

BIAS IN THE AIR: RETHINKING EMPLOYMENT DISCRIMINATION LAW

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Employment discrimination jurisprudence assumes that key concepts such as “discrimination,” “intent,” “causation,” and the various prohibited grounds of discrimination refer to discrete and objectively verifiable phenomena or facts. I argue that all of these concepts are not just poorly or ambiguously defined; most are not capable of precise definition. Drawing on familiar developments in private law, such as the legal realist critique of objective causation in torts, I argue that, in practice, the central concepts in antidiscrimination law do not describe objective phenomena or facts at all; instead, they refer to social conflicts between employer prerogatives and egalitarian goals. Ironically, at its best, employment discrimination law does not really prohibit discrimination; instead it imposes a duty of care on employers to avoid decisions that undermine social equality. This suggests that attempts to improve employment discrimination law by making it more attentive to “the facts”—for instance, refining causation in mixed-motives cases using quantitative empirical methods or defining discriminatory intent according to innovations in social psychology—are unlikely to be successful, because these facts are not really at the center of the dispute. Instead, we could better improve employment discrimination law—making it more successful as an egalitarian intervention and less intrusive on legitimate employer prerogatives—if we abandoned attempts to precisely define concepts such as “objective causation” and “discriminatory intent” and instead focused on refining the employer’s duty of care to avoid antiegalitarian employment decisions.

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INTRODUCTION: WHAT IS DISCRIMINATION?

American antidiscrimination law was developed in reaction to unambiguously racist policies: the policies typical of the Jim Crow system in the Southern states. Jim Crow policies had several characteristic features. They made explicit reference to race: blacks or "coloreds" were excluded from certain institutions, jobs, and public places; they were herded into segregated (and almost always objectively less desirable) areas. They were unambiguously designed to fulfill and to perpetuate an ideology of racial hierarchy, the rationale for the policies being that blacks were naturally inferior, were unfit for the social status whites enjoyed, and deserved an economic and social status that mirrored the natural status the ideology assigned them. Jim Crow policies were purposely stigmatizing, and they were universally experienced as stigmatizing—both by whites who enjoyed the relative psychological and social privilege the policies created and by blacks who suffered the corresponding psychological and social injuries.

It has long been well understood that antidiscrimination law needs a way of confronting subtler versions of the older Jim Crow policies. The easiest case involves a simple shift from a formal policy of exclusion to an informal one. The business that once announced "blacks need not apply" now accepts the applications but refuses to seriously consider them. The policy and its effects are identical; only the form has changed. Now, suppose the business considers some black applicants, but only for the least desirable positions. Or it considers only the very best black applicants, requiring much stronger credentials than it does for white applicants for the same jobs. Or suppose it considers only timid and subservient blacks, rejecting as "uppity" any black person who holds her head high and expects to be treated as an equal. It's easy to see that these practices are only slightly less noxious versions of the paradigmatic Jim Crow discrimination.

Jim Crow-style policies combined a number of evils: they were blatantly discriminatory, stigmatizing, and motivated by bigotry, and they had the effect of keeping blacks socially, politically, and economically subordinate to whites. But many of today's subtler controversies exhibit only some of these evils and, even then, exhibit them ambiguously. This makes it harder to be sure precisely what antidiscrimination law should prohibit. Is the defining evil of Jim Crow its social consequences or the motivations and ideology of those who imposed it? If the evil is its consequences, is the central wrong the cumulative effects of exclusion and segregation on a racial *group*, or is it each individual injury? Is Jim Crow's singular crime against humanity the creation of a social hierarchy, or is it guilty of innumerable individual offenses? Is the central harm symbolic and

stigmatic, or is it objective and materially unequal? If the evil is motivations, what is the precise nature of the wrongful motive? What is the content of the ideology? Is the evil here an irrational hatred, a specious belief in a natural hierarchy and proper place, a mistaken belief in differential capacities, a phobia of miscegenation? All of these come together in the figure of Jim Crow, but today the bird has been dismembered: a wing here, a leg there, a scattering of feathers.

Consequently we don't have a good definition of what makes a decision or action discriminatory. Instead we have a conception or impression of discrimination—inspired by the paradigmatic Jim Crow-style policies—that potentially includes a number of factors, such as motivation, cumulative effect, stigma, and lack of objective rationality.

Formally, current doctrine holds that individuals have an entitlement not to be treated unfairly because of race, sex, religion, etc. But this goal is both too ambitious and too poorly defined to guide the application of the law or the direction of public policy. We lack good and agreed-upon definitions of the relevant prohibited bases of discrimination. (For instance, does race denote only inherited characteristics such as skin color and other physical features, or does it extend to traits such as culture?) Even when such questions are settled, we lack a sound basis for determining whether the prohibited motivation was present and, if it was, whether it caused the challenged decision or was merely incidental to it. Finally, the commitment to individual entitlement is radically at odds with much of the way the doctrine is applied, most notably in the continued (and in my view appropriate) solicitude for the claims of members of vulnerable groups as opposed to members of powerful groups.

The law misrepresents this conceptual and definitional ambiguity as a problem of evidence. Antidiscrimination doctrine proceeds as if the definition of discrimination is pellucid and the only problems lie in determining whether discrimination in fact took place. So the question is whether we can infer discriminatory motivation from lack of good cause for an adverse employment decision or presume that prejudiced attitudes prevalent in the workplace caused an adverse decision. But these evidentiary disputes are unlike typical questions of evidence in an important sense: the actions and conditions that are offered as evidence of the underlying legal transgression are also objectionable in their own right. For instance, employment decisions made without justification or workplaces in which bigoted attitudes are prevalent are objectionable *whether or not* they are accompanied by race- or sex-dependent decisions. Hence, it is plausible that we are willing to punish employers that allow unjustified decisions or who preside over workplaces saturated with bias because we object to these conditions in and of themselves.

Since antidiscrimination laws effectively discourage the practices and actions that typically serve as evidence of discrimination—because those practices and actions are intrinsically objectionable and because “discrimination” itself is ambiguously defined—it is a small step to say that antidiscrimination

law in effect prohibits not discrimination but rather the things that count as evidence of discrimination. In this Essay, I take that small step as well as the somewhat larger one of defending this idea of antidiscrimination law as superior to one that tries to better define and identify the ever-elusive “discrimination.”

Accordingly the law should replace the conceptually elusive goal of eliminating discrimination with the more concrete goal of requiring employers, government officials, and other powerful actors to meet a duty of care to avoid unnecessarily perpetuating social segregation or hierarchy.¹ Of course, the things that unnecessarily perpetuate social hierarchy are precisely the things that now count as evidence of discrimination: unjustified adverse decisions, unexplained segregation of the workforce, and workplaces saturated with hostility or stereotyping. Meeting the duty of care should be an affirmative defense to any claim of discrimination, and failure to meet the duty should create a strong presumption that the challenged decision was discriminatory.

To the individual victim of discrimination, this may seem unfair or even perverse, but in fact it is no more problematic from the perspective of individual justice than the current approach. The central problem in employment discrimination is distinguishing the victim of *discrimination* from the person who simply suffered an adverse employment action. Under a default regime of employment at will, an adverse employment action—even an unjustified one—is not, in and of itself, a legally cognizable injury. In a large number of cases, it’s hard to tell whether the challenged employment action was justified, unjustified for nondiscriminatory reasons (e.g., the product of a personal grudge, a lapse in judgment, caprice, or a mistake), or discriminatory. As I will argue, much of the ideological dispute in employment discrimination centers on whether we should *presume* that the defendant discriminated in cases in which the plaintiff can prove only that the challenged decision was objectively unjustified. Both liberals and conservatives alike are willing to tolerate a lot of error in this respect: liberals are willing to allow people who suffer unjustified adverse decisions to recover, knowing that some are victims not of actionable discrimination but instead of some garden-variety type of unfairness; and conservatives

1. My analysis here has many inspirations: for instance, both David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993), and Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009), discuss analogies to tort law and make proposals inspired by tort doctrine; Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833 (2001), developed the basic understanding of antidiscrimination law as a form of affirmative market regulation that has undergirded all of my work in the area; and similarly Robert Post, Lecture, *Prejudicial Appearance: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000), developed the novel insight that antidiscrimination law is positive intervention in social practices as opposed to a purely negative prohibition of forbidden considerations. My main contribution here is to trace the idea of an affirmative duty of care through even those parts of the law that seem most clearly focused on a simple prohibition of discrimination.

are willing to let many victims of discrimination go uncompensated in order to protect employers' prerogatives to make decisions without having to justify them to lawyers and judges.

Whenever the employment contract is at will, many people will suffer unjustified employment actions and have no legal remedy. On the *individual* level, unjustified decisions based on race or sex are no different than unjustified decisions based on any other irrelevant factor beyond the control of the individual. The objective and immediate injury is identical: some employee doesn't get the job, promotion, or raise that he wanted and merited. What makes the prohibited forms of discrimination worse than the myriad types of discrimination that the law allows is that the prohibited types are pervasive; the victims of sex discrimination will encounter it in workplace after workplace, whereas the victim of discrimination based on red hair or freckles can rest assured that the next employer is unlikely to exhibit the same prejudice. This suggests that no individual could rightly complain that she had unequal *opportunities* because of race or sex if civil rights laws made discriminatory decisions no more likely than adverse decisions based on idiosyncratic factors.

If the duty is appropriately defined, this change will prevent a larger number of discriminatory decisions while also imposing a smaller burden on the legitimate business prerogatives of employers—an improvement for both employees and employers. Under current law, many plaintiffs with conceptually valid claims do not pursue them, either because of a perfectly reasonable belief that they won't be able to prove their claims in court or because they prefer to put an unpleasant experience behind them and find new employment.² As a result, employment discrimination claims are quite possibly skewed toward plaintiffs with the weakest work records—those who won't easily be able to find a new job—and for whom employers can cite plausible justifications for adverse employment decisions. It's not surprising, then, that plaintiffs in discrimination cases lose their lawsuits more than any other class of federal plaintiffs.³ Encouraging employers to meet a duty of care in order to enjoy a safe harbor from discrimination lawsuits would benefit the class of (on average) more deserving employees least likely to sue at the expense of the (on average) less deserving employees most likely to sue (and either obtain unwarranted settlements or lose at trial).

Our concern should be whether or not the law reduces the number of actions that perpetuate illegitimate hierarchies *in the run of cases*—not whether any individual case is “correctly” decided. Under this proposed reform, some plaintiffs who we now would say were in fact victims of discrimination would

2. See Richard Thompson Ford, *Discounting Discrimination: Dukes v. Wal-Mart Proves that Yesterday's Civil Rights Laws Can't Keep Up with Today's Economy*, 5 HARV. L. & POL'Y REV. 69, 81 (2011).

3. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 443-44 (2004).

lose their lawsuits because their employers met the relevant duty of care (even though they still discriminated in the given case), while some who we would now say were victims not of actionable discrimination but rather of some other garden-variety type of unfairness would win (because their employers failed to take due care). This would shift the focus of antidiscrimination law from individual justice to collective justice as well as away from a focus on the entitlements of passive victims and toward a focus on the corresponding responsibilities of perpetrators.⁴ This would also constitute a shift in emphasis from reparative justice to deterrence; a shift away from a conception of fault and injury to a conception of conflicting activities that entail joint costs; a shift away from the notion of objectively injurious actions to an idea of legally imposed duties of care that define legal injury; and a shift away from the goal of individual reparation to one of reducing the social costs of necessarily conflicting activities. These ideas have all been familiar staples of legal realist thought since the early twentieth century, but they have never been consistently applied to civil rights questions, which too often remain mired in the conceptualism of nineteenth-century classical legal thought.⁵

This proposal may seem radical—even reckless—but in fact often the law already implicitly functions in just the way I propose, albeit incompletely and erratically. Consider the controversy in the 2011 case of *Wal-Mart Stores, Inc. v. Dukes*.⁶ Betty Dukes and her co-plaintiffs claimed that Wal-Mart systematically discriminated against women in pay and promotions.⁷ They claimed that Wal-Mart’s personnel policies, which gave almost complete discretion to store and district managers and encouraged subjective decisionmaking based on soft qualifications such as “teamwork” and “integrity,”⁸ were especially vulnerable to sex discrimination.⁹ But vulnerability to sex discrimination is not the same as discrimination itself. In response, Wal-Mart pointed out that the plaintiffs

4. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) (arguing for a shift away from what the author describes as a “perpetrator perspective” to a “victim perspective” in antidiscrimination law). It’s fair to say that Alan Freeman’s argument has been the consensus position of left-liberal legal commentators ever since. My contention herein is that the “victim perspective” has obscured the real stakes of antidiscrimination law, leaving us with doctrine that is difficult to understand, enforce, or comply with. Accordingly, I advocate the “perpetrator perspective,” which offers a clear focus on the legal responsibilities of employers and other institutions covered by antidiscrimination laws.

5. See, e.g., DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* (1975).

6. 131 S. Ct. 2541 (2011).

7. *Id.* at 2547.

8. Declaration of William T. Bielby, Ph.D. in Support of Plaintiffs’ Motion for Class Certification at 22, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C01-02252 MJJ), 2003 WL 24571701.

9. *Wal-Mart*, 131 S. Ct. at 2549.

could not point to any specific company-wide discriminatory policy or practice; instead, the plaintiffs cited isolated and “widely divergent” anecdotes and advanced a vague hypothesis of a sexist corporate culture to conjure up the specter of a common pattern of discrimination.¹⁰ The absence of any centralized policy of discrimination doomed the class action against Wal-Mart. The Supreme Court found that because there was no common policy or practice of discrimination, there were no common issues of law or fact to justify class certification.¹¹

Despite their references to the sexist corporate culture at Wal-Mart, the crux of the Wal-Mart plaintiffs’ claim wasn’t really that Wal-Mart, *as a corporation*, had actively encouraged sex discrimination. It was that Wal-Mart hadn’t taken sufficient care to prevent it. Wal-Mart’s policies were vulnerable to sex discrimination by individual managers, but Wal-Mart did nothing to change the policies to reduce the risk of discrimination. Why not? Did Wal-Mart’s management secretly want its managers to discriminate? There’s little evidence of such a motivation, and what’s more, there are obvious business justifications for Wal-Mart’s policies: in a service industry, subjective factors are relevant to job performance, but information about varying local conditions in such a large enterprise is costly to obtain and evaluate centrally. Decentralized decisionmaking is an efficient way of organizing personnel decisions. To be sure, there will be mistakes—local prejudices and rogue managers who act on the basis of whim or bias—but these costs are probably outweighed by the benefits and savings of a decentralized and discretionary system. And there is the added benefit that a decentralized system effectively limits any liability for unlawful practices to the level of the individual store: if there is no centralized policy or decisionmaking apparatus, there is unlikely to be company-wide liability.

In Wal-Mart’s case, there was a conflict between protecting women from sex discrimination and employing its preferred personnel policies, which may well have been desirable for other reasons, such as cost or ease of administration. Wal-Mart chose to retain the risky policies. That is the only common policy that joined all of the disparate incidents of sex discrimination. The common policy was one of nonfeasance or negligence—a failure to take due care. In essence, the plaintiffs in *Wal-Mart* advanced precisely the theory of employment discrimination I advocate in this Essay.

This Essay’s focus is on employment discrimination doctrine. I can’t prove that all of the insights I draw from that context will apply to other areas of civil rights law without specific analysis of the doctrine in each area, but I suspect that many of them will have broader relevance.

10. Brief for Petitioner at 7-8, *Wal-Mart*, 131 S. Ct. 2541 (No. 10-277), 2011 WL 201045.

11. *See Wal-Mart*, 131 S. Ct. at 2553-57.

This Essay will proceed as follows: Part I examines the meaning of discrimination as used currently in Title VII of the Civil Rights Act of 1964. I argue that although the law is written and discussed as if it seeks to identify and remedy a discrete objective phenomenon—discrimination because of race, sex, etc.—it in fact does not offer a consistent concept of prohibited discrimination, and, further, liability does not depend on proof that anything one might reasonably call “discrimination” occurred. But this is not a bad thing: *at its best*, the law uses the term “discrimination” as a placeholder for a policy determination that balances the interests of employees in fair treatment, and of society in discouraging widespread unjust and destructive social inequalities, against the interest of employers in convenient workplace policies. The law is at its worst—least effective in counteracting widespread social inequality and unfairness and most intrusive on legitimate employer prerogatives—when it actually tries to eliminate “discrimination” as a discrete phenomenon.

Part II extends this hypothesis and applies it to the issue of causation in employment discrimination. Many employment discrimination disputes involve a plausible legitimate motivation as well as a discriminatory one, raising the vexing question of whether discrimination caused the adverse employment action. Title VII case law offers a complicated and quite unsatisfying set of inconsistent approaches to this question. Despite many allusions to tort doctrine, the courts have never fully embraced the now relatively conventional private law insights concerning causation: namely that legal “causation” does not refer to an objective phenomenon but is instead a legal conclusion informed by normative judgments about how to resolve conflicts between parties engaged in mutually incompatible activities. Following the private law insight, I argue that the question of causation in Title VII mixed-motives cases is best understood as a disguised determination of the scope of the employer’s duty of care to purge employment decisions of the influence of bigotry. Drawing on Title VII doctrine defining the extent of an employer’s vicarious responsibility for the actions of “rogue” supervisors in the sexual harassment context, I argue that Title VII doctrine should impose liability not for individual injury caused by discrimination but instead for violations of various duties of care to avoid socially destructive practices.

In the Conclusion, I argue that antidiscrimination serves an important but modest goal. It does not and cannot eliminate or remedy all discriminatory treatment. Instead it requires employers to take care to avoid those manifestations of prejudice that employers are well positioned to avoid at a reasonable cost. The inevitability of a tolerated residuum of discrimination suggests the need for other more proactive measures to combat social inequality.

I. THE CONCEPT OF DISCRIMINATION

Title VII of the Civil Rights Act of 1964 makes it illegal for employers to “discriminate against any individual . . . because of such individual’s race, col-

or, religion, sex, or national origin.”¹² There are many ambiguous terms here. A lot of ink cartridges have been spent over the definitions of race, religion, sex, and national origin, based on the understandable (but, I will argue, mistaken) belief that we need precise definitions of these terms in order to apply the statutory prohibition. Likewise, the question of cause and effect suggested by the phrase “because of” has provoked significant debate among the Justices of the Supreme Court, echoing the philosophical skepticism of David Hume and the metaphysical dilemmas surrounding the mishaps of Helen Palsgraf.¹³

A great deal of needless anxiety and confusion attends the attempt to make antidiscrimination law more receptive to the innovations of social science and less so to formal logic and categories and the internal demands of legal process.¹⁴ But many such calls for greater realism share a mistaken faith that antidiscrimination law provides a clear *conception* of intentional discrimination, which we can simply “look for” more effectively in the real, empirical world—a world of tangible things beyond the lifeless formalities of the courtroom. I’ll make the case that antidiscrimination law does not offer us a clear, empirical conception or definition of discrimination; instead it often offers us only that set of formal presumptions, inferences, and procedures that the advocates of greater realism hold in such contempt. “Discrimination,” which the realist would have us look for in and of itself, without the impediments of formal method, is itself a *product* of formal method.

This is just an observation, not a criticism. Just as the confused conceptual nature of “negligence” does not suggest that careless practices do not cause physical injuries that the law should seek to prevent, nor should the inadequacy of the empirical definition of discrimination suggest that racism, sexism, and other forms of invidious bias do not cause real and tangible social and individual injuries. Antidiscrimination law is not to be condemned for its failure to offer us a more realistic epistemology of discrimination. Like “negligence,” the term “invidious discrimination” denotes a real social phenomenon, or a set of related social phenomena, with which too many people are familiar. But those phenomena are identified by way of narrative, analogy, and subjective look and feel rather than by rigorous definition. As in Justice Stewart’s epistemology of pornography,¹⁵ we think we know discrimination when we see it, but an objective definition eludes us.

12. Civil Rights Act of 1964, tit. VII, § 703(a), 42 U.S.C. § 2000e-2(a) (2012).

13. See *infra* notes 60-62 and accompanying text.

14. See, e.g., Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

15. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of pornography] But I know it when I see it”).

But modern lawyers don't waste a lot of energy in search of an empirical definition of negligence or a psychological account of consent; we know that in practice these terms reflect policy judgments about how to balance competing social priorities. First-year law students are taught that questions of negligence, nuisance, and meeting of the minds are best understood as labels for complex policy questions. Similarly, it's now a truism that "malice aforethought" has little to do with either malice or forethought: in practice, it refers not to the defendant's subjective state of mind but instead to a set of objective elements, which, if present, allow a murder conviction.¹⁶ By contrast, countless law review articles and commentaries seek to refine and deepen our objective understanding of discrimination, and judicial opinions proceed as if the vexations of antidiscrimination litigation are confined to questions of evidence, while the definition of discrimination itself is clear and agreed upon.¹⁷

In the pages that follow, I argue that we should think of discrimination—like negligence, obscenity, and nuisance—as an umbrella concept under which we struggle over distinct, and at times conflicting, policy goals.

A. *In Search of Discrimination*

1. *Race- and sex-dependent decisions*

A commonsensical idea of discrimination is that it involves a decision that depends on the prohibited classification or characteristic. So sex discrimination involves a decision that depends on sex. In some contexts, this idea of discrimination is useful. For instance, when professional orchestras began conducting blind auditions, in which the sex of the musicians was concealed from the judges, the proportion of women selected rose dramatically.¹⁸ From this we can infer that many of the decisions made before blind auditions were discriminatory.

Unfortunately, in most legal disputes, this idea of discrimination is not directly applicable. Let's continue with the case of the orchestras. We may know that many of the decisions were sex dependent, but we don't know which ones. Suppose some orchestras begin blind auditions and others refuse to change their practices, insisting that looking at the musician provides relevant information. Even if the proportion of women grows in the orchestras that use blind auditions, that proves, at most, that *those orchestras* were discriminating before; it doesn't prove that nonblind auditions are inherently discriminatory. And

16. See JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 309 (6th ed. 2008).

17. See *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996) ("Intentional discrimination *vel non* is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not.").

18. See Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

in the orchestras that refuse to switch to blind auditions, we have no direct comparison. We can compare the proportion of female musicians in the various orchestras and claim to infer discrimination on the part of those with lower-than-typical female representation, but isn't that replacing the requirement not to discriminate with a duty of proportional representation? We can hire a sociologist to testify that nonblind auditions are "vulnerable" to discrimination, but as we know from *Wal-Mart*, vulnerable is not the same as discriminatory.¹⁹

If we move from the statistical case to an individual case, the problems are even more pronounced. Suppose a woman suffers an adverse employment action and claims that she was treated differently than identically situated men. The employer responds that although her objective record may appear to be similar to men who received better treatment, the men had intangible virtues that she lacked, or she exhibited intangible deficits that they lacked. If we infer discrimination from these facts, we have effectively substituted a duty to objectively justify employment decisions for the requirement not to discriminate.

