

Intent and Liability in Employment Discrimination

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ABSTRACT

The Silicon Valley Ellen Pao trial brought to the forefront once again the changing nature of discrimination in the workplace with its focus on a culture of bias and the prevalence of unconscious discriminatory behavior. This case is only the most recent high-profile example. There is an emerging consensus among scholars that the concept of “intent” in disparate treatment employment discrimination should be broadened to encapsulate more flexible notions including implicit bias, negligent discrimination, and structural discrimination. These scholars argue convincingly that psychological research demonstrates that implicit bias and reliance on ingrained stereotypes is, to some extent, natural to human decision-making processes. As a result, bias in the workplace operates at both an overt, knowing level but also beneath the surface and, at times, without the conscious knowledge of the decision-makers themselves.

However, despite extensive discussion of implicit bias in the legal literature, few, if any, scholars have considered alterations to liability and compensation schemes as a result of the broader meanings of intent. This article proposes looking to criminal law as a practical and theoretical model for an amendment to Title VII that would include gradations of intent with concomitant gradations in liability. The Model Penal Code presents an orderly and well-thought-out approach to intent, or mens rea, and the gradations of intent that support a finding of guilt. In addition, theory and policy supporting criminal law’s linkage of intent and liability are remarkably analogous to Title VII’s goal of elimination of discrimination. As a result, this article contends that a careful and measured consideration of criminal law’s approach to liability is instructive.

Drawing on the extensive literature on flexible intent and criminal law theories of retributivism and consequentialism, this article proposes a statutory expansion of the definition of disparate treatment discrimination under Title VII with an adjustment in the liability regime based on the level of employer intent. We contend that a clear link between intent level and damages constitutes an attractive balancing of employer and employee needs that should spur this crucial statutory change. A statutory amendment to Title VII that both broadens the meaning of “intent” for disparate treatment claims but also limits liability based on the level of intent offers a compromise position that expands the application of discrimination law to meet changing workplace norms and a theoretically and emotionally satisfying means of accomplishing that change.

INTRODUCTION

In March 2015, *The New Yorker* Magazine published an article entitled “The Ellen Pao Trial: What Do We Mean By ‘Discrimination’?”,³ bringing a question typically debated by legal scholars firmly into the public consciousness. An employment discrimination case brought by Ellen Pao, a former junior partner at the San Francisco-based venture-capital firm Kleiner Perkins Caufield & Byers, generated this public controversy. Pao claimed that she was the victim of sex discrimination in violation of California law and alleged that she was retaliated against for complaining about sexual harassment, that her performance reviews unfairly focused on interpersonal skills and clashes with her peers and other partners, that she and other women were “constantly being interrupted and ignored during meetings,” that women were excluded from firm-related social events, and that women partners were excluded from several partner dinners because they would “kill the buzz,” among other claims.⁴

While many of Pao’s allegations constitute traditional sex discrimination and retaliation claims, the media attention largely focused on those claims that alleged a culture of bias and stereotypes in which women’s opinions were regularly ignored or maligned, and high achieving women were excluded from important social events and committees, severely limiting their professional success. These claims emerge from a conception of discrimination that incorporates more than overt, conscious, or purposeful bias and includes actions that are born out of stereotypes (conscious or subconscious), implicit bias, and structural obstacles to equality. These claims led *The New Yorker* to inquire about the changing nature of discrimination.

Scholars have considered for several decades the questions of what discrimination means, how this term should change over time, and what type of motive or intent makes an employer liable under the law.⁵ There is an emerging consensus (with some notable dissenters) that the concept of “intent” in disparate treatment employment discrimination should be broadened to encapsulate more flexible notions, including implicit bias, negligent discrimination, and structural discrimination.⁶ Scholars point to psychological research demonstrating that implicit bias and

³ Vauhini Vara, *The Ellen Pao Trial: What Do We Mean By “Discrimination”?*, NEW YORKER, Mar. 14, 2015, <http://www.newyorker.com/business/currency/the-ellen-pao-trial-what-do-we-mean-by-discrimination>.

