

The Survival of the Intentionality Doctrine in Employment Law: To Be or Not to Be?

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I. INTRODUCTION.....	700
II. CHALLENGING THE INTENTIONALITY DOCTRINE.....	701
II. THE LONG AND SHORT OF IMPLICIT BIAS.....	704
III. OLD FASHIONED STEREOTYPING AND THE INTENTIONALITY DOCTRINE: THEIR GENESIS AND SURVIVAL.....	705
A. <i>One Hundred Fifty Years and Then Some of Explicit Racial Discrimination and Stereotyping and the Intentionality Doctrine</i>	705
1. Racial Stereotyping Becomes Official	706
2. Racial Stereotyping Reinforced: The Dawning of the Intentionality Doctrine	707
IV. THE HISTORIC ROLE OF DISCRIMINATORY INTENT AND MOTIVE IN EMPLOYMENT LAW	712
A. <i>Supreme Court Endorses Intentionality Doctrine in Employment-Related Disparate Treatment Cases</i>	714
B. <i>Motive and Intent Defined</i>	724
V. IMPLICIT BIAS: NO ROOM AT THE INN	726
A. <i>Implicit Bias and the Intentionality Doctrine Cannot Co-Exist</i>	730
B. <i>The IAT and Implicit Bias Theory Strike Out</i>	732
VI. CONCLUSION.....	744

To be, or not to be, that is the question:
 Whether 'tis Nobler in the mind to suffer
 The Slings and Arrows of outrageous Fortune,
 Or to take Arms against a Sea of troubles,
 And by opposing end them?
 The undiscover'd Country, from whose bourn
 No Traveler returns, Puzzles the will,
 And makes us rather bear those ills we have,
 Than to fly to others that we know not of?¹

I. INTRODUCTION

Now, and since at least 2004, there has been an enthusiastic and committed collection of the plaintiffs' bar, supported by a group of equally zealous academicians, that advocate judicial recognition of the role of implicit bias in employment law jurisprudence. They challenge the vitality of the long-established requirement of demonstrating discriminatory intent and motive in proving an alleged violation of laws prohibiting discriminatory disparate treatment.² Supporters of the role of implicit bias in employment law contend that such recognition must be considered in fulfilling the promise of anti-discrimination law and that "legal models of decision making in the workplace should recognize and incorporate the empirical scientific understanding about the influence of unwitting bias."³

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1. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc.1.

2. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2, (2012); Eva Paterson et al., *The Id, the Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence's Vision to Mount a Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008); Beth Potier, *Making Case for Concept of 'Implicit Prejudice'*, HARVARD GAZETTE (Dec. 16, 2004) (reporting on the "cluster" of scholars joining a research project at the Radcliffe Institute for Advanced Study, that "aims to extend the boundaries of the legal definitions of discrimination" and "challenge the notion of intentionality in the law").

3. Jocelyn D. Larkin, *Stereotypes and Decisionmaking: Reconciling Discrimination Law with Science*, 192 CPER J. 15, 22 (2008); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164-65 (1995); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345 (2007).

They argue that there is a “need to develop legal . . . paradigms that acknowledge the modern face of racism—both its overt manifestations . . . and also its less visible forms of prejudice and discrimination, including subconscious bias.”⁴ Supporters contend that the “existing legal framework recognizes only intentional acts of discrimination . . . [and] requiring ‘proof of intent’ is both outdated and largely ineffective in supporting our efforts to advance racial equality and remedy the continuing laws caused by racism.”⁵ Their objective is nothing short of a radical reconstruction of American employment law through judicial activism.

II. CHALLENGING THE INTENTIONALITY DOCTRINE

Professors Gregory Mitchell and Phillip Tetlock commented on the challenge to the intentionality doctrine.⁶ They wrote:

A group of prominent law professors and social psychologists recently joined forces “to use the energy generated by research on unconscious forms of prejudice to understand and challenge the notion of intentionality in the law.” The first target is anti-discrimination law’s emphasis on intentional discrimination, which these scholars claim “runs afoul of the psychologists’ research on implicit prejudice,” but the larger target is, “the role of intent in all bodies of law.”⁷

Continuing, the authors posit that:

4. Paterson et al., *supra* note 2, at 1179.

5. *Id.* at 1176.

6. Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). Professors Mitchell and Tetlock are nationally recognized scholars with expertise in the analysis of implicit bias and its validity and reliability as a predictor of discriminatory conduct. They have separately, as well as collaboratively, authored a number of scholarly articles and lectured on the topic of implicit bias. Each has also served as testimonial or non-testimonial witnesses in cases involving issues related to implicit bias in the context of employment discrimination. Gregory Mitchell is a professor at the University of Virginia School of Law; Phillip Tetlock is a professor of Psychology and Management at the University of Pennsylvania.

7. *Id.* at 1028 (citations omitted).

It is easy to be overwhelmed by the sheer volume of laboratory studies that implicit prejudice advocates cite, by the moral certitude with which they apply psychological generalizations to the real world, and by the impressive credentials they bring to the courtroom. But this would be a big mistake. On closer inspection, we shall discover that the scientific rhetoric accompanying legal application of research is . . . more honorific than descriptive. . . . If “scientific” is used honorifically, it is a tautology that “scientific” equals “reliable”; but this tautology, obviously, is of no help to a judge trying to screen proffered scientific testimony.⁸

Professors Mitchell and Tetlock provide various examples of situations in which implicit bias believers suggest the theory could be useful.⁹ Those examples are characterized by the authors as “but a small part of an ambitious project to use implicit prejudice to remake the law.”¹⁰

This article confronts the challenge to abolishing the intentionality doctrine and explains why it should not succeed. As an alternative to discarding the intentionality doctrine, I suggest that, instead of grappling with the ethereal concept of implicit bias, which has yet to enjoy significant judicial approval in the context of employment law, actual stereotyping remains an effective and fully accepted tool when

8. *Id.* at 1029–30 (citation omitted).

9. *Id.* at 1026–27. Replacing the intentionality doctrine with the implicit bias theory would impose liability based upon implicit or unconscious bias. *See id.* Given the alleged strong automatic preference for certain social groups representing population (white males) rather than observable, measurable conduct, this would condemn employers to blanket liability despite egalitarian attitude accompanied by the absence of discriminatory intent in their employment-related selection decisions. *See id.* Adopting such a theory of liability would virtually amount to liability *per se* and result in the rise of a negligence standard for finding liability in connection with employment selection decisions. That result would be the precise opposite of selection decisions based upon individual biases because of race, religion, sex, national origin, or age and disability. *See* 42 U.S.C. 2000e-2(a) (2012). Displacing or replacing the intentionality doctrine would fail to advance the goals of workplace equality of opportunity and fair dealing. Instead, it would vitiate decades of judicial precedent, as well as statutory mandates that foster the appearance of mind readers or fortune tellers as experts in employment discrimination cases. In short, it would result in unintended consequences of wholesale disarray in the law of employment discrimination.

10. *Id.* at 1027–28.

used to demonstrate unlawful employment discrimination, doing so based upon an enduring body of established judicial approval. In making my case, I trace the judicial origins of the intentionality doctrine as applied to claims of unlawful discrimination and its lapdog, racial stereotyping in America. I also trace the historic sources of racial stereotypic thinking in America, its persistence, and its impact upon our nation's legislative and jurisprudential history in its continuing effort to eradicate unlawful discrimination and deliver on our Federal Constitution's promise of equality of employment opportunity for its citizens. I also discuss the evolution and importance of requiring proof of intentional discrimination in today's employment discrimination jurisprudence.

The concept of implicit bias should not displace the requirement of showing intentional bias in employment law. Our courtrooms, judges, juries, lawyers, and witnesses will be best served by addressing the pernicious effect of explicit, discriminatory, stereotypical conduct, rather than spending scarce resources discussing the esoteric and intangible concept of implicit bias. This article posits that the intentionality doctrine has effectively served for decades to attack and reduce discrimination in employment, while more equitably allocating employment opportunities for members of protected classes. It concludes by discussing the impracticality of replacing the intentionality doctrine with implicit bias or "unintentional bias" as it is sometimes called. In doing so, I demonstrate why the concept of implicit bias should not displace the long-established, well understood, requirement of demonstrating intentional bias in showing discriminatory treatment.

Challenging the intentionality doctrine means nothing short of attempting to turn decades of judicially embraced employment law on its head and plunging the parties to employment disputes into the fog of the unconscious, inaccessible, and immeasurable recesses of the human mind. To dispose of the intentionality doctrine and replace it with the theory of implicit bias would plunge the courts into an "undiscovered country from whose bourn no traveler returns" or hi-jack employment law and send it on an uncharted voyage into the unknown, to paraphrase Shakespeare's *Hamlet*.¹¹

11. SHAKESPEARE, *supra* note 1, at act 3, sc. 1; see also Maurice Wexler et al., *Implicit Bias Evidence and Employment Law: A Voyage into the Unknown*, BLOOMBERG LAW (July 8, 2013), <https://www.bna.com/implicit-bias-evidence-and-employment-law-a-voyage-into-the-unknown/>.

II. THE LONG AND SHORT OF IMPLICIT BIAS

What is implicit bias? It is described as the “new science of unconscious mental processes.”¹² The science of implicit bias suggests that “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”¹³ Proponents of implicit bias theorize that such unconscious or hidden biases can influence decisions by employers, judges, jurors, and lawyers by leading them to preferentially favor people who are more like themselves than not, thereby resulting in unlawful discriminatory decisions without the explicit intent to do so.¹⁴ Implicit biases have also been described as being “unstated and unrecognized, and operate outside conscious awareness. . . . hidden, cognitive, or automatic biases.”¹⁵ Psychologists tell us that everyone unknowingly harbors implicit attitudes that we develop in highly individualized ways.¹⁶ These attitudes include: early (even pre-verbal) experiences; affective experiences; cultural biases, such as experiences we’ve had, the people we’ve met, and the places we’ve seen—all of those things and much more form our opinions.¹⁷

Efforts to displace the intentionality doctrine in favor of a system using implicit bias depend on two principal premises, both of which are controversial. One is the claim that implicit prejudice research is both reliable science and predictive of discriminatory conduct.¹⁸ The other is the alleged universality of the preference for one’s “in group,” (those with similar traits) as compared to the “out group,” (those with dissimilar traits) as allegations based upon the aggregated,

12. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006). Anthony G. Greenwald, Ph.D., is a professor in the University of Washington Department of Psychology; Linda Hamilton Krieger is a professor at the University of Hawaii William S. Richardson School of Law.

13. *Id.*

14. *See id.* at 950–52.

15. *See* Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 152 (2010).

16. *See, e.g.*, Wexler et al., *supra* note 11.