2. *Functional equivalence: classification = intent = impact*

Today we typically think of intentional discrimination as the core or paradigmatic type of invidious or illegal discrimination. Meanwhile, disparate impact is often thought of as evidence of an underlying discriminatory intent or as the practical equivalent of intentional discrimination. This is comforting: then we can define discrimination as a decision motivated by a discrete state of mind. This conception of discrimination, of course, underlies much of the hostility to the doctrine of discriminatory effect or disparate impact. If we define the core of discrimination according to mental state, a policy with a disparate impact is simply not discrimination. Even for those sympathetic to the disparate impact theory, disparate impact liability is often defended as evidence of discrimination. For instance, Paul Brest noted in 1976 that "[t]he disproportionate impact doctrine . . . acts as a safeguard against improper race-dependent decisions. . . . A substantial discrepancy between the proportion of qualified available minorities in a community and the proportion on an employer's workforce or in a particular job or department has long been taken as evidence that the employer discriminates."²⁰ Similarly, in *Watson v. Fort Worth Bank & Trust*, Justice O'Connor opined that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be *functionally equivalent* to intentional discrimination."²¹ The now-conventional view is that intentional discrimination or discriminatory motive is the essence of wrongful discrimination

19. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-54 (2011).

20. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 29-30 (1976).

21. 487 U.S. 977, 987 (1988) (emphasis added).

under Title VII; practices that disproportionately affect protected groups are actionable only because they suggest discriminatory intent or are sufficiently analogous to practices motivated by discriminatory intent.

This view is tempting because it seems to suggest an unambiguous, if complex, definition of discrimination. The troublesome disparate impact doctrine must always refer to intent. This framing suggests that the core antidiscrimination commitment is to prohibit intentional discrimination: we prohibit policies and practices that are evidence of discriminatory intent or are analogous to those that result from discriminatory intent only as a consequence of this core commitment.

But the prohibition of intentional discrimination is itself derived from the prohibition of facial discrimination. If there is a core commitment underlying equality law, it is to prohibit certain formal or facial classifications. Both the prohibition of intentional discrimination and the theory of discriminatory effect or disparate impact are derived from this prohibition; both intentional discrimination and discriminatory effects are, in a sense, the functional equivalents of the kind of facial classification that defined the Jim Crow system. Indeed, until the mid-1970s, discriminatory intent was a questionable basis for liability. For instance, in *Palmer v. Thompson*,²² Justice Black argued that the strictures of the Equal Protection Clause should be confined to instances of facial classification. He worried that a judicial investigation of a city council's possibly discriminatory motive was speculative and unmanageable:

[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. . . .

. . . [I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. Here, for example, petitioners have argued that the Jackson pools were closed because of ideological opposition to racial integration in swimming pools. . . . [But] [i]t is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators.²³

Justice Black urged that the constitutional guarantee of equal protection did not prohibit discriminatory motivations. Moreover, in distinguishing precedent that appeared to support the discriminatory intent theory, Justice Black emphasized the importance of *effects*:

It is true there is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality. But the focus in those cases was on the *actual effect* of the enactments, not upon the motivation which led the States to behave as they did. In *Griffin*, . . . the State was in fact perpetuating a segregated public school system by financing segregated "private" academies.

22. 403 U.S. 217 (1971).

23. *Id.* at 224-25 (citation omitted).

And in *Gomillion* the Alabama Legislature's gerrymander of the boundaries of Tuskegee excluded virtually all Negroes from voting in town elections.²⁴

Three of the dissenting Justices—Justices White, Brennan, and Marshall—advanced the expressive theory that facially race-neutral actions driven by discriminatory motives are unlawful because they are the functional equivalents of facial classifications based on race: “[S]hut[ting] down the pools was nothing more or less than a most effective expression of *official policy* that Negroes and whites must not be permitted to mingle together when using the services provided by the city.”²⁵

Griggs v. Duke Power Co.,²⁶ which established the disparate impact standard, was the first Title VII case decided by the Supreme Court. In the same year that the Court *rejected* the discriminatory intent theory of equal protection in *Palmer*, and two years before the doctrine of discriminatory intent reemerged in the Title VII context in *McDonnell Douglas Corp. v. Green*,²⁷ the Court opined in *Griggs* that Title VII mandated “the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers *operate invidiously to discriminate* on the basis of racial or other impermissible classification.”²⁸ *Griggs* involved an employer who had facially discriminated up until the effective date of Title VII.²⁹ For certain jobs the employer required a high school education or its equivalent, but it also excluded blacks from those jobs altogether.³⁰ After the effective date of Title VII, the employer formally opened the jobs to applicants of all races but also implemented a new standardized test requirement, with a passing score pegged to the national average for high school graduates.³¹ Unsurprisingly, given the inferior quality of segregated black schools in North Carolina, where the dispute arose, far fewer black than white applicants passed.³²

The Supreme Court held that Duke Power's hiring practices violated Title VII despite their formal evenhandedness and the trial court's finding that they were not motivated by discriminatory intent.³³ Indeed, the facts of *Griggs* suggest a sensible, nondiscriminatory business reason for Duke Power's policy. Given the poor quality of segregated black schools in the South, a black high school graduate's education was likely to be of lower quality than that of a white graduate. When Duke Power simply excluded blacks, it did not have to

24. *Id.* at 225 (emphasis added) (citations omitted).

25. *Id.* at 241 (White, J., dissenting) (emphasis added).

26. 401 U.S. 424 (1971).

27. 411 U.S. 792 (1973).

28. *Griggs*, 401 U.S. at 431 (emphasis added).

29. *Id.* at 426-27.

30. *Id.* at 427.

31. *Id.* at 427-28.

32. *Id.* at 430.

33. *Id.* at 432, 436.

consider the quality of black public education; a high school education in a pool limited to whites served as a reasonably accurate measure of educational achievement. After Title VII, it had to correct for the difference in educational quality, so it implemented the standardized test. The Court turned this potential justification against Duke Power: Chief Justice Burger opined that because “petitioners have long received inferior education in segregated schools,” the racial disparities in test performance were “directly traceable to race.”³⁴

There’s a poetic irony—and poetic justice—here: for decades Jim Crow segregation was defended under the rubric of separate but equal, but when it counted, employers’ self-interested decisions belied the claim. Still, Duke Power was not directly responsible for segregated schools; it was simply reacting to the realities of racial hierarchy with a formally race-neutral policy. Duke Power’s standardized test was discriminatory because it mirrored the *effects* of a formally discriminatory educational system—not because it betrayed hidden bias or animus. Of course, the segregated educational system was motivated by bias, but that was not, according to the law of the time, the reason it was unlawful; it was unlawful because of its *effects*, as demonstrated by psychological evidence that segregation “generates a feeling of inferiority [in black children] . . . that may affect their hearts and minds in a way unlikely ever to be undone.”³⁵

When the Court later articulated the discriminatory intent standard in *McDonnell Douglas*, it cited *Griggs* in support of a broad, *functional* definition of intentional discrimination, to be proved by way of inference: “The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory *practices and devices which have fostered racially stratified environments* to the disadvantage of minority citizens.”³⁶

The *McDonnell Douglas* standard for proof of discriminatory intent became the functional definition of discriminatory intent in many cases because it allowed the plaintiff to establish discrimination without introducing elusive direct evidence of the defendant’s mental state. Right away, *McDonnell Douglas* introduced a defining ambiguity: on the one hand, the test was said to allow the plaintiff to prove discriminatory intent indirectly, suggesting that the underlying legal violation was an employment decision caused by a discrete state of mind. On the other hand, the *McDonnell Douglas* Court, following *Griggs*, made reference to the broader goal of eliminating “practices and devices which have fostered racially stratified job environments,”³⁷ suggesting a broader substantive goal and a broader range of actionable violations. The disparate treat-

34. *Id.* at 430.

35. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

36. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (emphasis added) (citing *Griggs*, 401 U.S. at 429).

37. *Id.*

ment standard, despite its current emphasis on motive, was originally defined by reference to disparate effects.

It is tempting to define discrimination with reference to a core idea, such as formal classification or discriminatory intent, in relation to which all other types of discrimination could be defined. So, for instance, disparate impact is evidence of intentional discrimination or its functional equivalent. But the development of antidiscrimination law in both the employment context and in constitutional law demonstrates that there is no one core idea: instead, each candidate for the position of defining the core conception of discrimination has itself been defined by the other conceptions. In fact, discriminatory intent was defined in relation to facial classification, facial classifications have been understood to be problematic because of their effects, and discriminatory effect is in turn defined in relation to discriminatory intent. Hence each type of discrimination is defined by another type of discrimination, and the attempt to find the core or foundational definition leaves us moving in a logical circle.

B. *Inference*

The various doctrinal processes for establishing individual disparate treatment are meant to unearth discriminatory motivations after the fact and often indirectly. Lacking clairvoyance, the factfinder in a discrimination case must take on the slightly more pedestrian roles of sleuth and psychoanalyst. Like a sleuth, the factfinder must reconstruct the decisionmaking scenario by means of deduction. Like a psychoanalyst, the judge or juror must probe the opaque depths of the individual psyche, seeking disguised motivations, repressed phobias, and illicit desires. We could imagine litigation acquiring the revelatory drama of a detective story or psychological thriller. If the detective gets lucky, he'll uncover a smoking gun: the telltale memorandum or the witness willing to testify to the overheard bigoted remark. Or, as the trial unfolds, the culprit will eventually crack under the pressure of skillful cross-examination and admit his evil motives. Or perhaps his discriminatory intentions, buried deep in the subconscious, unknown even to his own conscious mind, will slowly but surely be made manifest as the witness stand becomes a surrogate for the analyst's couch and the wrongdoer comes to terms with the tortured domain of his own psyche through retold dreams, slips of the tongue, and fleeting memories of early childhood.

These images of inquiry and dramatic revelation are, of course, not at all what a typical employment discrimination trial is like. It's not just that the typical trial is less dramatic, its modes of proof plodding and technical rather than riveting and lyrical. It's not just that we rarely discover discrimination in the way a detective discovers the motive of a criminal or the psychoanalyst discovers the cause of a neurosis. It's that in the typical trial the object of discovery—discrimination—is much less well defined, less tangible. Often enough, “discrimination” is not there to be discovered; rather, it is what we say at the end of

the trial after we've decided something untoward has happened. "Discrimination" in legal discourse is a cipher; we find not the thing itself, but instead a series of stand-ins, understudies, and placeholders. Of course there is a recognizable, somewhat predictable procedure for establishing intentional discrimination, and anyone familiar with and competent in the doctrine can distinguish plausible claims from hopeless ones; courts can confidently toss many cases out as insufficiently pleaded at the beginning and can summarily judge many more claims as insufficient after the initial evidence is offered up. But to say that an employer (which is often a corporation and therefore *itself* incapable of intending anything) "intentionally discriminated" is not so much to say that someone acted based on a prohibited subjective (but objectively knowable?) state of mind but rather to aver to a set of objective circumstances and the lack of other (extenuating) circumstances. "Discrimination" is not a fact in and of itself; it is a narrative, an interpretation.