⁴ Complaint, Pao v. Kleiner Perkins Caufield & Byers LLC, et al., No. CGC 12 520719 (Cal. Super. Ct. May 10, 2012). Pao lost at trial and, in September 2015, announced that she was dropping her appeal because she cannot afford further costs. Jeff Elder, *Ellen Pao Won’t Appeal Trial Loss in Case Against Kleiner Perkins Caufield & Byers*, WALL ST. J., Sept. 10, 2015, <http://www.wsj.com/articles/ellen-pao-wont-appeal-trial-loss-in-case-against-kleiner-perkins-caufield-byers-1441906196>.

⁵ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (early example of consideration of implicit bias); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 734 (1987) (same); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381 (2014) (a recent example considering the concept of implicit bias).

⁶ See Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1, 35 n.194 (2015) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that Title VII jurisprudence must evolve to include implicit cognitive bias)); Lawrence, *supra* note 3, at 355-56 (proposing a test to identify and address implicit

reliance on ingrained stereotypes is, to some extent, natural to human decision-making processes.⁷ As a result, bias in the workplace operates at both an overt, knowing level but also beneath the surface and, at times, without the conscious knowledge of the decision-makers themselves.

Nonetheless, despite more than two decades of legal scholarship on this issue, there has been relatively little change in statutory protections or judicial interpretations of discrimination regarding the spectrum of motivational conduct that constitutes disparate treatment.⁸ The resistance to such change may be attributable to several factors that include (1) a sense of unfairness or injustice in awarding compensation based on motivations of which the decision-maker is unaware⁹, (2) the presumed difficulty in proving to a factfinder that the perpetrator had a culpable although less-than purposeful state of mind,¹⁰ and (3) objections from employers who will bear the burden of an expanded definition of intent but who may feel incapable of preventing the operation of subconscious or negligent bias in their workplaces.¹¹

motivations in discrimination cases); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 969 (1993) (advancing a theory of negligent discrimination); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 93 (2003) (proposing a structural account of disparate treatment theory that considers workplace dynamics); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (examining “second generation” forms of workplace bias that involve “patterns of interaction,” which exclude nondominant groups over time, and advancing a structural regulatory solution to address this form of discrimination).) See also Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 98 (2010) (suggesting a framework for evaluating implicit bias claims that forces employers to reflect upon their motives for a particular decision). *But see* Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1170 (1999) (“The absence of adequate, non-subjective methods for assessing workplace performance makes it almost impossible to assess the claims that subjective evaluations are biased.”); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (critiquing the Implicit Association Test and arguing that “unconscious processes” should not be relied upon as either legislative authority or litigation evidence in antidiscrimination cases until more valid research is done).

⁷ See Krieger, *supra* note 4, at 1187; Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL’Y 415, 423–24 (2000).

⁸ See, e.g. *Karlo v. Pittsburgh Glass Works, LLC*, 2015 U.S. Dist. LEXIS 90429, *29–30 (W.D. Pa. July 13, 2015) (reviewing cases that reject evidence of implicit bias and rejecting implicit bias expert and evidence as unreliable and irrelevant to a disparate treatment analysis that “require[s] proof of a discriminatory motive, which seems incompatible with a theory in which bias may play an unconscious role in decision-making.”).

⁹ See Maurice Wexler, *et. al.*, *Implicit Bias Evidence and Employment Law: A Voyage Into the Unknown*, BLOOMBERG L., <http://www.bna.com/implicit-bias-evidence-and-employment-law-a-voyage-into-the-unknown/> (“Placing unwarranted weight on implicit bias science would put employers in an untenable position of attempting to anticipate what is inherently unknown.”).

¹⁰ See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 766 (2005) (“While circumstantial evidence can allow a factfinder to conclude that the facts surrounding an employment decision suggest that race or gender played a role, no amount of circumstantial evidence will permit the factfinder to determine whether the discriminatory impulse at play was conscious but unspoken or was the product of the decision maker’s unconscious stereotypes and biases.”); Wax, *supra* note 4, at 1169–75 (“There is no ready way to determine the degree to which a racial or gender stereotype is operating to distort judgment in a particular case because there is no readily available baseline measure of how a particular employee would be assessed if the stereotype did not operate.”).

