁰ Since then, the Second, Sixth, Seventh, and D.C. Circuits have all adopted versions of the "ordinary reader" standard.¹⁰¹

A 1991 case in the Second Circuit, *Ragin v. New York Times Co.*,¹⁰² further articulated the objective "ordinary reader" standard. In *Ragin*, African-American readers sued the *New York Times* for running real estate advertisements featuring photos that either excluded black models altogether or dressed them as maids and doormen while whites were posed as prospective home buyers.¹⁰³ According to the court in *Ragin*, in a claim of discriminatory advertising the defendant is liable "when an ordinary reader would understand the ad as suggesting a racial preference."¹⁰⁴ This ordinary reader is

⁹⁸ 42 U.S.C. § 3604(c) (1988).

⁹⁹ *Jancik v. Department of Housing and Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995) (applying an objective standard and surveying the holdings of other circuits on this issue).

¹⁰⁰ *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972) ("To the ordinary reader the natural interpretation of the advertisements published . . . is that they indicate a racial preference . . .").

¹⁰¹ *Jancik*, 44 F.3d 553 (7th Cir. 1995); *Ragin v. New York Times*, 923 F.2d 995 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991); *Housing Opportunities v. Cincinnati Enquirer, Inc.*, 943 F.2d 644 (6th Cir. 1991); *Spann v. Colonial Village*, 899 F.2d 24 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 980 (1990).

¹⁰² 923 F.2d 995 (2d Cir. 1991).

¹⁰³ *Id.* at 998.

¹⁰⁴ *Id.* at 1002. It is possible to see the theory underlying *Ragin* as merely another branch of disparate effect liability, and thus miss the importance of discarding the test for subjective intent in this case. But the *Ragin* court did not base its move away from subjective intent on the kind of evidence that makes up a *prima facie* case of disparate impact. There was no proof in *Ragin* that the challenged ads were *actually* discouraging people of one race from renting or buying the pictured properties and thus either disadvantaging one racial group or perpetuating segregation. It is the meaning of the message itself that creates liability, not its effect.

simply another incarnation of the common law reasonable person, "that familiar creature by whose standards human conduct has been judged for centuries."¹⁰⁵

The court in *Ragin* stated explicitly that advertisements judged racist by the "ordinary reader" standard were illegal, "whether or not the creator of the ad had a subjective racial intent."¹⁰⁶ The focus is on the meaning of the ad itself, and the FHA outlaws "all ads that *indicate* a racial preference to an ordinary reader *whatever the advertiser's intent*."¹⁰⁷ The court further explained that should an ad's creator deny all knowledge that an ad's content is discriminatory a factfinder may disbelieve the advertiser and draw an inference of discriminatory intent "much as" factfinders do in an ordinary disparate treatment case, or "may consider such an assertion an *inadvertent or unconscious expression of racism*."¹⁰⁸

B. *Adapting the Ragin Standard to Ordinary Disparate Treatment Cases*

Title VIII liability attaches for a racist housing advertisement that expresses unconscious racial prejudice. Why, then, shouldn't the expression of unconscious prejudice through racist rejections of prospective tenants also create liability? It is not obvious why conscious racist intent should be needed to make an illegal discriminatory decision to turn away prospective tenants but not to express an illegal discriminatory decision about how to attract prospective tenants. Then again, advertising images differ from live interactions in fundamental ways.¹⁰⁹ At first, these differences might seem to justify the

¹⁰⁵ *Id.* at 1002.

¹⁰⁶ *Id.* at 1000.

¹⁰⁷ *Ragin*, 923 F.2d at 1000 (emphasis added).

¹⁰⁸ *Id.* at 1001 (emphasis added).

¹⁰⁹ The Second Circuit has subsequently extended the "ordinary reader" standard to "an ordinary listener" when the § 3604(c) claim involves statements made in the course of a housing transaction. *Soules v. United States Dep't of Housing and Urban Dev.*, 967 F.2d 817, 824 (2d Cir. 1992). In *Soules*, though, the court opined that "[f]acially nondiscriminatory statements pose even greater difficulties than facially nondiscriminatory ads. The written content of questions and statements does not demonstrate the inflection of the speaker, and out of necessity courts must turn to other evidence in determining whether a violation of the FHA occurred." *Id.* at 825. The court in *Soules* ultimately found that asking a housing applicant whether she had children and whether her child was noisy did not indi-

divergent liability standards.