17. *See id.*

18. *See, e.g.*, MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013) (discussing and analyzing the laboratory tests behind implicit bias).

undifferentiated product of non-random, self-selected individuals taking the Implicit Association Test (“IAT”).¹⁹ As an example of the latter, Professor Greenwald, expressed the opinion that, “White preference is pervasive in American society—almost 75 percent of those who take the Race IAT on the Internet or in laboratory studies reveal automatic White preference.”²⁰ In a later deposition, he testified that: “approximately 75 percent of all Whites who have been studied show what we call an automatic preference for White relative to Black.”²¹

III. OLD FASHIONED STEREOTYPING AND THE INTENTIONALITY DOCTRINE: THEIR GENESIS AND SURVIVAL

The history of racial stereotyping in American society is reflected in the history of our jurisprudence.²² It dates back to the grim days of slavery, prior to the American Civil War. It was from the ashes of that tragic period that the role of intentionality in fighting unlawful stereotypical discrimination arose, as illustrated by a series of opinions of the U.S. Supreme Court, extending from 1857 to today.

A. One Hundred Fifty Years and Then Some of Explicit Racial

19. See, e.g., *id.* at 41–52 (discussing use and implications of the Race IAT test). IAT refers to the Implicit Association Test invented by Professor Greenwald. See *id.* at 40–41. The Race IAT purports to measure the preferences of those who take the IAT by the speed at which test takers react to images of whites and blacks as each image is respectively paired with good and/or bad words. See *id.* at 41–42. The basic assumption underlying the IAT and similar reaction-time tests is that “mentally simple tasks take a (relatively) short time to complete, whereas mentally difficult tasks take a (relatively) long time to complete.” Jerry Kang & Kristin Lane, *Seeing Through Color Blindness: Implicit Bias and the Law*, 58 UCLA L. Rev. 465, 471 (2010).

20. BANAJI & GREENWALD, *supra* note 18, at 47.

21. Deposition of Anthony Greenwald at 51, *Jones v. YMCA*, 48 F. Supp. 3d 1054 (N.D. Ill. 2014) (transcript on file with author); see also *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017).

22. See, e.g., Larkin, *supra* note 3, at 15–16 (“The law has long recognized that gender and racial stereotyping in the workplace can constitute illegal discrimination. . . . Stereotypes are beliefs about a group’s characteristics that are assumed to also characterize the individual members of the group. Individuals are categorized into demographic groups (e.g. gender, age, class, race), and our stereotypes about a group’s characteristics influence how we perceive the individual.”).

Discrimination and Stereotyping and the Intentionality Doctrine

1. Racial Stereotyping Becomes Official

The year was 1857. Abraham Lincoln was yet to be elected. Slavery was an established institution in a number of states—its status the subject of national debate. The Supreme Court issued its opinion in *Scott v. Sandford*, holding that American descendants of slaves were not citizens of the United States and therefore could not bring suit in federal court.²³ Dred Scott was a slave who had lived in states and territories where slavery was illegal.²⁴ He sued to gain freedom for himself, his wife, and his children.²⁵ According to the Supreme Court, Dred Scott, who was born a slave, was considered “private property.”²⁶ Consequently, the rights and immunities guaranteed to citizens did not apply to him or others like him.²⁷ The Court reasoned that, at the time the Constitution was adopted in 1788, those who were slaves or their descendants were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race.”²⁸

Dred Scott became a standard bearer for officially recognized racial stereotyping that persisted long after the conclusion of the American Civil War. Then, in 1865, the Thirteenth Amendment to the Constitution of the United States was ratified, abolishing slavery in the United States.²⁹ It provides: “Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.”³⁰ Although the Thirteenth

23. *Scott v. Sandford (Dred Scott)*, 60 U.S. 393 (1857).

24. *Id.* at 394.

25. *Id.* at 400.

26. *Id.* at 395–96 (“The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the Territory in question to reside, is an exercise of authority over *private property* which is not warranted by the Constitution—and the removal of the plaintiff, by his owner, to that Territory, gave him no title to freedom.” (emphasis added)).

27. *See id.*

28. *Id.* at 404–05.

29. U.S. CONST. amend. XIII.

30. *Id.*

Amendment represented a significant step towards equality, it did little to abolish racial discrimination.

2. Racial Stereotyping Reinforced: The Dawning of the Intentionality Doctrine

In 1868, the Fourteenth Amendment was enacted in response to continuing violence against the newly-freed slaves, to enshrine the principles of the Thirteenth Amendment more securely in the Constitution, and to overrule *Dred Scott*.³¹ When claiming a violation of the Fourteenth Amendment, the challenging party must show a racially discriminatory purpose, motive, or intent in order to prevail.³² That requisite is predicated on the text of Section One of the Fourteenth Amendment, which provides that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³³

Following the adoption of the Fourteenth Amendment, early opinions of courts concerning application of the Fourteenth Amendment set the stage for cases arising out of the stereotypical discriminatory attitude toward former slaves widely held following the Civil War. One of the earliest of such cases is *Strauder v. West Virginia*.³⁴ It addressed a statute of West Virginia, born of racial stereotyping, that denied any “colored man” the “right and privilege of participating . . . as [a] juror[] because of [his] color.”³⁵ The plaintiff in error alleged that “by virtue of the laws of the State of West Virginia no colored man

31. See U.S. CONST. amend. XIV.

32. See *Akins v. Texas*, 325 U.S. 398, 403–04 (1945) (holding that a “purpose to discriminate must be present” to prove a Fourteenth Amendment Equal Protection claim regarding juries).

33. U.S. CONST. amend. XIV, § 1.

34. 100 U.S. 303 (1879).

35. *Id.* at 304.

was eligible to be a member of the grand jury or serve on a petit jury in the State[.]”³⁶ Prior to his trial, Strauder moved to quash the venire on the ground that it was unconstitutional.³⁷ The motion was denied, as were his motions challenging the array of the panel.³⁸ On writ of error to the Supreme Court, the Court referred to “a colored man,” who was indicted for murder in West Virginia and “upon trial was convicted and sentenced.”³⁹ The jury that convicted the defendant was composed only of white persons.⁴⁰ The defendant moved to discharge the jury before it was sworn in on the ground that the prohibition of any black men on the venire violated the petitioner’s right to due process under the Fourteenth Amendment, among others.⁴¹ The inclusion of the provision in the West Virginia statute prohibiting black men from serving on a jury was intentional and motivated by a discriminatory purpose stemming from racial stereotyping.⁴²

The central issue in the case was “whether, in the composition or selection of jurors by whom [the defendant] is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.”⁴³ In construing and applying the Fourteenth Amendment, the Court held that its purpose was “securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the *superior* race enjoy,” while clearly implying former slaves were members of an *inferior* race.⁴⁴

The Court observed that the true spirit and meaning of the Fourteenth Amendment could not be understood without understanding the history of the times when it was adopted and the general objectives it sought to accomplish.⁴⁵ The *Strauder* court reminds us that in 1868, when the Fourteenth Amendment was incorporated into the Constitution:

36. *Id.*

37. *Id.* at 304–05.

38. *See id.*

39. *Id.* at 304.

40. *Id.*

41. *Id.*

42. *See id.* at 310.

43. *Id.* at 305.

44. *Id.* at 309 (emphasis added).

45. *Id.* at 306.

[I]t required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such, they needed the protection which a wise government extends to those who are unable to protect themselves.⁴⁶

“Long regarded as inferior”; “a subject race”; “abject and ignorant”; “unfitted to command the respect of those who had superior intelligence”; “mere children”; “looked upon with jealousy and positive dislike”⁴⁷—these are words and phrases that in 1879 reflected a widely-held attitude toward recently freed slaves whose descendants, to this day, carry the badge of such discriminatory stereotyping. The resulting bias, which has been perpetuated, is not unconscious or implicit; it is intentional.

As *Strauder* noted:

The very fact that colored people are singled out and expressly denied by statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing individuals of the race that equal justice which the law aims to secure to all others.⁴⁸

46. *Id.*

47. *Id.*

48. *Id.* at 308.

The statute was ultimately held unconstitutional in violation of the Fourteenth Amendment.⁴⁹

Seven years after the Supreme Court's opinion in *Strauder*, black citizens were still singled out and regarded as "inferior," as illustrated by the express racial stereotyping in *Plessy v. Ferguson*.⁵⁰ In *Plessy*, Louisiana enacted a statute requiring the segregation by race of railway carriages, relying on the separate but equal doctrine.⁵¹ Plessy, who was seven-eighths white, purchased a ticket on the East Louisiana Railway, boarded the train and occupied a vacant seat in the coach set aside for white passengers.⁵² When asked to move to the car set aside for people of color, he refused.⁵³ After being forcibly ejected, he was charged with a criminal violation of state law.⁵⁴ His case came to the Supreme Court on the grounds that the Louisiana statute conflicted with the Thirteenth and Fourteenth Amendments to the Constitution.⁵⁵ Because the Louisiana statute only extended to intra-state commerce and neither denied Plessy equal protection of federal law nor abridged his privileges and immunities as a citizen of the United States, the Supreme Court endorsed the separate but equal doctrine that was eventually discarded in *Brown v. Board of Education*.⁵⁶

In 1945, the Supreme Court decided *Akins v. Texas*, in which it indorsed the intentionality doctrine.⁵⁷ Akins, "a Negro" who was sentenced to death, challenged the jury selection on the grounds that "Negroes" were deliberately excluded from the jury.⁵⁸ This claim was brought under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.⁵⁹ The

49. *Id.* at 310.

50. 163 U.S. 537 (1896).

51. *Id.* at 540–41.

52. *Id.* at 541.

53. *Id.* at 541–42.

54. *Id.* at 542.

55. *Id.*

56. *Id.* at 548 (holding that "the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of the law, nor denies him the equal protection of these laws, within the meaning of the fourteenth amendment"); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

57. 325 U.S. 398 (1945).

58. *Id.* at 399.

59. *Id.*

Court rejected Akins' claim, holding that: "A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurors of the proscribed race or by the unequal application of the law to such an extent as to show *intentional discrimination*."⁶⁰ Thus, the intentionality doctrine is endorsed by the Supreme Court—as it has been, without interruption, well into the twenty-first century.

Forty years after *Akins*, the Supreme Court decided *Batson v. Kentucky*.⁶¹ It involved a black man charged with second degree burglary facing a jury from which the prosecutor used the State's peremptory challenges to strike all four black persons on the venire, leaving the defendant with an all-white jury.⁶² The defendant's motion to remove the jury was denied.⁶³ Justice Powell, writing for the Court, held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."⁶⁴ He emphasized that it was *purposeful discrimination* that the Fourteenth Amendment prohibited, and that racially discriminatory selection procedures "must ultimately be traced to a *racially discriminatory purpose*."⁶⁵ While *Batson* represented a significant step away from perpetuating the race discrimination doctrines of *Plessy* and *Strauder*, it was also a significant step toward abolishing race discrimination in the courtroom.⁶⁶

Further, the Supreme Court's school desegregation cases hold that challenging the laws producing racially discriminatory segrega-

60. *Id.* at 403–04 (emphasis added).

61. 476 U.S. 79 (1986).

62. *Id.* at 82–83.

63. *Id.* at 83.

64. *Id.* at 86.

65. *Id.* at 93 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)) (emphasis added).