¹¹ See Wax, *supra* note 4, at 1157–69 (“Unfortunately, the state of knowledge in cognitive psychology provides reason to doubt that firms could devise effective programs to help supervisors escape the influence of group-based

Additionally, despite extensive discussion of expansions in the meaning of intent in the legal literature, few scholars have considered alterations to liability and compensation schemes as a result of such an expansion.¹² This article draws on the extensive literature supporting incorporation of flexible intent in discrimination law and argues that a statutory expansion of the meaning of intent under Title VII¹³ disparate treatment discrimination is warranted but should be accompanied by an adjustment in the liability regime based on the level of employer intent. We contend that a clear link between intent level and damages adds a key fairness component and constitutes an attractive balancing of employer and employee needs that should spur this crucial statutory change.

Although this is a new proposal from the employment discrimination perspective, the concept of intent-based liability has antecedents in discrimination law and other areas of law. This article proposes looking to criminal law as a model for linking intent level with liability for several reasons. First, the Model Penal Code presents an orderly and well-thought-out approach to intent or *mens rea* and the gradations of intent that support a finding of guilt. Second, the theory and policy supporting criminal law's linkage of intent and liability are remarkably analogous to Title VII's goal of elimination of discrimination.¹⁴ Although Title VII has been described as a statutory tort and, as a result, courts and scholars have often turned to tort law as an available model to help interpret discrimination doctrine, there has been a recent turn away from the knee-jerk "tortification" of employment law when the underlying theory and policy does not support Title VII's aims.¹⁵ In addition, scholars, including one of this article's authors, have critiqued the Supreme Court's off-hand comparisons between criminal law and employment

biases. Likewise, direct-line supervisors cannot be expected to control their own unconscious thought processes to avoid discriminatory decisions.").

¹² See Krieger, *supra* note 4, at 1241-42 (discussing alterations to liability and compensation schemes after recognizing a broader meaning of intent).

¹³ 42 U.S.C. § 2000e-2000e-17 (2000).

¹⁴ See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (a major goal of antidiscrimination law is to be the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989) (O'Connor, J., concurring) ("Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole. . . . The second goal of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' Both these goals are reflected in the elements of a disparate treatment action. There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. . . . While the main concern of the statute was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex. This Court's decisions under the Equal Protection Clause have long recognized that whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.") (internal citations omitted).

¹⁵ See generally Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1052 (2014) (discussing the ways in which the "reflexive use of tort law in employment discrimination cases is problematic"); Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1316 (2014) (taking "issue with both the [Supreme] Court's importation of tort and agency principles and its reluctance to hold employers vicariously liable for discriminatory acts of employees"); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1459 (2012) (criticizing the Court's "importation of [the tort principle of] proximate cause into Title VII jurisprudence").

discrimination law.¹⁶ Nonetheless, this article argues that a careful and measured consideration of criminal law's approach to liability is instructive in this instance.

A statutory amendment to Title VII that both broadens the meaning of "intent" for disparate treatment claims but also limits liability based on the level of intent established offers a compromise position that broadens the application of discrimination law to meet changing workplace norms and a theoretically and emotionally satisfying means of accomplishing that change. In order to fully understand the impact of the statutory changes proposed here, Part I will review the existing interpretations of intent under Title VII, including statutory language, doctrinal expansions, scholarly proposals, and gaps in the existing literature. Part II will examine criminal law as a model for changes to employment discrimination law both in its approach to intent and in the relationship between intent and liability. This Part will examine the Model Penal Code's various gradations of intent and liability and the theoretical justifications for the approach. Using this model, Part III proposes a statutory amendment to Title VII that would incorporate gradations of intent and concomitant reduction in liability and considers the theoretical justifications and practical implications of such a change. Finally, Part IV considers the potential pitfalls created by the proposal and possible responses.