Advertising images are designed, first and foremost, to be persuasive messages, so choices involved in selecting models for an advertisement are by definition expressive of meaning. In contrast, while a landlord's selection of tenants may express many things, it is not primarily an expressive action. Arguably, a different level of individual control also operates in the two contexts. Advertisers not only select models, they directly manipulate the models' appearance to express the message they wish to present. Landlords' choices, though, are limited by who comes looking for housing, and they generally must take their prospective tenants as they find them. The *Ragin* court hinted at this distinction when it explained that "[a]dvertising is a make-up-your-own world in which one builds an image from scratch. . . ."¹¹⁰ In the real world, a defendant does not have as much control over the situation being judged.¹¹¹

It might be thought unfair to base liability on a reasonable person's interpretation of the defendant's action when the defendant does not control the expressive content of her action to the extent an advertiser does. The law often assigns liability, however, based on what a hypothetical reasonable person would have done under complex, dynamic circumstances, many of which are outside the control of the real person whose actions are later judged. What sets disparate treatment cases apart, then, is not that they require an interpretation of complex circumstances that include elements outside the defendant's control. The unique difficulty in applying an objective standard to discrimination cases is that they entail a judgment about an action's expressive meaning, rather than an action's tendency to expose the plaintiff to physical, emotional or economic harm. What *Ragin* shows is that this specific kind of expressive meaning, that is, racial preference or discrimina-

cate discrimination on the basis of family status. In evaluating the challenged statements, the court fell back on an inquiry into the speaker's intent. The court insisted though, that intent was relevant "not because a lack of design constitutes an affirmative defense to an FHA violation, but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it." *Id.*

¹¹⁰ *Ragin*, 923 F.2d at 1001.

¹¹¹ But the meaning of advertisements, also, is at least partially dependent on factors outside the designers' control, including the experiences and perspectives of the readers who interpret them and the context in which they appear.

tion, can be evaluated objectively, without referring to subjective intent.

Basically, the *Ragin* standard says that, in an advertising case, if it *looks* like discrimination, it *is* discrimination. In ordinary disparate treatment cases, however, courts seem to want to ask if things *really* are as they appear. The notion that in real life, as opposed to pictures, there is a truth separate from and somehow *behind* appearance is itself open to question. The important question here, though, is whether the legal determination of true discrimination in real life necessarily depends on the defendant's subjective, conscious intent. The *Ragin* court held that there is no necessary equivalence between the meaning of a choice and the conscious thoughts of the chooser. Rather, those thoughts, even if they were perfectly transparent, would not exhaust the *meaning* of the choice for an ordinary reader.

It was the necessary element of meaning common to all individual discriminatory conduct that created problems for a negligence analysis; it is this same meaningful aspect of a challenged action that can be analyzed as a kind of expressive message. The *Ragin* case shows that existing discrimination law doctrine can accommodate an objective standard of discriminatory meaning. If a person can express an unconscious discriminatory attitude by excluding blacks from an ad that reasonable readers then would see as racially biased, surely she can express that same sort of unconscious prejudice in a choice to exclude a black tenant from a building.¹¹²

C. *The Benefits of the Ragin Standard*

The *Ragin* standard responds to the problem of defining discriminatory injury without subjective intent. Unlike a negligence standard, however, the objective standard in *Ragin* focuses attention on the defining component of racial meaning

¹¹² The fact that an advertising image is fixed, of course, means that at one level what the image "says" will be easier to prove than what a defendant meant by a disputed action. In the latter case, e.g., there may be factual disputes about the words or tone of voice a defendant used. But the ultimate issue of whether the defendant's actions should be interpreted as discriminatory, based on the available evidence, is no less applicable to a real life situation than to an advertising image.

that is also provided by a subjective intent requirement. In the context of discriminatory treatment cases, a standard adapted from *Ragin* could be characterized as an objective standard of inferred intent.¹¹³ Like a negligence standard of care, an inferred intent standard for discrimination focusses on societal expectations, rather than on individual malice. The expectation, however, is not only that some "reasonable" effort will be made to prevent unthinking racism from causing harm. Rather, inferred intent would assign legal responsibility for every identified instance of unthinking discrimination. Moreover, the inferred intent standard's emphasis on an objective social expectation preserves a concept of racism as a widespread tendency. The question is, could such a standard fit within a disparate treatment action as currently conceived? As it turns out, the procedural structure used in disparate treatment actions not only could accommodate such a standard, it may already assign liability on the basis of an implicit inferred intent standard in certain cases.