66. The *Batson* Court discussed discarding peremptory challenges but declined to do so because such challenges are an important part of the nation's system of justice, relying on trial judges to require the challenging party to prove purposeful discrimination. *See id.* at 96–97. Note that in his article *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, Judge Mark W. Bennett favors banning peremptory challenges entirely, a position he asserts is shared with Justice Marshall's concurring opinion in *Batson* and Justice Breyer's concurring opinion in *Rice v. Collins*, 546 U.S. 333, 342–44 (2006). Bennett, *supra* note 15, at 166. Thus far, their opinions have been for naught.

tion requires that the challenged discrimination be traceable to a racially discriminatory purpose, noting that an essential of *de jure* segregation is segregation resulting from intentional state action.⁶⁷ Taken together, these cases illustrate that the required showing of discriminatory intent and purpose is deeply rooted in American jurisprudence addressing patterns of state sanctioned invidious discrimination existing before the American Civil War and for far too long thereafter.

IV. THE HISTORIC ROLE OF DISCRIMINATORY INTENT AND MOTIVE IN EMPLOYMENT LAW

As previously discussed, our courts have experienced little trouble identifying evidence of unlawful stereotyping and its causal connection to discriminatory motive and intent. They are informed by more than a century of judicial opinion and personal observations. Judges recognize impermissible stereotyping when they see it, especially in the context of employment discrimination cases. Judges cannot immediately recognize hidden, or implicit bias, which is unknown, unseen, and to date, not found to be a reliable or valid vehicle for predicting a propensity for unlawful discriminatory behavior.⁶⁸

Title VII of the Civil Rights Act of 1964 (“1964 CRA”) prohibited discrimination in employment.⁶⁹ It was enacted amidst the 1960s Civil Rights Movement as a consequence of the violent episodes of intentional racial discrimination motivated by express racial stereotyping.⁷⁰ Requiring a showing of discriminatory intent and motive when

67. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007) (acknowledging that “remedying the effects of past intentional discrimination” is a justification schools use for requiring diversity); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (holding that, in order to obtain a remedy, the plaintiffs must show that the discriminatory acts of the district have been a substantial cause of segregation); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

68. See *infra* notes 235–44 and accompanying text (nothing that many sources have found that the IAT, the only currently recognized predictor of discriminatory behavior, is unreliable).

69. 42 U.S.C. § 2000 e-2 (2012).

70. The dark cloud of racial stereotyping and intentional race discrimination is illustrated by the following non-exclusive episodes, each of which is an example of the historic perpetuation of explicit stereotyping of black people and the overt intent to treat them differently because of their race. The biases of the perpetrators were neither unconscious nor hidden.

In 1955 in Money Mississippi, Emmett Till, a fourteen year-old African-American boy, was abducted, beaten, tortured beyond recognition, shot in the head, and had his body thrown into the Tallahatchie River. *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS: EXHIBITIONS, <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html>. In 1957 at Little Rock Central High, two years after *Brown v. Board of Education*, nine black students attempted to integrate Central High but were confronted by an angry mob supported by Arkansas Governor Orvill Faubus; the mob was motivated by their stereotypical attitudes. *Id.* In 1961, the Freedom Riders, a group of young civil rights activists, called boarded buses taking them into the “Deep South” to challenge Jim Crow laws. *Id.* In Anniston, Alabama, the Freedom Riders were violently attacked, and their bus was fire bombed. *Id.* In 1962, James Meredith, a black Air Force veteran, applied for admission to the University of Mississippi (“Ole Miss”). *Id.* With the complicity of the Governor of Mississippi, his application for admission was initially denied because of his race. *Id.* A federal district court issued an injunction directing the officials of Ole Miss to register him, following which, upon his arrival at campus, a violent and deadly riot broke out protesting his enrollment. *Id.* Despite the racial strife, in October 1962, Meredith became the first African-American to enroll and attend class at Old Miss. *Id.* In May 1963, Eugene “Bull” Connor, Birmingham Commissioner of Public Safety, ordered the use of fire hoses and attack dogs on children and others in an effort to end demonstrations in support of Civil Rights. *African-American Civil Rights Movement (1955–1968)*, NEW WORLD ENCYCLOPEDIA, [http://www.newworldencyclopedia.org/entry/African-American_Civil_Rights_Movement_\(1955-1968\)](http://www.newworldencyclopedia.org/entry/African-American_Civil_Rights_Movement_(1955-1968)) (last updated Nov. 2, 2016). In September 1963, the Sixteenth Avenue Baptist Church in Birmingham, Alabama was bombed as an intentional, racially motivated act of terrorism. *Id.* Four young black girls were killed and many others injured. *Id.* The bombing was fueled by racial animosity. *Id.* In 1965, Rev. Martin Luther King, Jr. led a march in Selma, Alabama, seeking the right to vote for African-Americans. *Id.* The marchers were beaten with clubs and attacked with tear gas in an effort to stop the march. *Id.* In Memphis, Tennessee, in April 1968, Rev. Martin Luther King, Jr. was assassinated while providing leadership and hope to Memphis sanitation workers, all of whom were black. *See id.* They were not only seeking economic improvement but human dignity as well. *See id.* They were victims of overt racial stereotyping that saw them working for low paying, dirty jobs, and euphemistically referred to as “Sanitation Workers.” *See id.* The sanitation workers picketed, carrying signs saying, “I am a man,” which told the story behind the strike and the ensuing strife, leading to the assassination of Dr. King on April 4, 1968. *Id.*

The foregoing are but a few of the examples of the perpetuation of racial stereotyping that was motivated and intentional racial discrimination. They reflect the attitude of many Americans toward black citizens that has continued to persist for more than one hundred and fifty years. While explicit, racially charged overt discrimination may have diminished in its frequency, evidence of the effects of such subtle discrimination can still be observed. From this, intentional discrimination can be inferred, absent a legitimate, non-discriminatory explanation for the observed conduct. *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

pursuing claims of employment discrimination is merely an extension of the intentionality doctrine approved by the Supreme Court as early as 1857, extending far beyond the enactment of the Thirteenth and Fourteenth Amendments to the Constitution in 1865 and 1868, and continuing in an unbroken series of judicial rulings construing and applying the 1964 CRA and its companion federal statutes prohibiting employment discrimination.

A. Supreme Court Endorses Intentionality Doctrine in Employment-Related Disparate Treatment Cases

The intentionality doctrine is alive and well in the law of employment discrimination. The opinions of the Supreme Court construing and analyzing the Thirteenth and Fourteenth Amendments and the protections they provided recently freed slaves from purposeful or intentional discrimination because of their race did little to eliminate the invidious and pervasive stereotyping of black citizens, which still exists today. The continuation of such racial stereotyping created obstacles to employment opportunities, voting rights, access to public accommodations, and led to the vicious public events in the 1960s. In response, Congress enacted the Civil Rights Act of 1964, including Title VII, which prohibited employment-related discrimination because of race, color, religion, sex, or national origin.⁷¹

71. 42 U.S.C. § 2000 e-2 (2012) (original version at Pub. L. No. 88-352, 78 Stat. 255). The enactment of the 1964 CRA was not easy. DONALD R. LIVINGSTON & REED L. RUSSELL, *EEOC LITIGATION AND CHARGE RESOLUTION* 5–9 (2d ed. 2014). Livingston and Russell lay out the tumultuous legislative history of 1964 CRA:

It was preceded by what has been characterized as the longest congressional debate in history—83 days, with over 500 amendments offered On February 10, 1964, the bill was brought to a vote in the House. It passed by a vote of 290 to 130, and was sent to the Senate, but with a significant addition. Shortly before passage in the House, Virginia Congressman Howard Smith, Chair of the Rules Committee and an opponent of the legislation proposed an amendment to include sex as a protected classification. The amendment passed. Some think Smith had believed his colleagues would find the concept of job equality between the sexes so ludicrous that they would reject the bill altogether. . . . In the Senate, the bill faced its most daunting hurdle; two key constituencies with major concerns about Title VII came to the fore. One group, the employer community, feared bureaucratic intrusion into its traditional freedom to hire, fire, and promote on merit. The other group, organized labor, was

Proving unlawful disparate treatment prohibited by Title VII of the Civil Rights Act of 1964 requires a showing of unlawfully motivated, intentional discrimination, as indicated by the text itself.⁷² Section 703(a) of Title VII made it an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of such individual's race or national origin.⁷³ Section 703(h) provided in part that, notwithstanding other provisions, it is not an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority or merit system . . . provided that such differences are not a result of an *intention to discriminate* . . ."⁷⁴

The 1991 Amendments to the Civil Rights Act of 1964 added the "motivating factor" language, which further supports the discriminatory intent requirement.⁷⁵ The pertinent text is: "Except as otherwise

most concerned with issues pertaining to employee seniority. Employers looked primarily to Republican Senator Everett Dirksen of Illinois, the Minority Leader of the Senate. . . . [H]is support was crucial to halt the filibuster of the southern Democrats [by insisting] on certain compromises on the scope of the Act's intrusion on employer freedom as his price for supporting cloture and permitting a Senate vote. . . . [Senator] Dirksen demanded two things: deferral by the EEOC to state and local fair employment agencies, where they existed, and, more importantly, the absence of any EEOC prosecutorial role. . . . Dirksen succeeded in amending Title VII to limit the EEOC in these two respects. To further alleviate the concerns of employers, Title VII was amended to stipulate, in what ultimately became 703(h), that it is not an unlawful practice for an employer "to give and act upon the result of any professional developed ability test" unless it was "designed, intended or used to discriminate because of race, color, religion, sex or national origin." In addition, provisions were added to alleviate the concerns of organized labor, and others, that Title VII would be interpreted to require racial balance and to overturn bona fide seniority systems. These amendments became part of what was called the "leadership compromise." . . . On July 2, 1964, President Johnson signed the bill, and it became Public Law 88-352.

Id. at 5–9.

72. 42 U.S.C. § 2000e-2 (2012).

73. *Id.* § 2000e-2(b).

74. *Id.* § 2000e-2(h) (emphasis added).

75. *Id.* § 2000e-2(m) (2012).

provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”⁷⁶ The motivating factor requirement can be found in Title VII jurisprudence law explicated by the Supreme Court in a number of its opinions.⁷⁷

In *McDonnell Douglas Corp. v. Green*, Green, who was black and a former employee of McDonnell Douglas, engaged in a “stall-in” by parking his vehicle in a road leading to Defendant’s plant.⁷⁸ He refused to move, and his car was towed by the police.⁷⁹ Thereafter, McDonnell Douglas advertised for help.⁸⁰ Green applied for an open position for which he was qualified by previous experience.⁸¹ He was denied re-employment.⁸² McDonnell Douglas asserted that Green was denied employment because of his participation in the unlawful stall-in.⁸³ Green claimed that he was denied employment because of his race (i.e., explicit, knowing racial stereotyping).⁸⁴ In its opinion, the Supreme Court developed a model of proof structured in such a way that would uncover intentional discriminatory motives for adverse employment actions involving disparate treatment claims.⁸⁵ In brief, the *McDonnell Douglas* model helped develop comparisons of similarly-

76. *Id.* (emphasis added).