Intentional discrimination is almost always established not by evidence of any discrete state of mind but rather indirectly. The indirect method of proof means that the plaintiff rarely establishes that a decisionmaker had the requisite mental state; instead, the plaintiff establishes some other set of facts that are supposed to stand in for the elusive mental state, typically that the defendant lacked a good reason to take the challenged action. So in effect, liability depends not on the presence of discriminatory intent but instead on the absence of a good reason for the challenged action. We might be better served if we simply accepted that the so-called "evidence" of discriminatory intent is in fact the real violation: that is, a violation of Title VII is an unjustified adverse employment decision that harms a member of an underrepresented or vulnerable group.

1. *Inference: "discrimination" = lack of good cause*

According to the Supreme Court's opinion in *McDonnell Douglas*, evidence of unlawful intentional discrimination in Title VII litigation shall unfold according to a formal structure: First, the plaintiff must allege (to survive a motion to dismiss) or prove (to avoid judgment for the defendant as a matter of law) his prima facie case:

- (i) that he belongs to a racial minority [or another group likely to suffer discrimination prohibited by Title VII];
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications.³⁸

Second, the defendant may challenge an element of the prima facie case or defend the challenged action as motivated by "some legitimate, nondiscriminatory

38. *Id.* at 802.

reason.”³⁹ *If the defendant does neither, the plaintiff is entitled to judgment as a matter of law.* And finally, if the defendant articulates a nondiscriminatory reason for the challenged action, the plaintiff must have the opportunity to rejoin that the proffered reason is a *pretext* for discrimination.⁴⁰

The prima facie case of intentional discrimination does not require the plaintiff to prove or even offer evidence of discriminatory intent. Indeed, in theory, if the defendant does nothing after the plaintiff establishes her prima facie case, the plaintiff is entitled to judgment as a matter of law. This would seem to contradict either the black-letter rule that the plaintiff in a civil action carries the burden of persuasion or the understanding of the Title VII cause of action as one alleging intentional discrimination.

The possibility of winning based on the prima facie case alone is merely theoretical: since the passage of Title VII more than forty years ago, there has not been a single reported case in which a defendant did nothing in response to a plaintiff’s prima facie case.⁴¹ Instead, the threat of judgment for the plaintiff based on an unanswered prima facie case serves to force the defendant to answer the plaintiff’s accusation rather than demur. The *McDonnell Douglas* framework is premised on the understanding that disparate treatment will rarely be proved directly; rather, intent will most often have to be inferred from circumstances. Were defendants able to simply demur, they would almost always prevail. The second stage of the framework is designed to force defendants to explain suspicious circumstances, in the hope that hidden discriminatory motives will be revealed—or suggested by unconvincing alibis.

The final potential stage in the production of evidence comes after the defendant has offered a nondiscriminatory reason for the challenged action. The plaintiff can rejoin that the proffered reason is a “pretext.” The exact meaning of “pretext” is ambiguous. A pretext implies a primary text: it is not simply a lie but rather a lie designed to cover up a specific underlying truth, a suspected truth, or a truth lurking in the background. When we use the term pretext in normal conversation, we don’t leave it hanging on the edge of a sentence. We provide it with the companion it implies: it’s a pretext *for something*. With respect to the *McDonnell Douglas* framework, the term “pretext” first appears in the following sentence: “Title VII does not . . . permit [defendant] to use [plaintiff’s] conduct as a pretext *for the sort of discrimination prohibited by § 703(a)(1)*.”⁴² Notice that once again the precise nature of that discrimination is left undefined.

39. *Id.*

40. *Id.* at 804.

41. See Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 665 (1998).

42. *McDonnell Douglas*, 411 U.S. at 804 (emphasis added).

In order to prove that the proffered nondiscriminatory reason is a *pretext for discrimination* (rather than simply an implausible assertion), the plaintiff would also have to demonstrate the existence of the primary *text* for which it covers: discriminatory intent. But there is an alternative reading on which the primary text implied by the use of the term “pretext” describes not what the plaintiff must prove but rather what we will *infer* once that plaintiff has met her formal evidentiary burden. Here the idea is that if the plaintiff can show that the legitimate nondiscriminatory reason is not to be believed, we should *infer* that the real reason is discriminatory. This ambiguity is illustrated in *Texas Department of Community Affairs v. Burdine*:

It is sufficient if the defendant’s evidence [of a legitimate nondiscriminatory reason] raises a genuine issue of fact as to whether it discriminated against the plaintiff. . . .

[If it does,] [t]he plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.* She may succeed in this 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.⁴³

The plaintiff “retains the burden of persuasion.”⁴⁴ This suggests that she must prove intentional discrimination. But she has the opportunity “to demonstrate that the proffered reason was not the true reason” or that “the employer’s proffered explanation is unworthy of credence.”⁴⁵ This suggests that she doesn’t have to show that the proffered reason is a *pretext for discrimination* but only that it is not the real reason for the challenged action. A demonstration that the proffered reason is not the real reason, or that it is a “pretext,” *is* proof of intentional discrimination, because we will infer discrimination from the combination of the *prima facie* case and the implausibility of the defendant’s proffered nondiscriminatory reason.

Here we might think of intent as nothing more than an artifact of the deductive legal framework. We could see the set of shifting evidentiary burdens as designed to produce not “the truth, the whole truth, and nothing but the truth” but instead truth value—a sort of stand-in for a truth that cannot be definitely established or even firmly conceived of. We have to settle on an outcome at some point—either the plaintiff wins or the defendant does—but we do so as a result of an epistemologically arbitrary rule that forecloses further inquiry. Truth is *generated*, rather than discovered or reflected, through the relationship of elements in a formal structure.

43. 450 U.S. 248, 254, 256 (1981) (emphases added).

44. *Id.* at 256.

45. *Id.*

Until 1993 many courts interpreted *McDonnell Douglas* and *Burdine* in just this way and held that if the plaintiff could convince the factfinder that the legitimate nondiscriminatory reason offered by the defendant was not the real reason for the adverse action, the plaintiff was entitled to judgment as a matter of law⁴⁶: the factfinder was *required* to infer discriminatory intent from the prima facie case and the failure of the defendant's proffered nondiscriminatory reason. Through this deductive method, intent is not a thing to be discovered but rather an absence or a lack; the lack of any other believable reason for the adverse employment action leaves intentional discrimination as the only acceptable inference.

An alternative reading prevailed in *St. Mary's Honor Center v. Hicks*.⁴⁷ In that case Justice Scalia insisted that courts

have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines . . . *that the employer has unlawfully discriminated*. . . . [N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.⁴⁸

Some nondiscriminatory reason that the defendant did not offer—perhaps because the decisionmakers who testified or swore on affidavits didn't know about it or were embarrassed to admit it—might have in fact motivated the adverse action. Lots of other reasons—not “articulated” at trial but also not ruled out—might have motivated the challenged action.⁴⁹

If discrimination is a simple matter of fact, this must be correct. The plaintiff bears the burden of persuasion: whatever the evidence, the plaintiff must convince the factfinder that the defendant discriminated. The failure of the defendant's proffered nondiscriminatory reasons to explain the challenged action doesn't necessarily prove discriminatory intent. At worst it suggests that the employees of the defendant (which, as Justice Scalia pointed out, is often not a person but rather a corporate entity⁵⁰) charged with the relevant decision perjured themselves either on the stand, in depositions, or in affidavits. Justice Scalia's point is that the defendant relies on its employees when introducing evidence: it's not fair to hold the defendant liable for *discrimination* under Title VII merely because its employees failed to uncover and introduce evidence of the real, nondiscriminatory motivation for a challenged decision. Title VII prohibits *discrimination*; it does not require employers to discover or make their employees reveal the true justifications for nondiscriminatory employment de-

46. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 512-13 (1993) (citing circuit court cases holding that a finding of a pretext mandated a finding of illegal discrimination).

47. *Id.* at 519.

48. *Id.* at 514-15.

49. See *id.* at 521-22.

50. *Id.* at 520.

cisions. Such a failure on the part of employers may suggest only that the defendant's witnesses were misinformed or unconvincing. The factfinder could disbelieve the defendant's evidence but still doubt the presence of discriminatory intent, perhaps because other evidence—even evidence that the plaintiff thought bolstered his case—persuades it that some third, unarticulated nondiscriminatory reason motivated the adverse action. Or perhaps, when all is said and done, the plaintiff's story of discrimination just doesn't ring true. If the plaintiff hasn't proved his case, he isn't entitled to judgment, regardless of what the defendant has or hasn't proved.

But one might say that Justice Scalia's opinion in *Hicks* reified intent, positing it as a thing that a factfinder can discover or a plaintiff can prove empirically, when it really is an artifact of a formal structure of deduction or the product of a judicially endorsed narrative. By contrast, Justice Souter's dissent in *Hicks* adopted the epistemologically *formal* position that intentional discrimination must be seen as the outcome of the formal process:

[P]roof of a prima facie case not only raises an inference of discrimination; in the absence of further evidence, it also creates a mandatory presumption in favor of the plaintiff. . . . [O]nce the plaintiff [proves his prima facie case] the employer must either respond or lose. . . . Thus, if the employer remains silent because it acted for a reason it is too embarrassed to reveal, or for a reason it fails to discover, the plaintiff is entitled to judgment⁵¹

Here discrimination is simply an adverse employment action against a plaintiff who has proved his prima facie case where there is no credible nondiscriminatory reason offered.

Justice Souter's approach to intentional discrimination can be seen as bringing the theory of disparate treatment into line with the disparate impact theory established in *Griggs*. In both instances, the upshot is that an employment practice or decision that needlessly excludes or injures a member of a disadvantaged or underrepresented group violates Title VII. An employment practice that screens out a disproportionate number of people of a given race or sex and is not job related has an unlawful disparate impact. Similarly, under Justice Souter's theory of disparate treatment, an unjustified employment decision that injures a plaintiff who can make out a prima facie case *is* unlawful disparate treatment.

Under Justice Souter's theory, it doesn't matter that the plaintiff cannot prove that the employer took a race-dependent employment action; it's sufficient that the plaintiff can discredit the employer's proffered explanation for its decision. Justice Souter's rule in *Hicks* effectively imposes a duty of care on employers: an employer like St. Mary's Honor Center that fires a minority employee without a good reason has failed to meet its duty to avoid perpetuating socially pervasive inequality.

51. *Id.* at 528 (Souter, J., dissenting) (citation omitted).

Further, Justice Souter's rejoinder suggests that Title VII requires (or should require) employers to scrutinize and root out unjustified employment decisions. Once faced with a *prima facie* case of discrimination, the employer has to reveal the reason for the challenged action. If the employer can't discover the true reason or discovers a reason that a jury is likely to disbelieve (or resent), the employer will face liability. Practically speaking, this implies an ongoing *duty* on the part of employers to monitor employment decisions and ensure that they are justified.