IV. ASSIGNING LIABILITY FOR UNCONSCIOUS RACIAL STEREOTYPES IN DISPARATE TREATMENT CASES

The indirect proof structure used in disparate treatment cases is often explained as a way to unmask defendants' hidden racial bias. What is less frequently discussed is the possibility that the prejudice revealed through this process may have been hidden from the defendant herself. Under the three-step procedural structure of a disparate treatment claim, once a plaintiff proves a *prima facie* case—that is, proves that he is a member of a protected class and is qualified for an available job or housing opportunity for which he was rejected—the evidentiary burden shifts to the defendant to produce an alternative, legitimate reason for the plaintiff's rejection.¹¹⁴ The plaintiff then has a chance to prove that the defendant's expla-

¹¹³ The term "inferred intent" is sometimes used in other areas of the law, including cases involving threats on the president's life, fireworks, and child abuse. See, e.g., *United States v. Mitchell*, 812 F.2d 1250, 1256 (1987) (stating that "the Ninth Circuit has adopted an objective intent standard for interpreting the requirement that a threat be made 'knowingly and willfully.'").

¹¹⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

nation is false.¹¹⁵ The plaintiff's attack on the defendant's explanation is often referred to as an attempt to prove "pretext."¹¹⁶ In practice, though, discrediting the proffered reason for the action does not necessarily reveal conscious discrimination.

The term "pretext" connotes deliberate deception on the part of the defendant, which in turn suggests concealment of a conscious discriminatory intent. The Supreme Court initially described this step as an employee's "opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were a cover-up for a racially discriminatory decision."¹¹⁷ Disproving the defendant's proffered explanation, however, does not necessarily prove that the defendant was deliberately concealing *conscious* racial distinctions. The defendant's explanation will also be false if it was used to rationalize an unthinking application of a racial stereotype. It is quite possible that the "pretext" with which the defendant "covered up" race prejudice obscured her own perception of prejudice as well. Thus, if disparate treatment plaintiffs can prove discrimination simply by disproving defendants' explanations for the challenged actions, discrimination based on the unconscious use of racial stereotypes can trigger liability unless factfinders were explicitly admonished to immunize this type of discrimination. The fact that an additional, explicit limitation would be necessary to prevent assigning liability shows that a narrow, subjective definition of intent is not integral to disparate treatment law as it is practiced today. The burden-shifting structure, even as limited by the Court's recent decision in *St. Mary's Honor Center v. Hicks*,¹¹⁸ logically accommodates the inferred intent approach that can be used to encompass the unconscious application of racial stereotypes.

The burden shift in disparate treatment cases parallels a classic tort doctrine, *res ipsa loquitur*. In a *res ipsa* case, a plaintiff makes use of a presumption of negligence if no direct

¹¹⁵ *Id.*

¹¹⁶ See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (plaintiff must have a chance to prove "that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.>").

¹¹⁷ *McDonnell Douglas*, 411 U.S. at 805.

¹¹⁸ 113 S. Ct. 2742 (1993).

evidence of negligence is available. *Res ipsa* is needed when there is no direct evidence of what caused the harm, for example, when a plane mysteriously falls from the sky and much of the wreckage is lost at sea.¹¹⁹ A *res ipsa* inference is *only* justified, however, if planes rarely fall from the sky unless someone was negligent.¹²⁰ It must be true that under the circumstances, more probably than not the accident was caused by *some kind of* negligence, though exactly what happened may never be known.¹²¹

Like a *res ipsa* inference, the burden shift in a disparate treatment case can be seen as a different way to prove an old standard of liability—in the *res ipsa* case, negligence, in the disparate treatment case, subjective intent. The burden shift may also be seen, though, as a way to shift the standard of what is to be proved. Because it allows liability to attach for the *lack of* an explanation, reasons other than the conventional liability standard may actually be behind the action. Thus, the doctrine of *res ipsa* in tort cases involving consumers injured by mass-manufactured products functioned as a bridge from traditional negligence liability to strict liability for manufacturing defects.¹²² Eventually the allowance of indirect proof for *res ipsa* cases was recognized as a new doctrine of liability for injury due to defect.¹²³ I am advocating an analogous move in the area of individual discrimination law. The fact that the burden shift in disparate treatment cases can allow liability to attach without proving subjective intent should be openly acknowledged as a doctrine of liability for unconscious discrimination.

¹¹⁹ *Cox v. Northwest Airlines*, 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968).

¹²⁰ KEETON, ET AL., *supra* note 9 § 39, at 244-70.

¹²¹ KEETON, ET AL., *supra* note 9 § 39, at 248.