I. EXISTING INTERPRETATIONS OF INTENT UNDER TITLE VII

The concept of intent and the role it plays in employment discrimination doctrine depends to a large extent on the type of discriminatory conduct asserted. Employment discrimination law generally includes three basic categories of unlawful conduct that can be alleged: disparate treatment, disparate impact, and harassment (which can also be viewed as a form of disparate treatment).¹⁷ Disparate impact discrimination involves an allegation that a neutral employment practice has an adverse impact on protected groups that cannot be justified by job relationship or business necessity. In disparate impact cases, the employer's motivation is irrelevant as even a neutral (e.g. non-racially motivated) practice or policy can constitute unlawful discrimination if it adversely impacts protected groups.¹⁸ In harassment cases, courts are typically presented with either *quid pro quo* harassment (involving a demand for a sexual relationship as a condition of employment) or hostile work environment (involving verbal or physical harassment by superiors or co-workers that is targeted at an employee's protected characteristic such as race, sex, age, etc.).¹⁹ Instead of focusing on an actor's intent or motivation, in harassment cases, courts are typically interested either in the *quid pro quo* nature of the proposition or, in hostile work

¹⁶ See Eisenstadt, *supra* note 4, at 3–4.

¹⁷ See BARBARA LINDEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 1304, 1306–08, 1322–25 (C. Geoffrey Weirich ed., 4th ed. 2007). See also Samuel Bagenstos, *Formalism and Employer Liability Under Title VII*, 2014 U. CHI. LEGAL F. 145, 162 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78–81 (1998)).

¹⁸ See Lindemann & Grossman, *supra* note 15, at 109–112.

¹⁹ *Id.* at 1304, 1306–08, 1322–25. See also Eisenstadt, *supra* note 4, at 5; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (U.S. 1986) (discussing *quid pro quo* and hostile work environment harassment cases); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751–752 (1998) (same); *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–92 (1998) (same).

environment cases, whether the harassing conduct was severe or pervasive enough to constitute prohibited discrimination. Thus, in both disparate impact and harassment cases, the court focuses its inquiry on the impact of the discriminatory practice or policy and not on the motivation of the actor.²⁰

In contrast, disparate treatment, also known as “intentional discrimination”²¹ requires consideration of the decision maker’s state of mind or intent. Disparate treatment cases essentially involve “treatment of a person in a manner which but for that person’s sex [or other protected class membership] would be different.”²² Not long after Title VII passed in 1964, the Supreme Court described disparate treatment cases as “the most easily understood type of discrimination” in which:

the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.²³

Despite the obviously important role played by motive and intent²⁴ in disparate treatment cases, neither word appears in the statute in its original form. As part of the Civil Rights Act of 1964,²⁵ section 703(a) of Title VII²⁶ made it unlawful for an employer with fifteen or more employees:

[T]o fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.²⁷

²⁰ *But see* Bagenstos, *supra* note 15 at 162 (discussing harassment as a form of disparate treatment because the harasser targets an employee because of his protected class).

²¹ Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1374 (2009).

²² *Id.* (citing *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 200 (1991) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978)); *accord McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 & n.10 (1976)).

²³ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (*cited in* Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 98 (1994)).

²⁴ Some scholars view these terms as interchangeable while others think “motive” describes reason for an action whereas “intent” refers to the desire for action to have a specific effect. *See, e.g.*, Michael Selmi, *Response to Professor Wax Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233, 1236 n.6 (1999); Wax, *supra* note 4, at 1139 n.21; Welch, *supra* note 3, at 734–35.

²⁵ Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., & 42 U.S.C.).

²⁶ 42 U.S.C. §§ 2000e–2000e-17 (2000).

²⁷ 42 U.S.C. § 2000e-2(a)(1)–(3).

As Martha West has pointed out, “Prior to the 1991 amendments,²⁸ Title VII included the word ‘intent’ only in 706(g), specifying what remedies a court may order once a plaintiff has proven a violation of the Act”²⁹ and not in its description of what constitutes unlawful discriminatory conduct or practices.³⁰ However, the causation language (“because of such individual’s [protected class]”) in the statute underscores the importance of motive or intent.

In addition, the Supreme Court’s creation of the *McDonnell Douglas* burden shifting scheme made it possible to infer intent without direct evidence of it. In *McDonnell Douglas Corp. v. Green*³¹, the Court laid out the now oft-repeated formula for establishing a prima facie case of race discrimination based on an inference of discrimination from the existing circumstances:

This may be done by showing (i) that he belongs to a racial minority; (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 complainant’s qualifications.³²

The Court then discussed the shifting of burdens of proof after the plaintiff establishes a prima facie case and the plaintiff’s ultimate burden to prove that any legitimate reason provided by the employer was, in fact, a pretext for discrimination.³³ In addition to creating a relatively low bar to make out a prima facie case, the *McDonnell Douglas* test, as explained by later courts,³⁴ essentially endorsed the notion that disparate treatment discrimination may be demonstrated merely by proving that the employer’s stated non-discriminatory reason is not truthful or accurate. As explained by the Supreme Court in *St. Mary’s Honor Center v. Hicks*:

The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the

²⁸ 42 U.S.C. § 2000e-2(m) (1991).