Of course one might insist that Justice Souter's theory in *Hicks* involves a factual presumption. As Deborah Malamud aptly puts it, Justice Souter presumed "that discrimination is the cause of unexplained employment actions against women and members of minority groups."⁵² It follows then that "[t]he question [in *Hicks*] is whether, in the face of uncertainty, the legal system should use a mandatory presumption instead of requiring individualized proof."⁵³ Malamud, like Justice Scalia, thinks this presumption is unjustified: "[It] is akin to *res ipsa loquitur*: nothing bad happens in the workplace without a provable reason; discrimination is a possible reason; no alternative reason has been proven; therefore discrimination must be the answer."⁵⁴ But according to Malamud the mandatory presumption suggests a too *optimistic* picture of the American workplace, because "wrongful, or at least undefendable, employer actions are significant problems in the American workplace, even outside of the setting of actionable discrimination."⁵⁵

Malamud is right. People—including women and minorities—are treated unfairly for all sorts of bad reasons that have nothing to do with sex or race. For Malamud, if the mandatory presumption is not justified, it follows that the plaintiff must present additional evidence to actually prove that the relevant employer discriminated:

[D]eciding cases on the basis of a mandatory presumption [as Justice Souter would have required in *Hicks*] that is inconsistent with contemporary beliefs about the nature of discrimination raises important questions about the perceived legitimacy of the enterprise.

. . . What is far more effective is for courts and advocates to *bring facts to the fore* and *convincingly portray them as instances of prohibited discrimination*. For example, . . . courts have learned and taught that "personal animosity" toward a woman can be the result of sex discrimination when the animosity is due to the woman's being "too aggressive, not feminine enough" . . .⁵⁶

52. Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2255 (1995).

53. *Id.* at 2254.

54. *Id.* at 2255.

55. *Id.*

56. *Id.* at 2260-61 (emphasis added).

Malamud is right that if most people don't believe that discrimination is sufficiently prevalent to justify the pre-*Hicks* presumption, *and if the presumption must be justified in each and every case*, then the presumption is illegitimate. But will more facts really settle anything? It's telling that even as Malamud calls for bringing more facts to the fore, she recognizes that this is not enough: the plaintiff must also "convincingly *portray* them as instances of prohibited discrimination."⁵⁷ To use Malamud's example, so-called personal animosity toward a woman can be the result of sex discrimination, but of course it can also be purely personal. How are we to know which is which? The facts may be settled, but they don't decide the legal question. Of course the plaintiff can pile on more facts: psychologists testifying that "personal animosity" is often a symptom of subconscious bias or sociologists testifying that allowing managers to make decisions based on their personal feelings is an employment practice that is vulnerable to bias. But none of this proves discrimination in the particular case.

Even if the facts are settled, the legal issue is not, because the facts can be portrayed as discrimination more or less convincingly. And ultimately this is not a simple matter of drawing uncontroversial factual inferences from the evidence; it is a matter of reframing the definition of discrimination itself. Whether or not animosity toward a woman counts as an instance of discrimination depends, first and foremost, on what one means by "discrimination." It's not enough to say that discrimination is treating a woman differently than one would treat a man in identical circumstances, because circumstances are never identical. As Kimberly Yuracko points out:

In a sexist society, nothing done by men and women has precisely the same meaning. Traits are necessarily viewed . . . through a systematically gendered lens.

. . . .

. . . Aggressiveness in women is bitchy in a way that aggressiveness in men is not. . . . Even if [a woman fired for her demeanor] had engaged in technically identical behavior to that of her male colleagues, her behavior would not have been socially the same.⁵⁸

Of course viewing behavior through a gendered lens is sex discrimination. But if doing so is unavoidable in our sexist society, how is an employer to avoid it? Just as a grudge could be sexist or strictly personal, a negative subjective evaluation could reflect bias, idiosyncrasy, or valid assessment. There is no possibility of a gender-neutral decision: an employer must either consider gender in an effort to correct for unavoidable gender bias or make decisions influenced by that bias. More facts won't help to resolve the controversy, because the ultimate issue is what counts as "discrimination": active and conscious con-

57. *Id.* at 2261 (emphasis added).

58. Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 196-97 (2004).

sideration of sex or passive influence of gendered criteria of evaluation? In short, in many cases there is no way of settling the question with more facts. Everything depends on how the facts are interpreted, and that, in turn, depends as much on whether we think the facts are damning in and of themselves as on whether we think the facts are evidence of an elusive and chameleon-like “discrimination.”

But suppose that instead of treating personal animosity toward a woman as *evidence* of sex discrimination, we made personal animosity toward a woman *an element* of a cause of action for sex discrimination. The latter formulation offers a predictable and systematic approach to determining what violates the law—in the form of a mandatory presumption.

Ideally a set of policy considerations balancing the prerogatives of employers against the need to make workplaces more receptive to women would underlie this determination. These considerations are better understood as defining the employer’s *duty of care* than as reflecting some discrete act or state of mind. In fact, the evidentiary structure for proof of discriminatory intent by inference can be best understood as implicitly defining various duties of care.

2. *A limited duty of care to make good-cause employment decisions accomplishes the goals of Title VII*

The pre-*Hicks* rules for proving discriminatory intent thus amount to a weak implicit requirement that employment decisions affecting members of historically vulnerable groups be made for justifiable reasons. The requirement is weak because an employer could avoid liability by frankly asserting a credible *bad*, but nondiscriminatory, reason for the decision; for instance, St. Mary’s Honor Center could have, even under Justice Souter’s rule, introduced evidence that Melvin Hicks was fired because his supervisor had an irrational but non-racial grudge against him. But of course bad and irrational reasons are less likely to be believed than defensible and rational ones, and many juries will punish employers even when they believe a nondiscriminatory (but bad) reason was behind the challenged action.

This is a scandal if Title VII liability, as the Court held in *Hicks*, requires a discrete mental state: the law will sometimes impose liability on employers who act for bad reasons unrelated to race or sex, just as it will sometimes fail to find employers who act for race- or sex-related reasons liable when those employers can advance credible legitimate reasons for their decisions. But this is true even if the law tries to zero in on mental state, because we typically have no way of establishing mental state directly; we must do so by making inferences from circumstantial evidence, and such an inquiry is necessarily imperfect. Moreover, there are sound policy reasons to discourage the very actions that count as evidence of discriminatory intent: they are objectionable and socially destructive in and of themselves. Hence, it makes sense from a more pragmatic perspective to simply punish actions without regard to whether or

how they are related to an elusive and ill-defined mental state. What's important is that the law will reduce unjustified decisions affecting vulnerable groups in the run of cases, breaking down patterns of segregation and hierarchy.

Some readers will complain that this approach sacrifices individual justice. But as far as individual justice is concerned, the specific injury suffered by an individual fired because of race (and who therefore has a conceptually valid discrimination claim) is normatively identical to that suffered by someone fired for an idiosyncratic bad reason (and who therefore does not have a valid claim). In both cases, the guarantee to be evaluated based on rational criteria such as merit has been breached: both employees have been fired for irrational or bad reasons. The reason we distinguish between *bad* reasons—offering legal remediation for some and not for others—is that the cost of combating all unjustified decisions is too high and we have reason to fear the cumulative effects of multiple bad-cause adverse actions affecting the same handful of discrete social groups. Liability hinges on the specific reason for the bad-cause termination not because the discrete individual injury suffered is distinctive, nor because the motivations of the employer are distinctively contemptible, but rather because we expect members of some groups to suffer a disproportionate incidence of bad-cause adverse decisions in the absence of extraordinary intervention. That the challenged decision is made because of race is relevant *only* because it signals that the target of the bad-cause decision in question is likely to suffer—both directly and indirectly as a member of an interdependent group—a disproportionate number of adverse decisions made for bad reasons. The goal of anti-discrimination law, then, is to make the predicted frequency of unjustified decisions roughly equal for all groups in society—not necessarily to eliminate them altogether. In principle, we shouldn't care whether we achieve this end by reducing only the number of "discriminatory" decisions (those in fact made "because of" race, sex, age, disability, etc., assuming we could agree on definitions) or by reducing some combination of "discriminatory" decisions and other bad decisions affecting members of vulnerable groups; the purpose underlying the statute will be achieved either way.

One might object that this ignores the stigma and psychological injury associated with each individual case of discrimination. But only the rare easy cases of overt classification based on race, or easily established and unambiguous animus or stereotyping, are inherently stigmatizing. Today, most discriminatory decisions are ambiguous: the central problem involves determining whether the decision in question involved bigotry or not. If the decision is ambiguous, the stigma should be correspondingly weak. What strengthens and clarifies the stigmatic effect of ambiguously "discriminatory" decisions is their frequency and pervasiveness. I may be in doubt as to whether race is the reason the first or second taxicab I hail passes me for another fare down the block, but after the sixth or seventh empty taxicab drives by, my doubt will be replaced by anger and shame. Consider Cornel West's account:

I had an hour until my next engagement. . . . I waited and waited and waited. *After the ninth taxi refused me*, my blood began to boil. The tenth taxi refused me and stopped for a kind, well-dressed, smiling female fellow citizen of European descent. As she stepped in the cab, she said, "This is really ridiculous, is it not?"⁵⁹

Taxicab drivers refuse passengers for a host of reasons, of which race is only one. Black people will typically suffer mysterious rejections more frequently than whites, because they will suffer the garden-variety rejections *and* the racial ones. But if the incidence of mysterious rejections were the same for people of all races, the stigma would be eliminated (or at least any remaining stigma would be the result of correctable misperception).

Admittedly it's unlikely that we could know with accuracy whether the incidence of unjustified adverse decisions is equal across social groups, although with sophisticated analytic and statistical methods, perhaps we could come acceptably close. In any event, reducing the number of unjustified rejections suffered by members of vulnerable groups should be the goal, and that effort should not be shackled to the unanswerable metaphysical question of whether a given rejection occurs "because of" race. This means that we should tolerate what some will perceive to be both false positives and false negatives in order to achieve better results overall. Here the tradeoff is rough justice at the individual level for more effective justice at the social level. This is a trade we should be willing to make, especially since, given the daunting evidentiary impediments to proving discrimination, rough justice at the individual level is the best we can expect in any case.

II. "CAUSATION" DEFINES THE SCOPE OF A DUTY OF CARE

I've argued that the pre-*Hicks* rules for proving discriminatory intent by inference effectively established a weak requirement that employment decisions affecting members of vulnerable groups be made for cause. But of course these rules are only a piece of the law of disparate treatment. This Part turns to the doctrine surrounding cases of mixed motives, in which the deductive approach we have just explored is not applicable.

The deductive and inferential approach to discrimination, articulated in the *McDonnell Douglas* line of cases, suffers from a significant practical weakness: it assumes that only one motivation can cause an employment decision. This assumption is built into its epistemological structure: it is assumed that if the employer articulates a legitimate nondiscriminatory reason for the challenged decision, that reason is either in fact the reason for the decision, thereby defeating the inference of discriminatory intent, or pretextual, thereby confirming the inference. But of course many cases involve mixed or ambiguous motives: the plaintiff may be fired because she is abrasive and because she is a woman, or

59. CORNEL WEST, RACE MATTERS, at x (1993) (emphasis added).

she may be fired because she is an “abrasive woman,” suggesting that either an abrasive man or a delightful woman would have been retained.

Under the *McDonnell Douglas* structure, no such cases violate Title VII, because the employer will be able to assert a valid nonpretextual, nondiscriminatory reason for its actions (e.g., “she was fired because she’s abrasive”) even if race or sex was also a motivation. This can’t be right: the promise of equitable treatment underlying the statute implies that no one should be worse off because of her race or sex. On the other hand, we might say that any decision in which race or sex is a factor violates Title VII (even if legitimate motivations are also factors). But this is overinclusive: it suggests that even a lazy, insubordinate, chronically late, underachieving woman might successfully attack her termination as discriminatory if she could show that sex played even a minor role in the decision. This conception of Title VII condemns not decisions made because of race or sex but rather any consideration of race or sex, regardless of its influence on a challenged decision. Such an approach may violate expressive liberties; individuals are entitled to harbor and express racist or sexist beliefs provided they do not act on them in their capacity as stewards of important social institutions.