¹²² See JAMES A. HENDERSON & AARON D. TWERSKI, *PRODUCTS LIABILITY*, 11-17 (2d ed. 1992).

¹²³ *Escola v. Coca-Cola Bottling Co.*, 24 Cal.2d 453, 463 (1944) (Traynor, J., concurring) ("In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability.").

A. *Tightening the Effect of the Burden Shift: St. Mary's Honor Center v. Hicks*

The 1993 Supreme Court decision in *St. Mary's Honor Center v. Hicks* held that proving that a defendant's explanation is false does not necessarily mandate a judgement for plaintiff.¹²⁴ Most commentators have focused on the way in which *Hicks* restricted liability by overturning a majority rule among the federal circuit courts that found discrimination as a matter of law whenever a plaintiff disproved the defendant's counter explanation.¹²⁵ It is equally important, however, to notice what the holding of *Hicks* leaves intact. In fact, *Hicks* reaffirmed that a finding of intentional discrimination may be based on the rejection of a defendant's explanation for the challenged action, with no additional evidence of discrimination.¹²⁶ Moreover, *Hicks* created a more equitable basis for an explicit shift to an objective inferred intent standard. The majority in *Hicks* clarified that the procedural structure in disparate treatment shifts only the burden of production to the defendant, not the burden of proof.¹²⁷ Thus, the *Hicks* decision ensures that whatever standard of discriminatory intent is applied, plaintiffs will have to rigorously prove that standard in order to attach liability.

Finally, an examination of the Court's reasoning in *Hicks* shows that an inferred intent standard is not only needed to assign liability for unthinking discrimination, but also to preserve the integrity of all disparate treatment actions as they now proceed. Without the express adoption of an inferred intent standard that includes the unthinking use of stereotypes, the initial presumption of disparate treatment that triggers the burden shift may not be justified. That presumption is based

¹²⁴ 113 S. Ct. 2742 (1993).

¹²⁵ See, e.g., Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995); Matthew D. O'Leary, *St. Mary's v. Hicks: The Supreme Court Restricts the Indirect Method of Proof in Title VII Claims*, 13 ST. LOUIS U. PUB. L. REV. 821 (1994).

¹²⁶ *Hicks*, 113 S. Ct. at 2749. In his dissent, however, Justice Souter expresses concern that the majority opinion may be read to mean that disproving the explanation alone is never sufficient to prove discrimination. *Id.* at 2762 (Souter, J., dissenting).

¹²⁷ *Id.* at 2747.

on the likelihood that, once plaintiff proves a prima facie case, discrimination explains the challenged action. Unless unthinking prejudice counts as discrimination, this may not be so. Thus, adopting an inferred intent standard is critical to preserving disparate treatment plaintiffs' opportunity to prove discrimination—conscious and unconscious—through the burden-shifting proof process.

1. The Facts and Lower Court Decisions in *Hicks*

Melvin Hicks, an African-American man, worked at St. Mary's Honor Center, a halfway house managed by the Missouri Department of Corrections and Human Resources.¹²⁸ In 1983, a state investigation found that St. Mary's was poorly run, and in January 1984, Hicks's supervisors were replaced.¹²⁹ Up until that time, Hicks, who had held a management position as a shift commander, had a satisfactory employment record with no disciplinary actions. In the following six months, however, he was repeatedly disciplined for various infractions, demoted, and finally fired.¹³⁰

Hicks filed a disparate treatment suit and made out his prima facie case by showing that he was black and qualified for the position he had lost, and that the position had remained open and finally been filled by a white man.¹³¹ St. Mary's explained that Hicks had been fired not because of race but on account of his accumulation of a number of serious violations of institutional rules.¹³² In response, however, Hicks was able to show that similar and even more serious violations by coworkers had been disregarded or treated more leniently and that he had been disciplined as a supervisor for his subordinates' infractions while other supervisors had not.¹³³

The district court found that Hicks had proven that St. Mary's proffered explanations of their actions were false.¹³⁴

¹²⁸ *Id.* at 2746.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Hicks v. St. Mary's Honor Center*, 756 F. Supp. 1244, 1249-1250 (E.D. Mo. 1991).

¹³² *Id.* at 1250.