77. Cases include, but are not limited to: *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Int’l Bhd. Teamsters v. U.S.*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

78. *McDonnell Douglas Corp.*, 411 U.S. at 795–96.

79. *Id.* at 795.

80. *Id.* at 796.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 802–04 (articulating the allocation of proof for disparate treatment cases: first, the plaintiff must establish a *prima facie* case of discrimination; second, the employer must then respond with a legitimate, non-discriminatory reason for its actions; third, in order to prevail, the plaintiff must establish that the employer’s articulated legitimate, non-discriminatory reason was a pretext to mask unlawful discrimination).

85. *See id.* at 802–03.

situated persons and the similarity of their treatment under the same or substantially the same circumstances.⁸⁶ Disparity of treatment revealed by the model provided an inference of intentional discrimination unless dispelled by the production of a legitimate, non-discriminatory reason.⁸⁷

International Brotherhood of Teamsters v. U.S. addressed race-based dual seniority systems existing by agreement with unions within a nationwide motor freight carrier.⁸⁸ The claim was that the freight carrier engaged in a pattern or practice of intentionally discriminating against “Negroes” and Spanish-surnamed persons who were assigned lower paying, less desirable jobs than over-the-road drivers.⁸⁹ They worked under a seniority system different than that of the over-the-road drivers, who were white.⁹⁰ The seniority systems in the applicable collective bargaining agreements required that when an employee assigned to the lower paying, less desirable jobs, (mostly “negroes” or Spanish-surnamed individuals) transferred to the position of an over-the-road driver, he or she became subject to the over-the-road seniority system and was required to take a job at the bottom of that system’s seniority list; this forced the driver to forfeit all of his or her previously accumulated company service, thereby discouraging such transfer and preserving the better paying jobs for white employees.⁹¹ The United States alleged that the dual seniority system was a result of a conscious stereotypical attitude displayed by the labor organizations representing the employees, their constituents, and the employer and that the “Negro” and Spanish-surnamed employees of the company were purposefully treated less favorably than white employees.⁹²

In an oft-cited dissent written by Justice Marshall commenting on the challenged seniority systems, he notes that different privileges of employment between Negroes and Spanish-surnamed Americans and all other employees are the result of prior intentional discrimination in

86. *See id.*

87. *See id.*

88. *Int’l Bhd. Teamsters v. U.S.*, 431 U.S. 324, 328 (1977).

89. *Id.* at 329.

90. *Id.* at 337–38.

91. *Id.* at 343–44, 349–350.

92. *Id.* at 335.

job assignment.⁹³ Further supporting the requirement of intent, at footnote fifteen of the opinion, the Court describes disparate treatment:

“Disparate treatment” such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.⁹⁴

Furnco Construction Corp. v. Waters arose out of the effort of three black bricklayers seeking employment they alleged was denied because of impermissible race discrimination.⁹⁵ Two of them were never offered jobs although they were fully qualified; the third was only hired long after he had applied.⁹⁶ Meanwhile, similarly situated, qualified white bricklayers were hired instead.⁹⁷ The focus of the Court’s inquiry here and in similarly-situated cases is whether the employer treats some people less favorably because of their race, color, religion, or national origin.⁹⁸ The Court’s opinion addresses the burdens and allocations of proof in disparate treatment cases, citing the model of proof addressed in *McDonnell Douglas Corp. v. Green*.⁹⁹ In discussing *McDonnell Douglas*, the Court notes that a prima facie showing is not the equivalent of a factual finding of discrimination.¹⁰⁰ Instead, it is “proof of actions taken by [an] employer from which . . . discriminatory animus” may be inferred.¹⁰¹ The terms “discriminatory

93. *Id.* at 382 (Marshall, J., dissenting) (“In this case, however, the different ‘privileges of employment’ for Negroes and Spanish-surnamed Americans, on the one hand, and for all others, on the other hand, produced by petitioners’ seniority system are precisely the result of prior, intentional discrimination in assigning jobs; but for that discrimination, Negroes and Spanish-surnamed Americans would not be disadvantaged by the system.”).

94. *Id.* at 335 n.15.

95. 438 U.S. 567, 569 (1978).

96. *Id.* at 569–70.

97. *Id.*

98. *Id.* at 577.

99. *Id.* at 575–76.

100. *Id.* at 579.

101. *Id.* at 579–80.

animus,” “intent,” and “discriminatory motivation” are the touchstones of disparate treatment under Title VII.¹⁰² As the Court observed:

[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 rejecting an applicant 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 his decision on an impermissible consideration such as race.¹⁰³

Taken separately or together, they are products of explicit discriminatory stereotyping made unlawful by Title VII. Moreover, they are diametrically opposite to the concept of implicit bias, which rests on a platform of bias unknown to persons making employment-related decisions.

Texas Department of Community Affairs v. Burdine involved a claim of an unlawful termination because of gender brought under Title VII of the Civil Rights Act of 1964.¹⁰⁴ In discussing the burden of persuasion on a plaintiff in a disparate treatment action brought under Title VII, the Court said, “The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”¹⁰⁵ Moreover, “[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee,” so there is no need to consider implicit bias or discrimination under this framework.¹⁰⁶ No implicit gender bias or implicit gender stereotyping was envisioned.¹⁰⁷

U.S. Postal Service Board of Governors v. Aikens involved a claim of failure to promote by virtue of discrimination on account of race brought under Title VII of the Civil Rights Act of 1964.¹⁰⁸ *Aikens*

102. *See id.* at 580.

103. *Id.* at 577.

104. 450 U.S. 248 (1981).

105. *Id.* at 253 (citations omitted).

106. *Id.* at 254.

107. *See id.*

108. 460 U.S. 711, 712 (1983).

dealt with the burdens and allocations of proof in a disparate treatment case.¹⁰⁹ The *Aikens* Court held that “[t]he ‘factual inquiry’ in a Title VII case is ‘whether the defendant intentionally discriminated against the plaintiff.’”¹¹⁰ Again, the Court points to explicit, knowing, differential treatment because of race, which in turn is a result of intentional racial stereotyping.¹¹¹

Watson v. Fort Worth Bank & Trust was a landmark case for a number of reasons, not the least of which is the impetus it provided for enactment of the Civil Rights Act of 1991.¹¹² Clara Watson, who was a black bank teller, applied for a number of supervisor positions at the bank.¹¹³ She was denied each of them, all of which were filled by white people.¹¹⁴ The job decisions were made by supervisors who relied on their own subjective judgment in denying Ms. Watson the jobs she applied for.¹¹⁵ This is yet another example of intentional discrimination, not implicit or unconscious bias because Justice O’Connor, in announcing the judgment of the Court, noted that in disparate treatment cases, the plaintiff is required to prove that the defendant acted with “discriminatory intent or motive.”¹¹⁶

Price Waterhouse v. Hopkins illustrates an example of the risk employers take when basing employment related decisions upon explicit gender stereotyping.¹¹⁷ Writing for the plurality, Justice Brennan stated:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of

109. *See id.* at 713.

110. *Id.* at 715 (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

111. *See id.*

112. 487 U.S. 977 (1988).

113. *Id.* at 982.

114. *Id.*

115. *Id.* (pointing out that the bank had not developed “formal criteria for evaluating candidates for the positions” and that all supervisors involved in denying the job to Ms. Watson were white).

116. *Id.* at 986.

117. 490 U.S. 228 (1989).

their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”¹¹⁸

Justice Brennan endorsed challenges brought under the 1964 CRA to employment decisions based upon evidence of explicit, discriminatory stereotyping.¹¹⁹ The district court found that the Price Waterhouse partners consciously made stereotypical remarks about Plaintiff Hopkins as she was considered for partner.¹²⁰ These comments included such things as: “[she] should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”¹²¹ Dr. Susan Fisk, a social scientist, testified without objection that it is a common form of stereotyping to judge women who engage in assertive behavior more critically because aggressive behavior is viewed as a masculine characteristic and that stereotyping played a major role in blocking Hopkins’s admission to partnership.¹²² *Price Waterhouse* is a classic example of unlawful discriminatory conduct motivated by gender stereotyping, as evidenced by consciously-made remarks related to Hopkins’s lack of femininity.¹²³ Hopkins was not a victim of unconscious or implicit bias; nowhere in *Price Waterhouse* nor its progeny is unconscious or implicit bias relied upon by the courts dealing with similar claims of discrimination.¹²⁴

In *St. Mary’s Honor Center v. Hicks*, Hicks, a black man, was discharged from his position as a correctional officer at St. Mary’s Honor Center for threatening a superior during a heated exchange of words.¹²⁵ Hicks claimed that he was a victim of race discrimination in violation of Title VII and 42 U.S.C. § 1983.¹²⁶ The Court remanded the case for a determination of intent but offered an in-depth discussion of the bur-

118. *Id.* at 251 (citations omitted).

119. *Id.*

120. *Id.* at 236.

121. *Id.* at 235.

122. *Id.* at 235–36.

123. *See id.* at 235.

124. *See id.*

125. 509 U.S. 502, 505 (1993).

126. *Id.*

dens and allocations of proof in disparate treatment, examining the issue under its previous opinions.¹²⁷ Throughout the opinion, the Court emphasized that in disparate treatment cases, “the ultimate burden of persuading the trier of fact is that the defendant intentionally discriminated against the plaintiff” because of his race.¹²⁸ The Court noted that once a prima facie case is established, specific proofs and rebuttals of discriminatory motivation are required.¹²⁹ The *St. Mary’s* Court noted that “[t]he plaintiff may succeed in this, i.e., in persuading the court that she had been the victim of intentional discrimination either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”¹³⁰ In analyzing *Burdine*, the *St. Mary’s* Court further notes that the ultimate burden is that of the plaintiff’s to persuade the trier of fact that the defendant intentionally discriminated against the plaintiff.¹³¹ To succeed, the Court notes that “the fact finder must believe the plaintiff’s explanation of intentional discrimination.”¹³² The *St. Mary’s* Court leaves no doubt that showing discriminatory intent and motive of a defendant employer is an essential element to succeeding in a disparate treatment case.¹³³

Hazen Paper Co. v. Biggins suggests the existence of an explicit stereotype associated with aging by noting that an emblem of intentional age discrimination exists when older employees are fired because the employer stereotypically believes that productivity and competence decline with age.¹³⁴ According to the Court, “Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate

127. *Id.* at 505–25 (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and others).

128. *Id.* at 507.

129. *Id.* at 516.

130. *Id.* at 517 (quoting *McDonnell Douglas Corp.*, 411 U.S. at 804–05).

131. *Id.* at 518 (citing *Burdine*, 450 U.S. at 253).

132. *Id.* at 519.