Actionable discrimination requires, at a minimum, that a decisionmaker put her prejudice into practice, allowing it to influence her behavior as a decisionmaker. Hence, in mixed-motives cases, the pivotal question is not the existence of a discriminatory motive but rather the existence of causation: did the prohibited motivation “cause” the challenged action? Following the analysis in Part I, I will argue that we should borrow from insights developed in private law and think of “causation” as a stand-in for a less conceptual inquiry: whether the employer satisfied a duty of care to keep illicit considerations from poisoning employment decisions.

This focus on causation should immediately sound alarms; we have realized at least since the time of David Hume that causation is less a physical fact than a philosophical dilemma.⁶⁰ Causation has inspired not only philosophical skeptics but also legal skeptics; consider for instance a classic torts case in which a central question for the court was whether the negligence of the employees of the Long Island Railroad *caused* Helen Palsgraf’s injuries.⁶¹ To be sure, the employees of the railroad, by pushing a passenger who was carrying concealed dynamite onto the departing train, caused him to drop the explosives, which in turn set into motion the cascade of events that ended in her injury. But Chief Judge Cardozo concluded that they did not cause her injuries—at least not in the sense necessary to give rise to legal liability:

The conduct of the defendant’s guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far

60. See DAVID HUME, A TREATISE OF HUMAN NATURE 168 (Ernest C. Mossner ed., 1969) (1739-1740).

61. *Palsgraf v. Long Island R.*, 162 N.E. 99 (N.Y. 1928).

away. . . . Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. “Proof of negligence in the air, so to speak, will not do.”⁶²

In *Price Waterhouse v. Hopkins*,⁶³ as in *Palsgraf*, the central issue *seems* to involve causation. Ann Hopkins sued her employer for sex discrimination after being passed over for partnership.⁶⁴ The evidence presented at trial showed that Hopkins was passed over because of shortcomings in her “interpersonal skills”: she was “overly aggressive, unduly harsh, difficult to work with and impatient with staff.”⁶⁵ But it was also clear that sex played some role in Hopkins’s failed bid for partnership: some partners complained that she “overcompensated for being a woman,” several mentioned her sex in contexts both favorable and detrimental to Hopkins, and she was advised that in order to improve her chances for promotion she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁶⁶

On the record, the case involved mixed motives: sex was in play, but so was Hopkins’s abrasive personality. Price Waterhouse—echoing Chief Judge Cardozo in *Palsgraf*, whether intentionally or not—argued that Hopkins showed only that discrimination was “in the air” when she was passed over and that discrimination “in the air” (like negligence in *Palsgraf*) will not do to establish liability.⁶⁷

A plurality of the Supreme Court agreed that it is not enough for the prohibited motivation to have been “in the air”; it must have *caused* the challenged adverse decision in order for the plaintiff to recover damages or be awarded personal injunctive relief: “Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.”⁶⁸ The plurality, however, employed an unconventional definition of cause:

62. *Id.* at 99 (quoting FREDERICK POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920)).

63. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014). Congress addressed the causation controversy in the Civil Rights Act of 1991, which was, in part a direct response to *Price Waterhouse*, insisting that an employment practice in which a forbidden consideration is a “motivating factor” is unlawful. § 107(a). Accordingly, much of the controversy over causation is, as a formal matter, now moot. Nevertheless, the concept of causation continues to play an important—and ambiguous—role in antidiscrimination law and the various opinions in *Price Waterhouse* remain instructive examples of the Justices’ thinking on the topic. Justice O’Connor’s opinion in particular reveals the ideological and policy questions underlying the causation question.

64. *Hopkins*, 460 U.S. at 231-32 (plurality opinion).

65. *Id.* at 235-36 (internal quotation mark omitted).

66. *Id.* at 235 (internal quotation marks omitted).

67. *See id.* at 251 (internal quotation mark omitted).

68. *Id.*

Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—*even if we may say later . . . that the decision would have been the same if gender had not been taken into account.*⁶⁹

But this definition of “because of” doesn’t involve causation at all. Instead, what is required is a prohibited state of mind at a critical juncture. The plurality’s attempt at clarification in this respect is less than edifying:

To attribute this meaning to the words “because of” does not, as the dissent asserts, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, *neither* physical force was a “cause” of the motion unless we can show that but for one or both of them, the object would not have moved . . . Events that are causally overdetermined, in other words, may not have any “cause” at all. This cannot be so.⁷⁰

This explanation echoes a familiar law school hypothetical of simultaneous causation: A building is engulfed in two fires, one negligently set and one caused by lightning, both of which simultaneously converge on the structure. Which fire “caused” the destruction of the building? Is the putative tortfeasor liable, or was the damage an act of God? Just as we know the answer can’t be neither, we should recognize that both legitimate and illegitimate factors could cause an adverse employment decision without either being the but-for cause.

But the problem of simultaneous causation suggests a different definition of “because of” than the one the plurality offers. The plurality’s definition would find liability whenever “an employer considers . . . gender . . . at the time of making a decision,”⁷¹ whether or not that consideration would have resulted in the decision absent the legitimate considerations and whether or not the legitimate considerations alone would have resulted in the decision. This is not analogous to two forces, each of which would independently have moved an object; here the analogy would be to say that if a force, in and of itself too weak to move the object, acts in tandem with a force, by itself strong enough to move the object, the weaker force nevertheless “caused” it to move. To return to our tort law hypothetical, if the negligently set fire alone would merely scorch the siding of the house, and the fire caused by lightning would destroy it, is the negligently set fire a cause of the destruction at all?

None of this discredits the plurality’s rule of decision (which I support, for reasons I will explain shortly), but it does demonstrate that the rule, in practice, dispenses with any notion of causation. The plurality’s rule is simply that *any*

69. *Id.* at 241 (emphasis added).

70. *Id.* (citations omitted).

71. *Id.*

consideration of the forbidden ground at the time of the challenged decision triggers liability, regardless of whether or not the forbidden ground “caused” the decision. In short, the plurality’s rule requires employers to purify their personnel decisions of forbidden considerations.

Justice O’Connor, in concurrence, insisted that unless the plaintiff is required to establish that the forbidden ground was the but-for cause, Title VII will effectively impose a form of “thought control”:

The legislative history makes it clear that Congress was attempting to eradicate discriminatory *actions* in the employment setting, not mere discriminatory *thoughts*. Critics of the bill that became Title VII labeled it a “thought control bill,” and argued that it created a “punishable crime that does not require an illegal external act as a basis for judgment.” . . .

. . . .

. . . Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.⁷²

Justice O’Connor concluded that if the prohibited ground played a “substantial role” in the decisionmaking process,⁷³ this alone is actionable discrimination, sufficient at least to shift to the employer the burden of proving that it would have made the same decision even without considering the forbidden ground and perhaps enough to subject the employer to some liability regardless. But on what theory of causation can sexism be said to have affected the decisionmaking process *at all* if the decision would have been the same even without the sexism? Stripped of its rhetoric, Justice O’Connor’s causation analysis is not very different than that of the plurality: both would infer causation from the presence of forbidden considerations in the decisionmaking process. Causation does not distinguish Justice O’Connor’s analysis from that of the plurality; indeed it does no analytic work in either theory of liability.

Justice O’Connor’s opinion differs from that of the plurality in its focus on “direct evidence” of sexism in the “decisionmaking process.”⁷⁴ Justice O’Connor insisted that the plaintiff must demonstrate by “direct evidence that an illegitimate criterion was a substantial factor in the decision.”⁷⁵ She indicated that “[neither] stray remarks in the workplace [n]or . . . statements by nondecisionmakers, [n]or statements by decisionmakers unrelated to the decisional process itself, [can] suffice to satisfy the plaintiff’s burden.”⁷⁶

Justice O’Connor’s causation analysis in *Price Waterhouse* would establish a presumption that prejudiced or stereotyping attitudes caused the challenged

72. *Id.* at 262, 265 (O’Connor, J., concurring in the judgment) (first and second emphases added) (quoting 100 CONG. REC. 7254 (1964) (statement of Sen. Sam Ervin)).

73. *Id.* at 269.

74. *Id.* at 270, 273.

75. *Id.* at 276.

76. *Id.* at 277.

action *only* when they were part of a formal or discrete decisionmaking process, as distinguished from more general attitudes and statements made in the workplace. This limitation would prevent Title VII from becoming a “thought control” law: employers would not be liable simply because their employees made sexist remarks; they would be liable only when employees with authority over the challenged decision made sexist remarks in direct relation to that decision.

Justice O’Connor used the image of the boardroom to illustrate her legal standard and to capture this idea of a discrete zone of decisionmaking:

It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.⁷⁷

For Justice O’Connor, Title VII does not require employers to police their employees’ thoughts and expression generally, but it does require employers to keep sexism out of this figurative boardroom.

This limitation has little to do with whether the prohibited motive “caused” the decision. Many employees will be injured not in formal decisionmaking processes but rather long before a formal review or promotion occurs, by supervisors who give them grunt work instead of challenging assignments that offer the chance to impress or by subtle comments and insinuations that will harm their reputations. This type of discrimination, much more so than overt bigotry in a formal process, is probably the most pervasive impediment to true equality of opportunity for women and minorities. Bigotry, stereotyping, and animus “in the air” is a pretty good indication that this type of discrimination is a problem on the ground—at least enough to let a factfinder decide the issue. Sexism quite removed from the formal decisionmaking process can have a powerful, if indirect, effect. Surely the private biases of influential nondecisionmakers, expressed in informal settings, can influence the decisionmaking process, even to the extent of “causing” adverse employment decisions. Why not allow the factfinder to infer causation from bias “in the air”? If the air smells bad enough, some of the contaminants probably touched the ground. Why shouldn’t it be a violation of Title VII whenever racism or sexism are “in the air” in sufficient quantities to pollute the workplace environment, potentially diminishing opportunities and creating a toxic environment for members of the potentially disadvantaged groups?

Limiting liability to cases that involve prejudiced statements in a formal decisionmaking process does not limit liability to those cases in which the discrimination “caused” the adverse decision. But it does define a danger zone in which employers are on notice that they should aggressively police and counter

77. *Id.* at 272-73.

discriminatory statements; in other words, it establishes the scope of the employer's duty of care. The idea here is that employers should be liable only for discrimination that they can prevent as *institutions* without overly draconian policing of the expressions of their employees ("thought control"). They should be liable only when they—as entities—could have prevented the discrimination from occurring. Sufficiently large employers⁷⁸ act only through rules and formal procedures; they do not have intentions that they can act on or resist. Instead of comparing such institutions to individuals with human psyches and subjective intentions, Justice O'Connor's approach treats Title VII defendants as *institutions* and requires them to do what institutions can do: establish procedures and protocols that will immunize their decisionmaking processes from the biases of their employees.