¹³³ *Id.*

¹³⁴ *Id.* The court pointed out that Hicks "was mysteriously the only person

The court went on to say, however, that even though Hicks had "proved pretext" and "the existence of a crusade to terminate him," he had not proved "that the crusade was racially rather than personally motivated."¹³⁵ Ultimately the district court said that Hicks had failed to prove "that his unfair treatment was motivated by his race" and entered judgment for St. Mary's.¹³⁶

The Eighth Circuit reversed, noting that, as the district court itself found, St. Mary's "simply never stated that personal motivation was a reason for their actions or offered evidence to substantiate such a claim."¹³⁷ Instead, St. Mary's had "articulated only two legitimate, non-discriminatory reasons for their actions (the severity and accumulation of Hicks's disciplinary violations), and both were discredited by Hicks as pretextual."¹³⁸ The circuit court concluded that disparate treatment plaintiffs "may succeed by proving pretext. The district court found that [Hicks] had done so. [He was] therefore entitled to recover."¹³⁹

2. The Supreme Court Decision in *Hicks*

In a five-four decision authored by Justice Scalia, the Supreme Court reversed and remanded, holding that Hicks was not entitled to a judgment of discrimination just because he had disproved St. Mary's explanation for his firing.¹⁴⁰ Justice Scalia maintained that finding discrimination as a matter of

disciplined for violations actually committed by his subordinates," and that despite St. Mary's claim that he was disciplined because he was the shift commander in charge when the violations occurred, "such a policy only applied to violations which occurred on plaintiff's shift." *Id.* In short, Hicks's violations were neither severe enough nor numerous enough to warrant his dismissal.

¹³⁵ *Hicks*, 756 F. Supp. at 1251-52.

¹³⁶ *Id.* at 1252.

¹³⁷ *Hicks v. St. Mary's Honor Center*, 970 F.2d 487, 492 (8th Cir. 1992).

¹³⁸ *Id.* The circuit court held that under the burden-shifting structure, since all of the defendant's proffered reasons were discredited, the defendant was in a position of having offered no legitimate reason for its actions. Because Hicks had "proven by a preponderance of the evidence that all the defendant's proffered non-discriminatory reasons are not true reasons" he had satisfied his ultimate burden of proof. The appellate court found that the district court's demand that Hicks "additionally prove by direct evidence or inference that the treatment was motivated by race" was "contrary to the law." *Id.* at 493.

¹³⁹ *Id.*

¹⁴⁰ *Hicks*, 113 S. Ct. at 2742.

law merely because Hicks had discredited St. Mary's proffered explanation would shift, the burden of *persuasion* improperly to the defendants.¹⁴¹ Previous cases had made clear that though disparate treatment defendants must *produce* an explanation to rebut the initial inference of discrimination, plaintiffs bear the burden of persuasion throughout the case.¹⁴²

In dissent, Justice Souter raised the possibility that Justice Scalia's opinion in *Hicks* might be read to hold that proof of pretext can never be sufficient to support a judgment for a disparate treatment plaintiff without some additional direct proof of discrimination.¹⁴³ In his majority opinion, however, Justice Scalia insisted that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," and that discrediting the defendant's explanation "is enough at law to sustain a finding of discrimination."¹⁴⁴ Thus, the majority in *Hicks* explicitly held that after a defendant's explanation for a challenged action has been discredited the jury may find discrimination with no additional evidence. *Hicks* said only that a plaintiff who discredits a defendant's explanation is not *necessarily* entitled to a judgment of discrimination as a matter of law.¹⁴⁵

The *Hicks* decision is generally seen as narrowing the basis for finding defendants liable for disparate treatment. Nevertheless, by explicitly affirming that factfinders have the option to find discrimination based on nothing more than a *prima facie* case and a discredited employer explanation, the Court left open the possibility of liability based on unconscious racial stereotypes. It is important to see that the district court's apparently narrow subjective standard of racist intent

¹⁴¹ *Id.* at 2749-50.

¹⁴² Quoting from the Court's decision in *Burdine*, Justice Scalia said that "to rebut the presumption [of discrimination] 'the defendant need not persuade the court that it was actually motivated by the proffered reasons.' The presumption having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture." *Id.* at 2749.

¹⁴³ *Id.* at 2761 (Souter, J. dissenting).

¹⁴⁴ *Id.* at 2749 & n.4.

¹⁴⁵ Justice Scalia's opinion could alternatively be read to reinterpret the notion of "pretext" itself as a two-pronged test that requires both proof that the employer's explanation is false *and* proof that the plaintiff's assertion of discrimination is correct. Of course this procedure would just reinscribe the need for direct proof of discrimination back into a disparate treatment case under the heading of pretext.

is not necessarily required by the Supreme Court's decision in *Hicks*. Indeed, Justice Scalia's opinion never directly addressed the issue of the intent standard and the effect of the burden shift upon it.