133. *See id.*

134. 507 U.S. 604, 610 (1993).

and stigmatizing stereotypes.”¹³⁵ Age discrimination is “based in large part on stereotypes unsupported by objective fact.”¹³⁶

In *Reeves v. Sanderson Plumbing Products*, Justice O’Connor succinctly reinforced the intentionality requirement in disparate treatment cases as follows: “The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”¹³⁷

Nevada Department of Human Resources v. Hibbs involved a claim brought under the Family and Medical Leave Act of 1993 (“FMLA”) against an agency of the State of Nevada.¹³⁸ In analyzing the FMLA’s coverage of state agencies, Justice Rehnquist discussed a number of former state laws that were predicated on gender stereotyping such as intentionally prohibiting women from tending bar, practicing law, or working more hours than statutorily authorized.¹³⁹ All were based upon the notion that women should remain the center of home and family life.¹⁴⁰ Congress responded to this pattern of state-based discriminatory stereotyping by enacting Title VII of the Civil Rights Act of 1964, abrogating the state’s sovereign immunity from discriminatory conduct made illegal by Title VII.¹⁴¹ The Court noted that an employer’s stereotypical views about women’s commitment to work and value as employees reinforces stereotypes about women’s domestic roles accompanied by parallel stereotypes presuming lack of domestic responsibilities for men.¹⁴²

These cases illustrate the fundamental role of motive and intent in finding liability for unlawful employment discrimination under the disparate treatment model. From at least as early as the Supreme

135. *Id.*

136. *Id.* at 610–11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983)).

137. 530 U.S. 133, 153 (2000); *see also* *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) (“‘Disparate treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”).

138. 538 U.S. 721, 725 (2003).

139. *Id.* at 729 (citations omitted).

140. *Id.*

141. *Id.* at 729–30.

142. *Id.* at 722.

Court's 1973 opinion in *McDonnell Douglas Corp. v. Green*, the doctrine of intentionality has been repeatedly endorsed without exception as a prerequisite to proving unlawful disparate treatment under Title VII, as well as other federal statutes prohibiting discrimination.¹⁴³ Supplanting it with unconscious and unknowing implicit bias would turn more than three decades of employment law on its head and amend Title VII without congressional action. In short, eliminating the intentionality doctrine from the jurisprudence of employment discrimination law would be akin to eliminating it as an element of an intentional tort.

B. Motive and Intent Defined

Motive and intent are not mysterious words. Their use carries a message that is sine qua non for finding liability for violating federal employment law prohibiting workplace discrimination, such as Title VII. Liability without a showing of intent or motive would be tantamount to unlawful discrimination and, consequently, would leave an alleged violator virtually defenseless.

Imposing disparate treatment liability based upon implicit or unconscious bias rather than observable, measurable conduct would condemn employers to blanket liability despite externally demonstrating egalitarian attitudes and the absence of any evidence of discriminatory intent in their employment-related selection decisions. Adopting such a theory of liability would virtually amount to liability *per se* and result in a negligence standard for finding liability, the precise opposite of selection decisions based upon individually held biases because of race, religion, sex, national origin, age, or disability. Displacing the intentionality doctrine and replacing it with the concept of implicit bias would not advance the goals of workplace fairness and equality or opportunity and fair dealing. Instead, it would vitiate decades of judicial precedent and statutory mandate.¹⁴⁴

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

144. See generally Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Company and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972) (providing that class-based claims of discrimination may be pursued under the disparate impact theory, which defines discrimination in terms of consequences without regard to the responsible actor's state of mind and pointing out that such claims may arise when an employer, without unlawful intent imposes a facially neutral condition of employment, such as a test score or high school diploma, that has

Returning to *Price Waterhouse*, Justice Brennan provided the following definition of “motivating” factor:

In saying that gender played a motivating part in an employment decision, we mean that, if asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.¹⁴⁵

As so defined, motive cannot be hidden or unconscious, for it if were, “a truthful response” such as that defined above would not be possible.¹⁴⁶

In 1991, three years after *Price Waterhouse*, Title VII was amended to include “motivating factor,” which obviously refers to intentional discrimination, not unknown or unconscious bias.¹⁴⁷ If discrimination is unknown or unconscious, there can be no impermissible intent or motivation.

With respect to fully understanding the words “motive” and “intent,” *Staub v. Proctor Hospital* is illuminating.¹⁴⁸ *Staub* is an action brought under the Uniform Services Employment and Reemployment Rights Act, in which Justice Scalia, writing for the Court, explains the relationship between “motive” and “intent” as follows: “We therefore hold that if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action . . . then the employer is liable”¹⁴⁹ Justice Scalia then notes that “Under traditional tort law, ‘intent’ . . . denote[s] that the actor desires to cause consequences of his act, or that he believes that the

a statistically significant disproportionate impact on a protected class (i.e., a built-in headwind upon the employment opportunities of a protected class)).

145. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (citation omitted).

146. *See id.*

147. 42 U.S.C. § 2000e-2(m) (2012) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.” (emphasis added)).

148. 562 U.S. 411 (2011).

149. *Id.* at 422.

consequences are substantially certain to result from it.”¹⁵⁰ As to assessing an actor’s state of mind, *Staub* notes that if an actor intends an adverse action for discriminatory reasons, the actor has the scienter required to be held liable for the challenged discriminatory conduct.¹⁵¹ Intent is key.

The foregoing cases provide context to the provisions of Title VII and comparable statutes prohibiting discrimination that require a showing of discriminatory motive and intent to support a claim of liability for prohibited disparate treatment. Neither these cases nor any others in the annals of Supreme Court employment law jurisprudence have accepted implicit bias in lieu of the intentionality doctrine. As a result of the foregoing opinions of the Supreme Court, the requirement of showing intentional discrimination and motive in disparate treatment employment cases was and remains solidly entrenched in the jurisprudence of employment law. These cases surfaced as a result of adverse employment actions predicated on explicit stereotyping of the same genre that led to the Fourteenth Amendment to the Constitution. At the time of its enactment, and through the decades that followed, no court known to the author has adopted the theory of implicit or unknown bias to find liability based either upon disparate treatment or impact.

V. IMPLICIT BIAS: NO ROOM AT THE INN

While there are several court opinions that refer to the concept of an “unconscious stereotype,” such observations are merely dicta that cannot be relied upon to support a claim of unlawful employment discrimination, and they do not provide reliable comfort to those who would discard the intentionality doctrine.¹⁵²

150. *Id.* at n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 8A (AM. LAW INST. 1979)).

151. *Id.*

152. *See, e.g.,* *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (*Watson* provided that subconscious stereotypes and prejudice may remain despite disparate treatment analysis but may not prove discriminatory intent.); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999) (*Thomas* referred to “unthinking stereotypes or bias” in context of disparate treatment case.); *Washington v. Saintcalle*, 309 P.3d 326 (Wash. 2013) (*Saintcalle* involved a criminal case in which the Court discussed *Batson v. Kentucky*, 476 U.S. 79 (1986) and the application of the doctrine of implicit bias in preemptory jury challenges versus purposeful discrimination. *Id.* at 329. Nevertheless, the court declined to adopt a new framework for addressing

Implicit bias is described as the “new science of unconscious mental processes.”¹⁵³ According to Greenwald and Krieger’s article, the science behind implicit bias suggests that “actors do not always have conscious, intentional control over the processes of social perspective, impression formation, and judgment that motivate their actions.”¹⁵⁴ Implicit bias is hidden from one’s consciousness and may unknowingly “influenc[e] non-deliberate or spontaneous discriminatory behaviors.”¹⁵⁵

In his deposition given in *Pippen v. Iowa*, Professor Greenwald testified that “[p]eople who have implicit bias, which is, we believe, a substantially larger number [than those with explicit bias], do not intend to discriminate, but unthinkingly they may discriminate without recognizing that they are doing that.”¹⁵⁶ In his various other depositions and publications, Professor Greenwald has expressed his general opinion that implicit racial biases preferring whites and disfavoring blacks exists in between 70% and 75% of American White and Asian citizens.¹⁵⁷ Moreover, Professor Greenwald and Professor Banaji recently published a book entitled *Blindspot: Hidden Biases of Good People*, in which they write:

For almost a decade after the Race IAT was created, when people asked us if a White-preference result means “I am prejudiced,” we dodged the question by saying that we didn’t yet know. We would say that the Race IAT measured “implicit prejudice” or “implicit bias,” emphasizing that we regarded these as clearly distinct from prejudice as it has generally been understood in psychology. We had good reasons to be cautious. . . . But this situation has changed. Because of the rapid accumulation of research using the Race IAT in the last decade,

bias in the context of peremptory jury challenges. *Id.* Instead, it simply relied upon the *Batson* doctrine. *Id.*)

153. Greenwald & Krieger, *supra* note 12, at 945–46.

154. *Id.* at 947.

155. *Id.* at 961.

156. Transcript of Record at 17, *Pippen v. Iowa*, No. 12-0913, 2012 WL 1388902 (Dist. Ct. Iowa Apr. 17, 2012) *aff’d*, 854 N.W.2d 1 (Iowa 2014) (transcript on file with author).

157. See, e.g., *id.*; BANAJI & GREENWALD, *supra* note 18; Deposition of Anthony Greenwald, *Jones v. YMCA*, 48 F. Supp. 3d 1054 (N.D. Ill. 2014) (transcript on file with author).

two important findings are now established. First, we now know that automatic White preference is pervasive in American society—almost 75 percent of those who take the Race IAT on the Internet or in laboratory studies reveal automatic White preference. This is a surprisingly high figure. . . . Second, the automatic White preference expressed on the Race IAT is now established as signaling discriminatory behavior. It predicts discriminatory behavior even among research participants who earnestly (and, we believe, honestly) espouse egalitarian beliefs. . . . Among the research participants who describe themselves as racially egalitarian, the Race IAT has been shown, reliably and repeatedly, to predict discriminatory behavior that was observed in the research.¹⁵⁸

Given the hypothesis of Professors Banaji and Greenwald that almost 75 percent of Americans taking the IAT have an automatic preference for whites over blacks, for those who embrace the doctrine of implicit bias and consider the IAT valid and reliable, it requires no leap of faith to challenge the intentionality doctrine, even though it has been long established as a requirement to demonstrating a violation of federal laws prohibiting disparate treatment.¹⁵⁹ Based upon that premise, Professors Greenwald, Banaji, Krieger, and others hold the view that more than three decades of judicial precedent adopting the intentionality doctrine in employment law jurisprudence should either be entirely displaced or relegated to virtual oblivion, while being replaced with a doctrine that imposes liability for unknown and unintentional conduct as a product of implicit bias.¹⁶⁰

Professors Frederick L. Oswald, Gregory Mitchell, Hart Blanton, James Jaccard, and Philip E. Tetlock published *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, reporting the results of studies examining the predictive validity of the IAT as well as “explicit measures of bias for a wide range of criterion

158. BANAJI & GREENWALD, *supra* note 18, at 46–47.

159. *See id.*; Paterson et al., *supra* note 2, at 1176, 1195–97.