Compare the Court's opinion in *Burlington Industries, Inc. v. Ellerth*.⁷⁹ In *Ellerth*, a male supervisor allegedly harassed a female subordinate, who eventually quit in response.⁸⁰ She never informed senior management about the pattern of harassment but later sued her former employer for sex discrimination.⁸¹ The trial court found that the plaintiff had suffered sexual harassment at the hands of the supervisor, whose conduct was "severe and pervasive enough to create a hostile work environment," but granted summary judgment for the defendant because it found that the employer neither knew nor should have known about the harassment.⁸² Justice Kennedy, writing for the Court, noted that a principal is vicariously liable for the torts of its agent only when the agent is aided in accomplishing the tort by the agency relationship.⁸³ Justice Kennedy also opined that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms . . . [and] borrows from tort law the avoidable consequences doctrine."⁸⁴ In order to encourage both employers and employees to take reasonable steps to avoid ongoing harassment, the Court held that when harassment does not take the form of a tangible employment action (such as a firing, demotion, or undesirable transfer), an employer

may raise an affirmative defense to liability . . . [which] comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff

78. Title VII does not apply to businesses with under fifteen employees. Civil Rights Act of 1964, tit. VII, § 701, 42 U.S.C. § 2000e(b) (2012).

79. 524 U.S. 742 (1998).

80. *Id.* at 747-48.

81. *Id.* at 748-49.

82. *Id.* at 749.

83. *Id.* at 758 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)).

84. *Id.* at 764.

employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁸⁵

This approach to Title VII liability is anathema to those who believe that actionable discrimination is a specific and discrete injury and that everyone who suffers it—and only those who suffer it—deserves reparation. But sexual harassment does not involve a specific and discrete injury: the identical behavior can be harassment in one context, an annoyance in another, speech protected by the First Amendment in another, and enjoyable flirtation in another. For instance, sexual overtures are objectionable because of their *effects* on women's opportunities in the workplace. Employers must make an effort to prevent harassment and the corresponding damage to women's career opportunities, but no employer can prevent every ill-considered comment, unwelcome pass, or off-color joke. As entities, most employers can't harass or refrain from harassment—but they can establish procedures to ensure that unwelcome comments and overtures can be reported and dealt with.

By the same token, the victim of harassment is usually in the best position to bring the problem to the attention of the employer. It's reasonable to apply extraordinary scrutiny to potentially discriminatory adverse decisions when the victim is powerless to affect her fate; in such a case the employer is certainly, in Guido Calabresi and Douglas Melamed's terms, the "cheapest cost avoider."⁸⁶ But when the employee can also avoid the conflict, *she* may be the least cost avoider. Often only the victim and the perpetrator know what transpired, and only the victim knows whether the conduct was unwelcome and crossed the threshold from merely irritating to a material change in the terms and conditions of employment. The employee can help to avoid joint costs by bringing the incident to the attention of the employer, assuming the employer has a well-known and effective process for dealing with such complaints. In turn, only the employer can establish such complaint procedures and ensure that complaints are taken seriously and problems rectified. The *Ellerth* approach requires each party to do what it can to avoid the costs of sexual harassment.

Justice O'Connor's approach to causation in mixed-motives analysis follows a similar logic. The employer as an entity can easily clean up the formal decisionmaking process, but it can't police the offhand comments of employees without great expense, surveillance, and regulation of individual opinion and expression ("thought control"). Hence, for Justice O'Connor, stray comments and sexism or racism "in the air" are not actionable even if they affect employment decisions, whereas prejudiced and stereotyping comments in a formal decisionmaking process *are* actionable even if they *don't* actually affect the final decision.

85. *Id.* at 765.

86. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 n.43 (1972).

Policy judgments—not the metaphysics of causation—underlie these rules. Imposing liability for decisions caused by sexism “in the air” might encourage an excess of caution, to the detriment of other socially desirable goals. In *Palsgraf*, Chief Judge Cardozo pointed out that the railroad guards were trying to protect the passenger carrying the explosives from physical injury: “The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted it was a wrong to a property interest only, the safety of his package.”⁸⁷ Imposing liability for unforeseeable injuries might lead to an excess of caution, discouraging interventions that would *prevent* injury to people under normal circumstances. Similarly, Justice O’Connor’s concern with “thought control” suggests that imposing Title VII liability for sexism “in the air” might lead to an excess of caution on the part of employers, leading them to police legitimate, if controversial, expressions of opinion.

Under Justice O’Connor’s approach, Title VII does not even aspire to eliminate all intentional discrimination on the basis of race and sex. At most it will regulate certain formal proceedings that are within the direct control of upper management and are fairly neatly sealed off from the more unpredictable give-and-take of the workaday world. In Justice O’Connor’s conception, the prohibition against disparate treatment doesn’t offer a remedy whenever an individual is treated differently because of race or sex; instead it seeks to limit the introduction of patently prejudicial assertions and bigoted stereotypes into a discrete formal decisionmaking process. “Causation” is little more than shorthand for a policy analysis that balances the goal of reducing illegitimate workplace segregation and hierarchy against legitimate employer prerogatives, assigning responsibility to employers only in those circumstances that they can control *at an acceptable cost*.

In a sense, this focus on the employer as an entity completes a move begun in the 1970s when federal courts eliminated supervisor liability under Title VII in favor of vicarious employer liability for the actions of supervisors.⁸⁸ Ever since, the question of employer liability for the unauthorized actions of supervisors has been a source of concern. The latest iteration of this concern involves “cat’s paw” liability for discriminatory actions that influence an employment decision made by someone without discriminatory intent.⁸⁹ Applying the Uniformed Services Employment and Reemployment Rights Act of 1994, which

87. *Palsgraf v. Long Island R.*, 162 N.E. 99, 100 (N.Y. 1928).

88. Scott J. Connolly, Note, *Individual Liability of Supervisors for Sexual Harassment Under Title VII: Courts’ Reliance on the Rules of Statutory Construction*, 42 B.C. L. REV. 421, 433 (2001) (noting that federal appellate courts initially disagreed about whether supervisors could be held individually liable under Title VII, but that today “there is almost complete consensus . . . [with the] Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits” having rejected supervisor liability).

89. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190 (2011) (internal quotation marks omitted).

forbids employers from discriminating on the basis of military service or obligation, the Supreme Court held in 2011 that an employer is liable for the discriminatory actions of a supervisor who influences, but does not make, the employment decision if the supervisor's influence is a "proximate cause" of the challenged decision.⁹⁰ At this point, I hope it's clear that the question of proximate causation is, as demonstrated by *Palsgraf*, nothing more than an invitation for courts to define the scope of the employer's duty of care.

As Judge Andrews pointed out in dissent in *Palsgraf*, negligence is, in principle, a legal injury to anyone who is in fact harmed as a result, but the law cannot follow this through to its logical conclusion, imposing legal liability for injuries remote in time and place from the alleged tort. Unlike Chief Judge Cardozo, who sought to replace objective causation with a crisp legal distinction between compensable injury and *damnum absque injuria* in the notion of foreseeability, Judge Andrews insisted that the limit of liability, as expressed in the legal notion of proximate causation, is in fact a policy judgment disguised as an objective inquiry:

Any philosophical doctrine of causation does not help us. . . .

. . . .

. . . A murder at Serajevo may be the necessary antecedent to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. . . .

A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. . . .

. . . .

. . . There is in truth little to guide us other than common sense.⁹¹

So it is with "causation" in antidiscrimination law. As a practical matter the inquiry will involve the same kinds of inferential leaps, controversial judgments, and questions of expediency involved in determining whether it makes sense to say that the assassination of Archduke Franz Ferdinand "caused" the Blitz twenty-six years and a world war later.

The modest conception of antidiscrimination law that I've unearthed here doesn't try to eliminate all discriminatory conduct, but given the constraints of popular politics, the limits of judicial administration, and the real conflicts with freedom of expression in the workplace, it may be the most one can realistically expect from civil rights law.

This shouldn't signal retreat from our ambitions to guarantee social justice; instead it should suggest that civil rights laws are not a comprehensive means to that end. Greater honesty about the limitations of civil rights laws might help

90. *Id.* at 1194.

91. *Palsgraf*, 162 N.E. at 103-04 (Andrews, J., dissenting).

convince a skeptical public of the need for other egalitarian policies. For instance, in answer to the objection that affirmative action violates an individual right against race or sex discrimination, the correct response is that there is no such absolute right. The law allows a great deal of discrimination to go unpunished and unremedied when providing a remedy would unduly undermine other important social or institutional values or goals. It is therefore consistent to allow some “reverse discrimination” in order to serve the important institutional goals that affirmative action serves. Further, because civil rights laws do not eliminate all discrimination, proactive social justice policies such as affirmative action can be seen as offsetting the discrimination that antidiscrimination law implicitly allows.

CONCLUSION

I have argued that antidiscrimination law does not prohibit a discrete type of action, state of mind, or motivation. Instead, it mediates an unavoidable tension between competing and contradictory goals: fairness as opposed to employer prerogatives; individual as opposed to collective justice; and equity as opposed to expressive liberty.

Consequently, the doctrine displaces this basic tension onto concepts that appear to have objective and empirically derived definitions, such as “discriminatory intent” and “causation.” Unfortunately, this leads lawyers and academic commentators to marshal empirical evidence that they believe will definitively settle what are in fact normative controversies. So, for instance, liberals insist that new developments in cognitive psychology conclusively support plaintiff-friendly shifts in presumptions surrounding proof of discriminatory intent,⁹² while conservatives maintain that the metaphysics of causation requires defendant-friendly rules in cases of mixed motivation.⁹³ But because the factual questions are really displaced normative questions, the empirical targets are always on the move: no amount of social science evidence will convince those sympathetic to employer prerogatives that ambiguities should be resolved in favor of plaintiffs complaining of discrimination, and no objective theory of causation can defeat the normative conviction that employers should be held responsible for bias “in the air” that poisons the working environment.

If discrimination does not define a discrete type of action, then it follows that the injury suffered by individual plaintiffs in discrimination lawsuits is not *inherently* distinctive: it is, viewed from an individual perspective, the same injury that anyone who faces an unjustified adverse decision (rejection of a job application, termination, demotion, failure to receive a promotion, etc.) suffers. For the most part, we consider such disappointments to be among the costs of living in a free society; employers, like other private actors, are free to make

92. See Krieger & Fiske, *supra* note 14, at 1004.

93. See *supra* Part II.

bad decisions, and we can take solace in the fact that they will have to suffer the consequences of their bad judgment along with those they unwisely decline to hire, retain, or promote. The reason to prohibit a small group of unjustified adverse employment actions is not the nature of the specific *individual* injury but rather the consequences of multiple adverse actions affecting the same individuals and interdependent social groups. Therefore, if antidiscrimination law can reduce the expected incidence of unjustified adverse decisions to achieve parity across relevant social groups, it will have achieved its social goal, even if some of the unjustified decisions that remain might reasonably be experienced as dependent on race or sex.

In other words, the metaphysical entitlement against “discrimination” must boil down in practice to a more tangible policy goal of breaking down illegitimate hierarchy. Once the doctrine is viewed in this way, many of what appear to be defects of antidiscrimination law are revealed as pragmatic virtues. It should be obvious that the policy goals underlying antidiscrimination law must compete with other potentially inconsistent policy goals. This balance can be struck openly or surreptitiously, but one way or the other, it will be struck. So, for instance, the law formally insists that employers are liable for the discrimination of managers, whether or not the employer as an entity can prevent the discrimination at a reasonable cost.⁹⁴ But courts adjust this stricture as a practical matter through evidentiary rules that may or may not make employers responsible for monitoring, reviewing, and defending ambiguously motivated decisions and through evidentiary rules that may or may not make employers responsible for controlling or correcting a generally adverse or hostile work environment.