As the finder of fact, the district judge expressed doubts that disproving St. Mary's explanation meant that race discrimination was necessarily the most likely cause of Hicks's firing. The court mentioned that black subordinates of Hicks were not disciplined for their part in the episodes that led up to Hicks's firing and the fact that blacks sat on the disciplinary committee that voted to fire him.¹⁴⁶ In the district judge's view, these facts weighed against a finding that Hicks had been fired because of his race.¹⁴⁷ Instead, the court suggested that "personal" reasons were a more likely explanation than racial prejudice.¹⁴⁸ As Justice Souter pointed out, however, not only did St. Mary's fail to introduce specific evidence of personal animus toward Hicks, the supervisor whom the district judge suggested was responsible for a "crusade to terminate" Hicks denied that there were any "personal difficulties" between them.¹⁴⁹ It seems quite possible that other factfinders might have viewed the "personal" friction between Hicks and his superiors as at least partly based on race, though perhaps not at the level of conscious animus. They might then have found that Hicks had proved discrimination. Nothing in the Supreme Court's decision in *Hicks* would preclude this outcome.

The district judge, however, apparently saw the question to be decided as whether Hicks had been the victim of deliberate racial animus or instead had been forced out of his job because of personal conflicts that had nothing to do with race.¹⁵⁰ Lacking a legal concept of unthinking discrimination, and forced to choose between calling the defendants' behavior illegal overt racism or legal personal hostility, the court chose the latter. With growing recognition of the prevalence of dis-

¹⁴⁶ *Hicks*, 756 F. Supp. at 1252.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Hicks*, 113 S. Ct at 2766.

¹⁵⁰ *Hicks*, 756 F.Supp at 1252 (stating that "although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated").

crimination based on unconscious racial stereotypes, however, the district court's dichotomy appears unrealistic. The rigid distinction between conscious racial hostility and completely colorblind personal dislike misconstrues the racial barriers to employment that Title VII is meant to dismantle. What is more, this "black-and-white" vision of discrimination does not match the picture of discrimination liability that is actually created through current disparate treatment procedure.

B. *The Reason for the Burden Shift*

It is generally agreed that the burden shifting proof structure used in disparate treatment cases is necessary because discrimination is uniquely hard to prove, but why discrimination should be so "elusive" is not entirely clear.¹⁵¹ The burden shift has sometimes been explained as a way to allow plaintiffs to prove subjective intent indirectly. As Justice Rehnquist sardonically remarked, "there will seldom be 'eyewitness' testimony as to the employer's mental processes."¹⁵² In this view, requiring defendants to produce legitimate reasons for their actions simply circumvents the evidentiary problem posed by the invisibility of subjective intent. Some discussions of the burden-shifting proof structure, however, downplay the role of subjective intent and focus instead on the discriminatory meaning of a challenged action as it appears. The Court has explained the burden-shifting structure as a process of elimination:

[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the adverse employment action] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based [its] decision on an impermissible consideration such as race.¹⁵³

¹⁵¹ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) ("the creation of a presumption by the establishment of a *prima facie* case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.").

¹⁵² *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

¹⁵³ *Furnco Construction v. Waters*, 438 U.S. 567, 577 (1978).

Note that in this description, the discriminatory "reason" that appears is never characterized as involving subjective intent.

The notion that the burden shift is necessary because subjective discriminatory intent is often disguised seems questionable. It is hard to see why conscious intent to discriminate is more likely to be hidden and difficult to discern than any other sort of blameworthy, legally punishable intent. Murderers, for example, do not typically announce their intentions, because, like conscious racists, they recognize that such declarations would bring punishment. What sets discrimination apart is not that it is frequently kept secret. There must be some other reason, then, why discrimination plaintiffs are allowed prove their case by disproving defendants' explanations. I propose that discrimination's character as a meaningful, but sometimes subjectively unintended, expression of prejudice is such a distinguishing feature.

The burden shift reflects judicial acknowledgement of the elusive nature of discrimination. That elusiveness flows from the very fact that discrimination is not always subjectively purposeful. If it is difficult to bring evidence of conscious intent that an actor wishes to hide, it is much harder to prove directly a motivation that was hidden from the actor herself. The use of the burden shift to uncover the reasons for a decision can best be explained by the fact that a decision's discriminatory basis may not have been clear to the decisionmaker.