²⁹ See West, *supra* note 21, at 97–98.

³⁰ *Id.* at 100 (“The remedial section of Title VII, 706(g), provides: ‘If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate’” (citing 42 U.S.C. 2000e-5(g)(1) (Supp. III 1991)).

³¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793–94 (1973). The plaintiff, Percy Green, was a longtime employee until he was laid off during a general reduction in force. *Id.* at 794. Green was a civil rights organizer who took part in a “stall-in” and a “lock-in.” *Id.* at 795–96. Several weeks after these protests, McDonnell Douglas advertised positions for mechanics and Green applied for re-employment. *Id.* at 796. Despite his qualifications, Green was rejected on the basis of his participation in the protests. *Id.* In response, Green sued, alleging that he was rejected because of his race and his involvement in the civil rights movement. *Id.*

³² *Id.* at 802.

³³ *Id.* at 802–04.

³⁴ See McGinley, *supra* note 5, at 451 (“Under *Burdine*, most courts of appeal held that a plaintiff’s proof that the reason articulated by the employer was pretextual was sufficient to prove that the employer’s act was discriminatory.” (citing Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 65 (1991)).

elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is required'³⁵

Thus *McDonnell Douglas* and its progeny arguably allow for a demonstration of discriminatory intent without direct evidence of biased motive; instead, a plaintiff may point to circumstances that give rise to an inference of discrimination.³⁶ Nonetheless, neither the statute nor the cases interpreting it defined the all-important concept of discriminatory intent itself.

In 1991, Congress amended Title VII to clarify the law in response to several Supreme Court decisions with which it took issue.³⁷ The amendments recognized that decision-making in the employment context can be based on multiple factors, both legitimate and illegitimate. The amendment included the following language: “[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”³⁸ As a result of this amendment, the statute now describes disparate treatment discrimination in “motivational” terms, using the phrase “motivating factor” to describe the role that bias must play in the decision-making process. Again, however, despite introducing the term “motive” into the statute, Congress failed to define it.³⁹

It is possible and even probable that in 1964 when Title VII was passed and even in 1991 when Congress amended it, the notion of defining “motive” or “intent” seemed unnecessary. To most, intentional discrimination meant that the conscious reason for the decision maker’s action was

³⁵ 509 U.S. 502, 511 (1993).

³⁶ See generally Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOKLYN L. REV. 703 (1995); Leslie M. Kerns, *Comment: Aka v. Washington Hospital Center: Why the Debate over Pretext Ended with Hicks*, 60 OHIO ST. L.J. 1625 (1999).

³⁷ 42 U.S.C. § 2000e-2(m) (1991). The 1991 Amendments responded to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989). Congress responded to the *Price Waterhouse* decision with the Civil Rights Act of 1991. James Concannon, *Retaliation Revisited: Gross v. FBL Financial Services, Inc. and the End of Mixed-Motive Title VII Retaliation*, 17 TEX. J. ON C.L. & C.R. 43, 52 (2011).

³⁸ 42 U.S.C. § 2000e-2(m). As Sandra Sperino points out, “Congress did not separately delineate a type of discrimination called ‘mixed motive’ or enunciate a separate test. Rather, Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait played a motivating factor in an employment decision. . . . Courts began referring to the 1991 amendments as establishing a ‘mixed motive’ claim with a two-part framework. Although there is some variation among circuits, courts primarily analyze mixed-motive claims under Title VII through the statutory language of the 1991 amendments. They analyze Title VII single motive discrimination claims based on circumstantial evidence through *McDonnell Douglas*.” Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 F.I.U L. REV. 501, 503 (2013).