160. *See* BANAJI & GREENWALD, *supra* note 18; Greenwald & Krieger, *supra* note 12, at 945–46. Banaji, Greenwald, and Krieger are all associated with a group referred to as the “Radcliffe Cluster,” in which the idea for *Blindspot* began. *See* BANAJI & GREENWALD, *supra* note 18, at 211–16.

measures of discrimination.”¹⁶¹ They note that, although only fifteen years old, the IAT has made a significant impact, including a research article introducing the IAT which has been cited literally thousands of times and is “now the most commonly used implicit measure in psychology.”¹⁶² However, they offer a word of caution: one must be careful not to conflate popularity with validity and reliability.¹⁶³ The authors warn that the findings of Professor Greenwald and his colleagues should be treated as provisional, especially when considered in the light of findings reported in other relevant meta-analyses.¹⁶⁴ The article concludes that “IATs were poor predictors of every criterion category other than brain activity, and the IATs performed no better than simple explicit measures. These results have important implications for the construct validity of IATs, for competing theories of prejudice and attitude-behavior relations, and for measuring and modeling prejudice and discrimination.”¹⁶⁵

Proponents of abolishing the intentionality doctrine provide only argument but no persuasive legal authority supporting the proposed integration of implicit bias and its alleged consequences into the jurisprudence of employment law, particularly as it relates to claims of disparate treatment.¹⁶⁶ Do they suggest administering the IAT to the judge, the jurors, the parties, the witnesses, or even counsel involved in each case? Doing so would not only be cumbersome, intrusive, and expensive, but the outcome would also depend on judicial acceptance of the IAT’s validity and reliability as predictive of unlawful discriminatory conduct in the employment setting, which, to date, is uncertain, unsettled, and subject to debate.

The debate is illustrated by a thoughtful article by U.S. District Judge Mark Bennett, a nationally prominent and distinguished jurist, who notes that implicit biases are “much more difficult to ascertain,

161. Frederick L. Oswald et al., *Predicting Ethnic and Racial Discrimination: A Meta-Analysis of IAT Criterion Studies*, 105 J. PERSONALITY & SOC. PSYCHOL. 171, 171 (2013).

162. *Id.*

163. *See id.* at 172.

164. *Id.*

165. *Id.* at 171.

166. *See generally id.*; BANAJI & GREENWALD, *supra* note 18; Greenwald & Krieger, *supra* note 12 (offering arguments in favor of abolishing the intentionality doctrine but failing to offer viable, alternative legal analyses).

measure, and study than explicit biases.”¹⁶⁷ Judge Bennett opines that specific IAT results are not ready for the courtroom in terms of demonstrating that specific actions were caused by or resulted from implicit bias measured by an IAT score.¹⁶⁸ The obvious inference is that the IAT is not a valid and reliable predictor of unlawful discriminatory behavior. No leap of faith is required to conclude that implicit bias is ill-suited to replace the intentionality doctrine and supplant three decades of uninterrupted and undisturbed Supreme Court opinions and untold numbers of lower court opinions that continue to require a strong showing of discriminatory motive and intent in order to find unlawful disparate treatment. Without convincing evidence that the IAT is a valid, reliable predictor of discriminatory conduct, any effort to discard or marginalize the intentionality doctrine must fail.

A. Implicit Bias and the Intentionality Doctrine Cannot Co-Exist

Even if we assume that implicit bias or social cognition is possessed but unknown to each of us, as proponents of abolishing the intent doctrine in favor of implicit bias contend, implicit bias is completely and inexorably contradictory to the concept of intentionality. There is a glaring contrast between motive and intent to unlawfully discriminate and unknown, unseen, unconscious, and unintentional discrimination as described by Professor Greenwald and his colleagues. Professor Greenwald is quoted as saying, “We now understand that much discrimination is unintended. Nevertheless, it’s real discrimination. . . . But if you ask them what they intend, they will quite honestly deny any intent, and they would be accurate from our perspective.”¹⁶⁹ But, an enduring and universal principle is that actions speak louder than words—or implicit biases.¹⁷⁰ In the law of employment discrimination, what someone does is more important than their unconscious biases or what they may think.¹⁷¹ When one acts, whether a product of conscious bias or unconscious bias, such action and its observable or measurable consequences are evidence as to what is real and what is not.

167. Bennett, *supra* note 15, at 152.

168. Bennett, *supra* note 15, at 150–51.

169. Potier, *supra* note 2 (quoting Anthony Greenwald).

170. See *infra* notes 172–78.

171. See, e.g., 42 U.S.C. § 2000e-2 (2012).

Many historical figures over time have expressed the belief that action and its reasonably foreseeable consequences reflect the actual intent and motive of the actor. For example, Sir Isaac Newton's law of physics holds that "[f]or every action, there is an equal and opposite reaction."¹⁷² John Locke said, "I have always thought the actions of men the best interpreters of their thoughts."¹⁷³ Ernest Hemingway wisely noted that one must "never mistake motion for *action*."¹⁷⁴ William Shakespeare noted that "action is eloquence."¹⁷⁵ Tehyi Hsieh, a Chinese educator, author, and philosopher who is often quoted for his words of wisdom, said, "Action will remove the doubts that theory cannot solve."¹⁷⁶ Lewis Cass, an early American politician and military officer, said, "People may doubt what you say, but they will believe what you do."¹⁷⁷ Although they are not legal doctrines, these widely held principles related to assessing human conduct have endured the test of time, displacing the ghosts of speculation and crystal-ball gazing with real life observations of conduct and its consequences, as opposed to the world of hidden implicit bias. These principles represent the touchstones of intentionality on which rest historically successful challenges to violations of the Thirteenth and Fourteenth Amendments to the Constitution, as well as to claims of violations of federal laws prohibiting employment discrimination.¹⁷⁸

172. See, e.g., *Newton's Third Law*, THE PHYSICS CLASSROOM, <http://www.physicsclassroom.com/class/newtlaws/Lesson-4/Newton-s-Third-Law> (last visited Apr. 16, 2017). Sir Isaac Newton was a physicist and mathematician in England—one of the world's great minds of the 17th Century Scientific Revolution. Richard S. Westfall, *Sir Isaac Newton: English Physicist and Mathematician*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Isaac-Newton> (last updated Aug. 17, 2016).

173. See, e.g., Tina Didreckson, *John Locke, the Actions of Men*, FEDERALIST PAPERS PROJECT (Apr. 17, 2013), <http://thefederalistpapers.org/posters/john-locke-posters/john-locke-the-actions-of-men>.

174. See, e.g., Joe Warnimont, *Never Mistake Motion for Action—Decoding Ernest*, WRITE WITH WARNIMONT (Aug. 28, 2014), <http://www.writewithwarnimont.com/never-mistake-motion-for-action-ernest-hemingway>.

175. WILLIAM SHAKESPEARE, *CORIOLANUS* act 3, sc. 2.

176. TEHYI HSIEH, *CONFUCIUS SAID IT FIRST* (Kessinger Publishing 2004) (1936).

177. See, e.g., *Business & Leadership: Wisdom on Action*, LEADERS LEAGUE (Dec. 16, 2016), <http://www.leadersleague.com/en/news/wisdom-on-action>.

178. See, e.g., 42 U.S.C. § 2000e-2 (2012) (referring to claims of disparate treatment in violation of Title VII).

B. *The IAT and Implicit Bias Theory Strike Out*

We began this article by referring to the bold contention that the “existing legal framework recognizes only intentional acts of discrimination . . . [and] requiring ‘proof of intent’ is both outdated and largely ineffective in supporting our efforts to advance racial equality and remedy the continuing laws caused by racism.”¹⁷⁹

In 2013, stoking the passion of the challengers, Professors Greenwald and Banaji published their popular book *Blindspot* in which they discuss a 2009 meta-analysis that “answered the most important question about which we have been uncertain in the first several years of the IAT’s existence: It clearly showed that the Race IAT predicted racially discriminatory behavior.”¹⁸⁰ This conclusion became the Holy Grail, which bolstered and appeared to validate the movement challenging the intentionality doctrine, as well as the vehicle upon which were launched a series of claims of system-wide unlawful discrimination in an attempt to support the challengers’ mission to void (or marginalize) the intentionality doctrine.¹⁸¹ What follows is a discussion of cases and articles depicting the gradual erosion of this challenge to the intentionality doctrine and its popular underpinning, the IAT, as a valid and reliable predictor of discriminatory behavior and alternative to the intentionality doctrine.

In 2004, nine years before Professors Greenwald and Banaji published *Blindspot*, *Wal-Mart Stores, Inc. v. Dukes* began to wind its way via the U.S. Court of Appeals for the Ninth Circuit to the U.S. Supreme Court.¹⁸² *Dukes* is the same genre as the cases involved with the IAT, all of which avoid the intentionality doctrine by relying upon the social science of implicit social cognition, a subspecialty of cognitive and social psychology.¹⁸³

179. Paterson et al., *supra* note 2, at 1176.

180. BANAJI & GREENWALD, *supra* note 18, at 49.

181. *See generally id.*; Greenwald & Krieger, *supra* note 12; Oswald et al., *supra* note 161 (arguing to abolish the intent doctrine in favor of a system acknowledging implicit bias).

182. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

183. *See id.* At the time *Wal-Mart* was commenced, IAT research was in its early stages. However, the concept of “social framework” applied in *Wal-Mart*, and Professor Greenwald’s testimonial support of the IAT and its theory of implicit bias in later system-wide cases of alleged discrimination discussed elsewhere, have a remarkable conceptual resemblance to the “social framework” concept advanced in

Pippen v. Iowa was commenced as a class action lawsuit by which plaintiffs, African-Americans who sought employment with or promotion within the State of Iowa's merit-based employment system, claimed that because of the state's failure to enforce statutory and regulatory policies, a disproportionate number of their class were denied equal opportunity for employment.¹⁸⁴ They did not claim that this was done intentionally or with malice.¹⁸⁵ They argued that the disparate impact was "the natural unintended consequences of the State's failure to follow rules designed to ensure equal opportunity in the workplace and was not done intentionally or with malice."¹⁸⁶ To support their system-wide claim, plaintiffs relied in part upon the theory of implicit bias.¹⁸⁷ According to the trial court, which the Supreme Court of Iowa upheld, "Dr. Greenwald conceded that he would not use the phrase

Wal-Mart, as well as a shared record of judicial rejection. *See id.*; *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017); *Jones v. YMCA*, 48 F. Supp. 3d 1054 (N.D. Ill. 2014); *Pippen v. Iowa*, 854 N.W.2d 1, 6–8 (Iowa 2014).