C. The Procedural Imposition of Disparate Treatment Liability for Unthinking Discrimination

Not only is the original need for disparate treatment's proof structure best explained by discrimination's sometimes unconscious nature, the justification for retaining the burden shift may depend on recognizing the unconscious application of racial stereotypes as discrimination. The disparate treatment *prima facie* case "is simply proof of action taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on

impermissible considerations.”¹⁵⁴ When a qualified person is rejected for an available job or denied an apartment that is later given to a person of another race, however, it may not be true that the decision was most likely based on *conscious* racial animus. It may be just as likely that the action was the result of applying unconscious stereotypes. Thus, the failure to acknowledge unconscious discrimination as a basis for disparate treatment undermines the burden-shifting structure that currently facilitates proof of all kinds of discriminatory treatment.

As long as acting on unconscious stereotypes does not count as discrimination, this behavior must weigh against conscious discrimination in the balance of probable explanations for the challenged actions.¹⁵⁵ Of course no one would claim that the unconscious application of racial stereotypes is a “legitimate” explanation for an employment or housing decision. But if that explanation can neither be ruled out by the *prima facie* case nor ruled in under a subjective standard of intentional discrimination, then it disrupts the analysis and discredits its claim to accurately reflect experience. Alternatively, as long as the law fails to recognize this kind of behavior as discrimination such conduct can be freely characterized in other ways that appear legitimate, or at least legal. For instance, such behavior may be seen as motivated by colorblind personal dislike. This view that vague personal reasons may explain rejections of minority job or housing applicants then casts further doubt on the validity of the original presumption that, more likely than not, purposeful discrimination was involved.

D. *The Inferred Intent Standard Implicit in the Burden Shift Should Be Made Explicit in Substantive Discrimination Law*

Looking more closely at how the shifted proof structure works reveals that it leads to an implicit inferred intent standard that encompasses unconscious as well as conscious dis-

¹⁵⁴ *Furnco*, 438 U.S. at 579-80.

¹⁵⁵ Without discussion, the majority in *Hicks* suggested that the current disparate treatment *prima facie* case was generally unpersuasive, referring to its “minimal requirements.” *Hicks*, 113 S. Ct. at 2747.

crimination. There are three ways for a disparate treatment plaintiff to discredit a defendant's proffered explanation for a challenged action.¹⁵⁶ The plaintiff can show that defendant's explanation is wrong factually, i.e., plaintiff never did what defendant now says she did; show that others who exhibited the behavior defendant now claims explained the action were treated more leniently than plaintiff; or provide additional evidence that makes the defendant's reliance on the proffered explanation incredible, e.g., that plaintiff received consistently glowing evaluations that clearly outweigh the relatively minor infraction the defendant now offers as the reason for the plaintiff's dismissal.¹⁵⁷ None of these three methods of discrediting a defendant's explanation necessarily entails proof that the defendant was lying when he proffered the explanation. Instead, in each case, proving that the explanation is false could also mean that the defendant himself believed the proffered reason but was actually motivated in part by unconscious racial prejudice.

In the first type of situation, a defendant might, for example, assert that plaintiff was fired on account of numerous incidents of tardiness and insubordination. Upon investigation, though, it may turn out that plaintiff was usually on time and that the few incidents of conflict between the plaintiff and her superiors could be ascribed not to insubordination but to the plaintiff's good faith attempt to offer her opinion of how a particular problem should be solved. The employer may have deliberately fabricated the false description to cover up a consciously racist decision. Alternatively, though, the employer may have misperceived the incidents as numerous and insubordinate because he subscribes to stereotypes that characterize the plaintiff's racial group as unreliable and aggressive.

In the second type of case, it is even easier to see that an employer may simply fail to recognize that her actions are motivated by unconscious racial stereotypes. The employer may, for instance, treat identical rules infractions more harshly in black employees than in whites. Again, such disparate treatment might well be the result of unconsciously deployed

¹⁵⁶ Davis, *supra* note 125 at 731-32 (citing *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)).

¹⁵⁷ *Id.*

racial stereotypes. Even after the fact, the employer may not recognize that her actions were based on prejudice. It would still be accurate, however, to say that her real reason for acting was discriminatory.

Finally, in the third kind of situation in which additional contradictory evidence surfaces, employers may not realize that they were disposed to ignore some employees' positive attributes because of racial stereotypes. Thus, a black employee's fine work evaluations may be erased by relatively minor criticisms that would hardly be noticed in a white worker's record. Again the employer's proffered reason for her actions could be discredited without proving either a deliberate coverup or conscious racial prejudice.