For example, *Ellerth* was formally a case defining an employer’s vicarious liability for actions that don’t directly involve the authority of the employer. It’s firmly established that an employer is vicariously liable for any and all discriminatory employment decisions made by managers authorized to act for the employer.⁹⁵ Arguably, hostile work environment discrimination is different because it does not directly involve an act made on behalf of the employer; in a sense, workplace harassment is almost always the misconduct of a rogue agent.⁹⁶ But most discriminatory decisions can be said to be the misconduct of rogue managers. Consider the discrimination at issue in *Price Waterhouse*. Much of the evidence of discrimination involved sexist comments only indirectly related to the actual decision. Writing for the plurality, Justice Brennan noted that the district court had found that the employer did nothing to repudiate or disclaim sexist comments, implying that the employer’s negligence was a

94. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986)).

95. See *id.*

96. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 769-70 (1998) (Thomas, J., dissenting).

factor that justified liability.⁹⁷ Justice O'Connor's concern about "thought control" reflects the understanding that the employer is not responsible for sexist comments made outside the context of an employment decision.⁹⁸ Yet of course such comments can indirectly but profoundly affect the conditions of employment. In both instances the unauthorized and unofficial behavior is at issue.

Indeed we could extend this analysis to include even the discriminatory decision of an individual manager. If an employer forbids discrimination as a matter of policy, a manager who nevertheless discriminates has acted outside the scope of his authority. In *Hicks*, Justice Scalia argued that, even if the manager responsible for the challenged decision were to lie under oath about his motivations, a mandatory presumption of discrimination would not be justified, because the dishonesty of the manager cannot be attributed to the employer.⁹⁹ But if the employer isn't responsible for discovering the reason for an employment decision in the context of trial, where it has an explicit legal responsibility to offer an explanation, can the employer be responsible for reasons underlying the employment decision when it's made? It's only a small step from Justice Scalia's argument in *Hicks* to the conclusion that the employer's responsibility for discriminatory decisions is limited in some way—in other words, that vicarious liability does not automatically apply even in cases involving tangible employment decisions. If so, then what determines whether or not an employer is liable? In each case, the relevant question is what the *employer* has done or failed to do to prevent the discriminatory behavior.

Accordingly, we could reframe the burden-shifting question in *Hicks*, the causation analysis in *Price Waterhouse*, and the hostile work environment problem in *Ellerth* as each involving an implicit judgment about vicarious liability. Rather than a sharp distinction between discriminatory employment decisions and hostile work environment harassment by nondecisionmakers, we have a spectrum with third-party harassment at one extreme and a discriminatory decision made by a single manager at the other. (Both hostile work environment cases that do not involve a tangible employment action and mixed-motives cases fall somewhere in between.) The strength of the *presumption* that the employer is vicariously liable increases as we move along the spectrum toward the single-motive discriminatory decision, but in practice there is no categorical distinction between the various types of discrimination and hence no type of discrimination for which the employer must always be vicariously liable.

97. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

98. *Id.* at 262 (O'Connor, J., concurring) (internal quotation mark omitted).

99. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 520-21 (1993).

The struggle between Justices Souter and Scalia in *Hicks* is a struggle over how to balance antidiscrimination goals with the common law liberty to end an employment relationship at will; Justice O'Connor's "causation" analysis in *Price Waterhouse* is an attempt to balance antidiscrimination goals with both employment at will and the expressive liberties of other employees (hence the concern about "thought control"). Accordingly, Justice O'Connor's tacit redefinition of but-for causation as a duty to rid a discrete decisionmaking process of forbidden motivations should not be attacked for finding liability where sex did not cause the challenged decision, nor for failing to find it when sex did cause the decision. Despite causation rhetoric, what Justice O'Connor really means to punish is the employer's failure to insulate the formal decisionmaking process from prohibited stereotyping and animus.

My own view is that Justice Souter struck the appropriate balance in dissent in *Hicks* and Justice Scalia the wrong one. But the reason Justice Scalia is wrong in *Hicks* is not that he underestimates the frequency of discrimination as a matter of fact; it's that he undervalues the importance of race equality as a matter of policy. Similarly, I worry that Justice O'Connor's analysis in *Price Waterhouse* too heavily favors expressive liberties and employer prerogatives over egalitarian goals, but this has nothing to do with whether Price Waterhouse denied Ann Hopkins partnership *because of her sex*; instead it has to do with the relative weight Price Waterhouse's promotional process accorded to gender equity as against the liberties of contract and expression.

The need to balance these competing interests explains aspects of anti-discrimination doctrine that have suffered extensive attack in the academic literature yet are widely embraced by judges for practical reasons. For instance, I am one of a handful of academic commentators willing to defend the doctrine that Title VII prohibits discrimination only on the basis of immutable characteristics; by contrast, academic critiques of the immutability doctrine fill volumes.¹⁰⁰ If we believe the law prohibits discrimination as a matter of objective fact, the immutability criterion is unjustified: it implies, implausibly, that employers can have the prohibited state of mind only when they consider the immutable characteristics of the plaintiff. The critics of immutability doctrine justifiably complain that bigotry and animus may attach to mutable traits commonly associated with race or sex as well: an employer may forbid racially identified hairstyles or disfavor employees with racially identified dialects because of the association of the trait with race.¹⁰¹

100. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Pre-emption and the Case of "Don't Ask, Don't Tell,"* 108 *YALE L.J.* 485, 518 (1998) ("[A]cademic commentary seems univocal in calling for [immutability's] retirement even as a factor [in antidiscrimination analysis].").

101. See, e.g., Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 *FORDHAM L. REV.* 21, 75-80 (2013) ("[W]hen an employer refuses to promote or hire a plaintiff because she speaks with an accent associated with a group that society, history, and

But if we think of antidiscrimination law pragmatically, as a policy designed to balance antiracist goals with the legitimate liberties of employers, the immutability doctrine makes more sense. The balance between competing interests may tip to favor the employer when the employee can avoid the adversity by altering her behavior. In this respect, it is instructive that courts applying the immutability doctrine have done so almost exclusively with respect to “traits” that we could as easily describe as behavior—for example, hairstyles, clothing, and the choice to use a specific language by an employee fluent in more than one.¹⁰² This has nothing to do with the employer’s “discriminatory intent”; it’s not necessarily less likely that the employer has bad motives when the employee can conform to the challenged rule. Instead it is a pragmatic approach that effectively relaxes the employer’s duty toward members of disadvantaged groups when the plaintiff can and chooses not to avoid the adverse action by changing her behavior. The underlying conflict pits the subjective preferences of the employer against the equally subjective preferences of the employee.

The conception of antidiscrimination law I’ve outlined makes sense of current doctrine and offers insights for improving it. For example, following the Court’s opinion in *Ellerth*, the law might evolve to require employers to use the best practices currently developed in management science to avoid discriminatory decisions. Doing so would give the employer a safe harbor from liability; failing to do so would give rise to a strong presumption that challenged decisions were discriminatory. But it also might suggest more radical policy reform. For instance, suspending the idea that the law is designed to prevent a discrete phenomenon of discrimination potentially allows us to sever the deterrence function of antidiscrimination law from its reparative or compensatory function. One might move from tort as a model for civil rights law to administrative law and consider removing the deterrence function from private litigation altogether and handling it through comprehensive regulation.¹⁰³ Like occupational safety standards, the employer’s duty to avoid discriminatory employment decisions might be defined by administrative rules requiring best practices and be enforced through fines and cease-and-desist orders. We might then provide for individual reparation through a system similar to public insurance or workers’ compensation, with streamlined and inexpensive factfinding hearings and the application of a mandatory schedule of compensation.

Or we might monitor the workforce demographics of large employers to ensure that they match the demographics of the relevant qualified labor pool.

pragmatism have distinguished from others, that employer has treated the plaintiff differently because of her race.”).

102. See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1991) (holding that an employer’s prohibition on braided hairstyles did not constitute sex discrimination because it did not “regulate on the basis of any immutable characteristic”).

103. See David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1655 (1991).

One might object that such a standard would encourage quota hiring, but of course any statistical measure of equity has that potential. This alone is no more an objection to the use of statistics in defining a duty of care than it is in the context of statistical evidence of systemic disparate treatment or disparate impact. We might even implement a cap-and-trade approach to labor market discrimination: employers with workforces in which minorities or women are underrepresented could buy exemptions from civil rights liability from employers for which the relevant group is overrepresented. Such a market in discrimination might appear morally repugnant if one assumes that all discrimination involves morally objectionable behavior, based on animus or stereotyping. But once one looks at discrimination as a failure to meet a socially optimal standard of care, a market in discrimination is at least as sensible as a cap-and-trade system for pollution or greenhouse gas emissions.

Obviously these reforms demand a great deal of elaboration, which I will not provide here. I offer them only to suggest the kinds of new ideas that a reconceptualization of the antidiscrimination question makes room for.

The larger point in this respect is that the best response to social injustice and inequality doesn't always involve *rights* against *discrimination*. The dramatic success of antidiscrimination law in the most fertile soil has encouraged many to try to cultivate new rights against discrimination in much less hospitable environments. But our experiences with well-established civil rights laws demonstrate that antidiscrimination rights are much more effective in some contexts than in others. It's not an accident that antidiscrimination law has been dramatically successful in areas such as public accommodations and basic access to the franchise but much less so in areas such as housing, where complex, interdependent, and imbedded social practices must be overcome and resources redistributed to achieve effective change. New legal mandates unsupported by changes in attitudes, institutional practices, and material resources have little chance of success. And many of today's most serious injustices just aren't readily analyzed, either practically or morally, in terms of rights: as Mark Kelman and Gillian Lester have pointed out, "Many perfectly just claims—as well as any number of claims that are either intrinsically unworthy or must be balanced against competing concerns—are *not* civil rights claims" ¹⁰⁴

Antiracist and feminist political struggle needs antidiscrimination law. But it needs many other policy interventions as well. It's tempting to imagine that wrongful social hierarchies would collapse if only we could eliminate a small and discrete set of bad practices. Antidiscrimination law promotes this seductive idea when it insists that it does nothing more than eliminate a specific evil: irrational discrimination. If this were true, more aggressive application would almost always be justified because it would come at no cost beyond that of enforcement. But to be effective, antidiscrimination law must do more than elimi-

104. MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* 226 (1997).

nate unambiguously evil or irrational practices; it must also curtail many arguably legitimate practices. This is obvious in the context of disparate impact doctrine, which makes actionable otherwise legitimate policies that disproportionately affect underrepresented groups, but it is also true in the context of disparate treatment or intentional discrimination: practically speaking, the law must balance egalitarian goals and employer prerogatives. The image of discrimination as a discrete evil or mistake obscures this necessity and hence leads to unrealistic aspirations and expectations. It leads liberals to insist that simple fairness and justice justify the most assertive and ambitious egalitarian projects and inspires a profound sense of betrayal and frustration when the courts and popular branches of government are unwilling to go along. It leads conservatives to insist that only unambiguous bigotry justifies *any* corrective legal intervention and inspires self-righteous opposition to even modest egalitarian policies that are not aimed at “discrimination.” Focusing on the doctrine surrounding intentional discrimination in employment—for many the most compelling part of antidiscrimination law—I’ve tried to suggest a more pragmatic way of thinking about antidiscrimination law, which might better advance egalitarian goals while also protecting legitimate employer prerogatives and expressive liberty.