Wal-Mart involved class claims that its pay and promotion practices and policies discriminated against women. *Wal-Mart*, 564 U.S. at 342. One of the principal theories upon which the plaintiffs relied was the concept of "social framework" to support their contention that Wal-Mart had a strong nationwide corporate culture of centralized personnel policies and subjective decision making, which made it vulnerable to bias because of gender stereotyping. *Id.* at 346. The social framework theory was presented to the court by Dr. William Bielby, plaintiffs' sociological expert. *Id.* "Social framework" has been described as the utilization of social science research "to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case." Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987). Never mind the intentionality doctrine. When *Wal-Mart* reached the Supreme Court, the Court discounted Dr. Bielby's social framework testimony by concluding that "[w]e can safely disregard what he has to say. [He] is worlds away from 'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'" *Wal-Mart*, 564 U.S. at 354–55. The Court found that Dr. Bielby could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotypical thinking. *Id.* at 354. Compare that finding with similar judicial findings in *Pippen v. Iowa*, 854 N.W.2d 1, 6–8 (2014), where the court found that Prof. Greenwald's analysis was not based upon specific acts of decision making, and a person's preference for one race or another as reflected on the IAT would not necessarily result in prejudicial behavior.

184. 854 N.W.2d 1, 5 (Iowa 2014).

185. *Id.*

186. *Id.*

187. *Id.* at 6–7.

‘implicit bias’ in writing a scientific article,” and that “a person’s preference for one race or another on the IAT would not necessarily result in prejudicial behavior.”¹⁸⁸ Moreover, “[Dr. Greenwald] specifically refused to offer any opinion that implicit bias of Iowa managers caused any difference in hiring of whites and blacks”¹⁸⁹ The trial court found, “Implicit bias does not mean prejudice, but merely reflects attitudes.”¹⁹⁰ More pointedly, according to the trial court, “[Professor Greenwald] offered no empirical data regarding Iowans and implicit racial bias.”¹⁹¹ Professor Greenwald was unable to offer “a reliable opinion as to how many, or what percentage, of the discretionary subjective employment decisions made by managers or supervisors in the State employment system were the result of ‘stereotyped thinking’ adverse to the protected class.”¹⁹² The trial court noted, “In legal parlance, this is an opinion of conjecture, not proof of causation.”¹⁹³ Continuing, the trial court found that:

The closest Dr. Greenwald came to such an opinion was extrapolating data from an internet based site relating to the IAT. From the uncontrolled responses to this website he opined that 70 to 80% of respondents in the United States had an “automatic preference for whites.” This was not a “representative sampling by research design.” It did not require the respondent to give demographic information. It was a weighted data set. And in his words “it could be representative of the United States.”¹⁹⁴

According to the trial court’s order, Professor Greenwald seemed “to operate from the assumption that every three out of four subjective discretionary employment decisions made in the State’s hiring process were the result of, or tainted by, an unconscious state of

188. *Pippen v. Iowa*, No. LACL107038, 2012 WL 1388902 (Dist. Iowa), *aff’d*, 854 N.W.2d 1 (Iowa 2014).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352–55 (concluding that social science expert testimony, such as that offered regarding implicit bias “is worlds away from ‘significant proof’”).

194. *Pippen*, 2012 WL 1388902.

mind adverse to African-Americans.”¹⁹⁵ In conclusion, the trial court held (affirmed by the Iowa Supreme Court) that:

Plaintiffs have failed to prove by the preponderance of the evidence that subjective, discretionary decision-making . . . caused disparate impact or adverse impact discrimination with respect to hiring and promotion decisions and/or unequal terms and conditions of employment associated with those decisions under Title VII and the Iowa Civil Rights Act.¹⁹⁶

In 2014, the U.S. District Court for the Northern District of Illinois issued its opinion in *Jones v. YMCA*, in which Dr. Greenwald was ultimately not allowed to testify.¹⁹⁷ Plaintiffs alleged that company-wide policies and practices discriminated against black employees in compensation and promotions.¹⁹⁸ Granting the defense’s motion to strike the report and testimony of Dr. Greenwald, the Magistrate’s Report, which was affirmed by the District Court, held that “[t]he application of Dr. Greenwald’s cognitive theory on stereotyping to the circumstances at the [YMCA] is speculative, without any scientific basis, and cannot assist the Court in deciding class certification.”¹⁹⁹ The Magistrate recommended that the report and testimony of Dr. Greenwald be stricken and the defendant’s motion to strike the report of Dr. Greenwald be granted.²⁰⁰ The District Court agreed, and the defense’s motion was granted.²⁰¹

The year 2017 brought forth *Karlo v. Pittsburgh Glass Works*.²⁰² Rudolph Karlo and others filed suit against Pittsburgh Glass Works in the United States District Court for the Western District of Pennsylvania based on both disparate impact and disparate treatment

195. *Id.*

196. *Id.*

197. 48 F. Supp. 3d 1054 (N.D. Ill. 2014); *Jones v. YMCA*, 34 F. Supp. 3d 896, 898–901 (N.D. Ill. 2014).

198. *Jones*, 48 F. Supp. 3d at 1066–89.

199. *Jones v. YMCA*, No. 09C6437, 2013 WL 7046374, at *9 (N.D. Ill. Sept. 5, 2013).

200. *Id.* at *1.

201. *Jones*, 34 F. Supp. 3d at 901 (“For these reasons, the Court overrules the plaintiffs’ objections to Judge Keys’ recommendation and grants the defendants’ motion to strike Dr. Greenwald’s report and testimony.”).

202. 849 F.3d 61 (3d Cir. 2017).

theories of discrimination arising out of a reduction in force.²⁰³ The case was predicated upon an alleged violation of the Age Discrimination in Employment Act.²⁰⁴ In support of their claim, plaintiffs enlisted the assistance of Professor Anthony G. Greenwald.²⁰⁵ Defendants moved to bar the proposed expert opinion of Professor Greenwald as it related to the purported implicit social bias.²⁰⁶ Plaintiffs' theory in the trial court was that PGW's corporate culture was tainted by implicit age bias, which manifested itself in a discriminatory reduction in force.²⁰⁷ The district court granted and the Third Circuit affirmed the defendants' motion to bar Professor Greenwald's expert testimony related to purported implicit social bias.²⁰⁸

The district court determined that "Dr. Greenwald's opinion is not based on sufficient facts or data. . . . Simply put, the data underlying his opinion is unreliable and cannot withstand scrutiny in this Court's function as a gatekeeper."²⁰⁹ The district court explained its denial of Dr. Greenwald's expert testimony:

Dr. Greenwald's methodology is unreliable, to the extent that the IAT informed his analysis and provided a basis for his opinion that most people experience implicit bias. Although taken more than fourteen million times, Dr. Greenwald cannot establish that his publicly available test was taken by a representative sample of the population—let alone any person or the relevant decision-maker(s) at PGW. Dr. Greenwald also fails to show that the data is not skewed by those who self-select to participate, without any controls in place to, for example, exclude multiple retakes or account for any external factors on the test-taker. . . . Although Plaintiffs submit that "Dr.

203. *Id.* at 66–67.

204. *Id.* at 67.

205. *Id.*

206. *Id.*

207. *See Karlo v. Pittsburgh Glass Works, LLC*, No. 2:10-cv-1283, 2015 WL 4232600, at *6 (W.D. Pa. July 13, 2015), *aff'd*, 849 F.3d 61 (3d Cir. 2017).

208. *Karlo*, 849 F.3d at 84 ("The District Court concluded that Dr. Greenwald's testimony lacks fit to this case because his population-wide statistics have only speculative application to PGW and its decision-makers. . . . We agree. . . . We are simply unable to conclude that the District Court abused its discretion in excluding this evidence.").

209. *Karlo*, 2015 WL 4232600, at *7.

Greenwald does not claim his opinions prove causation,” his own report calls this suggestion into question, in which he states that “[t]hese findings [regarding implicit bias] provide a framework that can aid a judge or jury in evaluating the facts of this case” This is the sort of “substantial disconnect” between the abstract principle from which his general principle is derived and the facts of this case, which was fatal to his opinion Dr. Greenwald’s opinion is more likely to confuse a jury rather than elucidate the issue(s) for the factfinder.²¹⁰

In analyzing the value of Dr. Greenwald’s purported testimony on disparate treatment claims, the district court noted that a plaintiff pursuing a claim of intentional discrimination must prove a discriminatory motive, which, according to the court, “seems incompatible with a theory in which bias may play an unconscious role in decision-making. In a disparate impact claim, evidence of implicit bias makes even less sense, particularly because a plaintiff need not show motive.”²¹¹ The district court ultimately found that “Dr. Greenwald’s opinion does not meet the requirements of Rule 702, and therefore, will bar his testimony at the trial of this action.”²¹²

In addition to each of the foregoing opinions of courts rejecting the notion that implicit bias is capable of predicting discriminatory behavior, a number of articles, both scholarly and otherwise, have been published discussing the predictability of the IAT scores.

In 2013, Oswald, Mitchell, Blanton, Jaccard, and Tetlock authored *Predicting Ethnic and Racial Discrimination: A Meta-Analysis*

210. *Id.* at *8.

211. *Id.* at *9.

212. *Id.* In its Memorandum and Order, the district court discussed the opinion of Court in *Samaha v. Wash. St. Dep’t of Transp.*, No. CV-10-075-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012) in which the district court denied the defendants’ motion to exclude Dr. Greenwald from offering testimony about implicit bias, “rejecting their challenges to the reliability and fit prongs in an employment discrimination case in which the plaintiff (an individual of Arab descent) alleged a disparate treatment claim.” *Id.* at *7 (discussing *Samaha*, 2012 WL 11091843, at *3). The *Samaha* court found that Professor Greenwald satisfied each factor of the four-step test to determine the admissibility of expert testimony. *Id.* (citing *Samaha*, 2012 WL 11091843, at *4). Ultimately, the *Karlo* court declined to follow *Samaha*. *Id.* (“Unlike the *Samaha* Court, the undersigned cannot conclude that Dr. Greenwald satisfies the requirements of Rule 702.”).

of *IAT Criterion Studies*.²¹³ The article discusses an examination of a meta-analysis of studies examining the predictive validity of the IAT.²¹⁴ The article begins by saying, “The research article introducing the IAT (Greenwald, McGhee, & Schwartz, 1998) has been cited over 2,600 times in PsycINFO and over 4,300 times in Google Scholar, and the IAT is now the most commonly used implicit measure in psychology.”²¹⁵ Notwithstanding the apparent popularity of the IAT, the authors conclude that, “The initial excitement over IAT effects gave rise to a hope that the IAT would prove to be a window on unconscious sources of discriminatory behavior.”²¹⁶ A closer look at the IAT criterion studies “in the domains of ethnic and racial discrimination revealed, however, that the IAT provides little insight into who will discriminate against whom, and provides no more insight than explicit measures of bias.”²¹⁷

The Wall Street Journal published an article by Daniel J. Levitin entitled, *What You Might Be Missing: Startling Stories About How Our Minds Work Can Too Easily Neglect the Bigger Picture*.²¹⁸ The article observes that experienced pollsters have concluded in an election study that some whites tell pollsters they intended to vote for a black candidate, while voting statistics show not quite as many actually do.²¹⁹ The discrepancy in reporting reveals the importance of having a way to measure attitudes and opinions without having to ask each individual directly.²²⁰ Levitin cites to *Blindspot*'s discussion of the IAT, noting, “The IAT relies on a theory of mental chronometry . . . that posits that difficult mental operations take the brain more time to accomplish than the easy ones.”²²¹ The IAT “enabled us to reveal to ourselves the contents of hidden-bias blindspots.”²²²

213. Oswald et al., *supra* note 161.

214. *Id.* at 171.