³⁹ See McGinley, *supra* note 5, at 416 n.2 (detailing the four parts of Title VII that are relevant to the meaning of intent, none of which define the term).

his or her bias against the protected group of which the plaintiff was a member.⁴⁰ This notion, however, obscures inherent complexity in the meanings of motive and intent. First, although courts (and some scholars) have used the terms “motive” and “intent” interchangeably in discussing employment discrimination cases,⁴¹ Don Welch argues that the terms describe distinctly different components of a claim.⁴² “Intent” refers to the actor’s “‘purpose’ and ‘design’” in taking action and concerns the desired result of action.⁴³ In contrast, “motive” refers to the reason for that action or “what prompts a person to act, or fail to act.”⁴⁴ In the employment discrimination context, this distinction could mean that “intent” is concerned with whether the decision maker aimed to cause the desired result of his action—the termination of an employee for example. In contrast, “motive” considers the motivational nature of the employer’s reason for taking the action and whether it was an impermissible, biased reason or not. Arguably, in contrast to other areas of law,⁴⁵ both motive and intent are relevant to a disparate treatment claim.

Second, the notion that “intent” and “motive” are self-explanatory and relate only to conscious and purposeful discriminatory action overlooks the broader meanings of “intent” employed in other areas of law. As will be discussed later, and as is evident in tort and criminal law, “intent” can encompass states of mind beyond conscious and purposeful. From implicit bias to negligence to recklessness, the notion that an act is intentional does not necessarily mean that it was purposeful or even fully conscious. Nonetheless, despite this fact and the existence of significant scholarship advocating for the expansion of the meaning of intent, employment discrimination doctrine has only begun to acknowledge this complexity.

A. Doctrinal Expansion of “Intent” in Employment Discrimination

Although slow and halting, over the last several decades, courts have been expanding the meaning of intent in Title VII claims. As early as 1973, the Supreme Court began to acknowledge that prohibited discrimination must include more than overt expressions of bias. In *McDonnell Douglas Corp. v. Green*,⁴⁶ the Court remarked that “it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.”⁴⁷ In its earliest, and perhaps most influential interpretation of the statute, the Court noted that Title VII was aimed at discrimination in all its forms.

⁴⁰ See, e.g., *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“‘Disparate treatment’... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.”) (cited in *McGinley*, *supra* note 5 at 417 n.3).

⁴¹ See *supra* note 21. See also Welch, *supra* note 3. (distinguishing between “motive” and “intent” and describing a fundamental confusion among courts and legal scholars on the difference between these two concepts).

⁴² *Id.* at 736–40.

⁴³ *Id.* at 737.

⁴⁴ *Id.*; see also Wax, *supra* note 4, at 1138–39 n.20–22 (1999); Krieger, *supra* note 4, at 1243.

⁴⁵ See *infra* Part II.

⁴⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁴⁷ *Id.* at 801. See also Krieger, *supra* note 4, at 1164 n.10.

The Supreme Court again expanded the meaning of intentional discrimination in its groundbreaking decision in *Price Waterhouse v. Hopkins*,⁴⁸ which revolved around a female candidate for partnership in an accounting firm who claimed that she had been denied partnership because of her sex.⁴⁹ The evidence in the case demonstrated that Ann Hopkins was denied partnership, at least in part, because of sex stereotyping—that is, despite her high level of performance and effectiveness at work, she faced discrimination for not being feminine enough in her interpersonal interactions.⁵⁰ The Court made the important decision in the case that sex stereotyping can be a form of intentional discrimination prohibited by Title VII.⁵¹ As the Court famously remarked,

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.⁵²

In making this statement, the Court moved beyond the simple view that disparate treatment involves a consciously biased decision against a protected characteristic. Instead, the Court explained that intentional discrimination encompasses actions that are based on a belief that members of a protected group should behave, appear, or sound a certain way.⁵³ It is, of course, true that someone could hold and act on a particular stereotype without consciously or maliciously intending to be prejudiced.⁵⁴ By acknowledging that decision making based on stereotypes can be a form of intentional discrimination, the Court was, in fact, expanding the definition of intent.⁵⁵

⁴⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁹ *Id.* at 231–32.

⁵⁰ *Id.* at 235–37.

⁵¹ *Id.* at 250–52.

⁵² *Id.* at 251 (internal quotations and citations omitted).

⁵³ *Id.* at 250.