In each of these cases, the actual effect of the burden shift challenges the abstract notion that conscious discrimination is the only appropriate basis for liability in disparate treatment actions. Why should the defendant's liability in any of these examples hinge on whether or not she was aware of her prejudiced motivations at the time she acted? In all of these examples proving whether or not a defendant was conscious of the discriminatory reason for her challenged action becomes a separate and extraneous issue. The central question is whether or not the action actually reflects some kind of racial prejudice.

The courts should explicitly adopt an objective standard of inferred intent for disparate treatment that embraces the procedural effect of the burden shift. Factfinders should be told that the logical effect of the indirect method of proof is a legally valid one: if they find that defendant's proffered reason was false and that the real reason for the challenged action was either deliberately racist or unconsciously influenced by negative racial stereotypes, they may find for the plaintiff. If, however, they believe that though defendant's explanation of the action was false, race really played no part in the decision, they must find for the defendant.¹⁵⁸

¹⁵⁸ This is the holding of *Hicks*. Justice Scalia offers as an example a situation in which a plaintiff is turned down for a job at a firm that hires a disproportionately high number of employees from plaintiff's minority group and the manager who rejected plaintiff was a member of that minority—and is now unavailable to testify. In such a case, if the employer's proffered explanation for the rejection was proven false, but there was no further evidence of discrimination it might indeed be reasonable for a jury to find that plaintiff had not proven his

The need for an explicit standard of inferred intent is all the more urgent, because without that concept, the existing burden-shifting structure seems unjustified. In fact, it may not be possible to defend the indirect proof structure used in disparate treatment cases while insisting that only subjectively purposeful racial discrimination is illegal. Both the initial inference of discrimination that flows from the *prima facie* case and the final permissive inference of discrimination based on disproving the defendant's proffered explanation depend on the likelihood that illegal discrimination was involved in the challenged decision. That likelihood is called into question when discrimination is defined to exclude all unthinking prejudice. The shift to an explicit standard of inferred intent that would cover the unconscious application of racial stereotypes may thus be needed not merely to broaden disparate treatment liability but to maintain it.

CONCLUSION

The unthinking use of racial stereotypes continues to be widespread and is increasingly recognized as a kind of discrimination. Because for a majority of white Americans overt racial prejudice is no longer socially acceptable, whites rarely acknowledge, even to ourselves, the extent to which racial stereotypes may influence our "personal" feelings about people of other races. At the same time, by emphasizing purposeful subjective intent, discrimination law continues to favor the person who is least conscious of the play of race in her own actions. In fact, if only conscious acts of individual discrimination are illegal, the law will encourage people to remain ignorant of their own feelings and motives in dealings with people of other races. This is not a recipe for decreasing racial tensions. The prevalence of unthinking racial prejudice calls for a liability standard that will sharpen social awareness of all kinds of discrimination and assign liability when racial stereotypes form the basis of unfair housing and employment decisions. In this Note, I have tried to articulate an objective standard of inferred intent that would create liability for unthinking discrimination in disparate treatment actions under Title VII and

Title VIII.

An inferred intent standard can be conceptualized along the lines of the "ordinary reader" standard applied by the Second Circuit in *Ragin*.¹⁵⁹ The objective *Ragin* standard suggests a principled way to define individual discrimination without subjective intent through an assessment of the challenged action's meaning. Much of the prejudice that now burdens minority job and housing applicants cannot properly be called intentional in a purely subjective sense. Yet, all individual discrimination is intentional, or at least meaningful, in the message it conveys and its dependence on common social attitudes.

The inferred intent standard is more appropriate for assessing unthinking discrimination than a classic objective negligence standard would be, because inferred intent preserves the meaningful quality of individual discriminatory action that is one of its defining characteristics. Also, in keeping with Americans' disavowal of all race prejudice, the inferred intent standard would assign liability for every identified instance of discrimination. An inferred intent standard of liability is the practical result of the procedural structure already used in disparate treatment cases. Explicitly adopting the inferred intent standard would reconnect both that procedural structure and the legal doctrine of disparate treatment with the reality of how discrimination functions in the world.

Finally, the only intellectually honest way to preserve an indirect proof structure in disparate treatment law is to acknowledge that the discriminatory intent that procedural structure infers is not always conscious. The law must clarify that the burden shift in discrimination cases is not only appropriate because "clever men may easily conceal their motivations,"¹⁶⁰ but because both clever and dull defendants may discriminate without realizing what they are doing. By adopting an inferred intent standard, the law can both adapt to the changing social context in which discrimination operates and

¹⁵⁹ 923 F.2d 995.

¹⁶⁰ *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974).

preserve an important procedural structure in discrimination law that has worked well for over twenty years.

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