215. *Id.*

216. *Id.* at 188.

217. *Id.*

218. Daniel J. Levitin, *What You Might Be Missing: Startling Stories About How Our Minds Work Can Too Easily Neglect the Bigger Picture*, WALL STREET J. (Feb. 8, 2013) (on file with author). Daniel J. Levitin is a Professor of Psychology and Neuroscience at McGill College University in Montreal, Canada. *Id.*

219. *Id.*

220. *See id.*

221. *Id.*

222. *Id.* (quoting BANAJI & GREENWALD, *supra* note 18).

However, the author continues, “If you’re skeptical, you are hardly alone. Many challenges to the IAT have been leveled by social scientists and statisticians.”²²³ Setting aside what the author describes as the “oddities of the test’s construction,” he notes that there is a bigger issue: “Its results don’t predict real-world behavior very well. In psychometric theory, a test is considered valid if it does indeed measure what it purports to measure, based on some objective criterion. A reasonable criterion for the IAT would be the ways in which people act in real-world situations.”²²⁴ Levitin notes that:

[A] team of respected social scientists . . . have analyzed data on how individuals who had previously taken the IAT acted and reacted toward white and black people during a real conversation. . . . Those who received the highest scores for the “anti-black bias” on the IAT showed no bias toward blacks at all. Other research has shown that high “anti-black” scores on the IAT actually predict that the person is more likely to respond compassionately toward blacks. It appears then, that the IAT is claiming to find racism, ageism, sexism and all sorts of inter-personal biases in people who probably don’t possess them.²²⁵

The article concludes with the note that states, “There is far from a consensus about the IAT [T]he authors themselves published [a meta-analysis] in 2009, reviewing 184 independent samples and nearly 15,000 experimental subjects. The result: The IAT was very weakly correlated with other measures, failing to account for more than 93% of the data.”²²⁶ In summary, Levitin opines that, “The big problem with *Blindspot* is that it perpetuates several inaccurate stereotypes about how science is done.”²²⁷

In 2015, the Journal of Personality and Psychology published *Statistically Small Effects of the Implicit Association Test Can Have*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

Societally Large Effects by Anthony G. Greenwald, Mahzarin R. Banaji, and Brian A. Noseck, in which the authors who were involved in the development and introduction of the IAT, now expressly state:

The IAT measures have two properties that render them problematic to use to classify persons as likely to engage in discrimination. Those two properties are modest test-retest reliability . . . and small to moderate predictive validity effect sizes. Therefore, attempts to diagnostically use such measures for individuals risk undesirably high rates of erroneous classifications. These problems of limited test-retest reliability in small effect sizes are maximal when the sample consists of a single person (i.e., for individual diagnostic use), but they diminish substantially as the sample size increases. Therefore, limited reliability and small to moderate effect sizes are not problematic in diagnosing system-level discrimination, for which analyses often involve large samples.²²⁸

This is an interesting concession in light of the early positions of the three foregoing authors that the IAT is predictive of discriminatory behavior.²²⁹ Moreover, as to the authors' comment mentioned above that "limited reliability and small to moderate effect sizes are not problematic in diagnosing system-level discrimination, for which analyses often involves large samples,"²³⁰ it is more likely than not based upon non-random, self-reporting laboratory samples from IAT outcomes and therefore lacks the validity and reliability of a non-random sample taken in the real world. Conceding that diagnostically using the IAT for individuals risks "undesirably high rates of erroneous classifications"²³¹ represents a clear signal that the IAT (and the implicit bias theory generally, because the IAT is the only predictor as of now) can have no role in proving discriminatory disparate treatment.

228. Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 557 (2015).

229. See, e.g., BANAJI & GREENWALD, *supra* note 18; discussion *supra* notes 184–212 and accompanying text (discussing cases that discarded Professor Greenwald's proposed use of the IAT results as expert testimony in employment discrimination cases, all of which alleged system-level discrimination).

230. Greenwald et al., *supra* note 228, at 557.

231. *Id.*

In another article evaluating use of the IAT, *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, the authors stake out their collective opinion that, “by current scientific standards, the IATs possess only a limited ability to predict ethnic and racial discrimination and, by implication, to explain discrimination by attributing it to unconscious biases.”²³²

In 2015, Rickard Carlsson and Jens Agerstrom, Swedish psychologists, observed, “To what extent the IAT predicts racial and ethnic discrimination is a heavily debated issue.”²³³ The short version of their evaluation of the issue is that:

The present research suggests that many of the outcomes are not valid operationalizations of discrimination, and among those that have apparent validity, there is little evidence of reliable amounts of discrimination that can be predicted. Hence, the IAT has been put up to the impossible task of predicting discrimination that is simply not there.²³⁴

Moreover, in 2017, Jesse Singal’s article discussed the popularity of the IAT.²³⁵ The article notes that:

Maybe the biggest driver of the IAT’s popularity and visibility, though, is the fact that anyone can take the test on the Project Implicit website, which launched shortly after the test was unveiled and which is hosted by Harvard University. The test’s architects report that, by October 2015, more than 17 million individual test sessions had been completed on the website. . . . Given all this

232. Oswald et al., *Using the IAT to Predict Ethnic and Racial Discrimination: Small Effect Sizes of Unknown Societal Significance*, 108 J. PERSONALITY & SOC. PSYCHOL. 562, 562 (2015).

233. RICKARD CARLSSON & JENS AGERSTROM, A CLOSER LOOK AT THE DISCRIMINATION OUTCOMES IN THE IAT LITERATURE 2 (2015), <https://lnu.se/globalassets/lmdswp201511.pdf>.

234. *Id.* at 25.

235. Jesse Singal, *Psychology’s Favorite Tool for Measuring Racism Isn’t Up to the Job*, NY MAG.: SCIENCE OF US (Jan. 11, 2017, 12:18 PM), <http://nymag.com/scienceofus/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html>.

excitement, it might feel safe to assume that the IAT really does measure people's propensity to commit real-world acts of implicit bias against marginalized groups, and that it does so in a dependable, clearly understood way. . . . Unfortunately, none of that is true. A pile of scholarly work, some of it published in top psychology journals and most of it ignored by the media, suggests that the IAT falls far short of the quality-control standards normally expected of psychological instruments. The IAT, this research suggests, is a noisy, unreliable measure that correlates far too weakly with any real-world outcomes to be used to predict individuals' behavior—even the test's creators have now admitted as such.²³⁶

It goes on to note that the “[r]ace IAT scores are weak predictors of discriminatory behavior.”²³⁷ Indeed, the author notes that the IAT test merely measures reaction times, rather than real-world behavior and that there have always been alternate explanations for what the IAT truly measures.²³⁸

Overall, the articles indicate that both critics and proponents of the IAT now agree that the statistical evidence is simply too lacking for the test to be used to predict individual behavior. Additionally, in his primer on implicit bias (“Mitchell Primer”), Professor Gregory Mitchell provides a convenient yet comprehensive explanation of the entire concept of implicit bias.²³⁹ Supporting the thesis of this article, the primer puts to rest the idea that implicit bias or the results of the IAT are capable of predicting any individual's predisposition to engage in unlawful discriminatory conduct or constructing a background or framework of organization-wide personnel systems that provide an environment out of which specific, unlawfully discriminatory employment practices will likely occur.²⁴⁰ According to the Mitchell Primer,

236. *Id.*

237. *Id.*

238. *Id.* (describing how the IAT measures the test taker's reaction time to various stimuli).

239. Gregory Mitchell, *An Implicit Bias Primer*, VA. J. SOC. POL'Y & L. (forthcoming 2018).

240. *Id.*

Consensus now exists among implicit bias researchers that current measures of implicit bias cannot reliably identify who will or will not discriminate in any given situation Implicit bias has become an all-purpose explanation for societal problems. . . . Unfortunately, many popularizations of the implicit bias concept, both in law reviews and mainstream media, rely on statements made during the first generation of implicit bias research, when there was great optimism about the power of measures of implicit bias to identify persons who are more and less likely to engage in acts of discrimination—but little data at that time to support such optimism. The second generation of implicit bias research has produced decidedly less optimistic reviews about the predictive and explanatory power of implicit bias measures.²⁴¹

Mitchell Primer uses the most up to date research on implicit bias, including large-scale meta-analysis of the full body of implicit bias research to summarize the current understanding of implicit bias, how to measure implicit bias, and whether and how it relates to behavior.²⁴² Mitchell poses that:

[W]ith respect to individual-level behavior, the accumulated research findings reveal that it is scientifically inappropriate to use any individual's score on an implicit bias measure, regardless of the feedback given to that individual, as a measure of how likely it is that the individual will have engaged in acts of discrimination in the past or will do the same in the future. Indirect measures of bias are too unreliable (i.e., they show a high degree of variance in measurement across persons, situations, and time) and therefore too poor at predicting individual-level behavior (i.e., they have little ability to predict accurately who will and who will not discriminate in any given situation).²⁴³

241. *Id.*

242. *Id.*

243. *Id.*

Based on the discussion in Mitchell Primer, empirical evidence regarding implicit bias now establishes the IAT should not be used to predict past discrimination or likelihood of future discrimination.²⁴⁴

VI. CONCLUSION

This article opens with a quote from *Hamlet, Prince of Denmark*, by William Shakespeare that cautions against venturing into “The undisclosed Country, from whose bourn No Traveler returns, Puzzles the will, And makes us rather bear those ills we have, Than to fly to others that we know not of.”²⁴⁵ By analogy, those who argue that proof of discriminatory intent required by the existing legal framework of employment law is outdated and largely ineffective because it fails to recognize the “modern form of racism” in its less visible form of unconscious bias, appear to do so in reliance upon the promise of the IAT and its purported capacity to measure racial preference and thereby predict discriminatory behavior. Were that so, predicting unlawful discrimination by reading IAT “tea leaves” would render the intentionality doctrine a legal relic in the world of employment law, despite its long-established record, endorsed by the United States Supreme Court and Congress, of providing a reliable vehicle by which to attack unlawful discrimination in employment and elsewhere.

Research has not shown the IAT to be a good indicator of implicit bias resulting in discriminatory conduct, and without any other reliable way to measure implicit bias, courts have refused to overturn more than three decades of employment law and amend Title VII without Congressional approval by abolishing the intentionality doctrine. The intentionality doctrine serves to provide defendants with a viable defense while also allowing a remedy for those harmed by overt discrimination in employment law. Paraphrasing Shakespeare’s *Hamlet*, the jurisprudence of employment law will continue to bear the intentionality doctrine it has rather than fly to the world of unconscious bias, “that we know not of.”²⁴⁶ The utility of the intentionality doctrine in employment law remains undiminished; it shall survive.

244. *Id.*

245. SHAKESPEARE, *supra* note 1, at act 3, sc.1.

246. *See id.*