⁵⁴ See *McGinley*, *supra* note 5, at 473–74 (discussing possible scenarios in which employer unlawfully relies on stereotypes either consciously or unconsciously). Note that in *Price Waterhouse*, there was evidence that the employer knowingly relied on evaluations that were motivated by stereotypes of women. See *Price Waterhouse*, 490 U.S. at 255–58. See also *Oppenheimer*, *supra* note 4, at 924 (1993). Nonetheless, the Court did not make conscious reliance on stereotypes a requirement for using such evidence.

⁵⁵ In *Price Waterhouse*, the Court also explained what it meant by “motivating factor”: “In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.” *Price Waterhouse*, 490 U.S. at 250. On first look, this definition appears to endorse the simplistic view of intent as conscious, purposeful action. However, given that this statement was made in the context of the Court recognizing stereotyping as a form of discrimination, that explanation cannot stand. It makes more sense to explain the “truthful response” language as meaning a view into the back reaches of the decision-maker’s mind, perhaps even beyond what the person himself consciously knows to be true.

In addition to recognizing stereotyping as a form of intentional discrimination, *Price Waterhouse* also acknowledged the more complex nature of motivation and decision making. The Court endorsed the view that decisions are not always based on one singular motivation and (probably more often than not) are the result of multiple factors, both legitimate and illegitimate.⁵⁶ This conception of action attributable to “mixed motives” is itself an expansion of the simplistic view of intent. After *Price Waterhouse*, one could no longer argue that disparate treatment was limited to conscious, purposeful and singularly motivated actions. The 1991 Amendments to Title VII altered some aspects and codified other aspects of *Price Waterhouse*, generally endorsing and strengthening the notion of mixed motive discrimination.⁵⁷ After these seminal cases, it is clear that the meaning of intentional discrimination is flexible. At the same time, however, neither the Court nor Congress has explicitly endorsed the notion that intent under Title VII can include recklessness, negligence, or subconscious motivations.

B. *Scholarship Advocating Expansion of Intent*

In the years since *Price Waterhouse*, there has been an explosion of legal scholarship about the nature of bias and the way in which it operates. Beginning in 1987 with Charles Lawrence’s work exploring the “unconscious nature of racially discriminatory beliefs and ideas”⁵⁸ through the present,⁵⁹ scholars have been highlighting the complexities of prejudice and the subconscious ways in which it impacts our actions and beliefs. These legal scholars have looked to psychological research and its accumulating evidence that stereotypes and bias play a subconscious but definitive role in our everyday lives and have argued that the psychological evidence should impact discrimination doctrine as well.⁶⁰ This section reviews some of the major voices on the complexities of bias and intent and the resulting impact on law. Despite nearing a consensus on the need for changes to the statute and doctrine,⁶¹ however, there has been little progress either in Congress or the courts.⁶²

⁵⁶ *Id.* at 240–42.

⁵⁷ See Sperino, *supra* note 36, at 503.

⁵⁸ Lawrence, *supra* note 3, at 322.

⁵⁹ See, e.g., Elayne E. Greenberg, *Fitting the Forum to the Pernicious Fuss: A Dispute System Design to Address Implicit Bias and 'Ism's in the Workplace*, 17 CARDOZO J. CONFLICT RESOL. 75 (2015); Sabreena El-Amin, *Addressing Implicit Bias Employment Discrimination: Is Litigation Enough?*, 31 HARV. J. RACIAL & ETH. JUST. ONLINE 1 (2015); Tanya Kateri Hernandez, *One Path for "Post-Racial" Employment Discrimination Cases - the Implicit Association Test Research as Social Framework Evidence*, 32 LAW & INEQ. 309 (2014).

⁶⁰ See Krieger, *supra* note 4 at 1164–65.

⁶¹ The primary outspoken opponent of incorporation of more flexible theories of discriminatory intent has been Amy Wax. See generally Wax, *supra* note 4. See also Amy L. Wax, *Supply Side or Discrimination? Assessing the Role of Unconscious Bias*, 83 TEMP. L. REV. 877, 877 (2011) (considering and critiquing the “the claimed link between unconscious bias and social disadvantage”). Cf Selmi, *supra* note 22 (responding to Wax’s 1999 article that critiqued the scholarship on implicit bias).

⁶² Notions of flexible intent have impacted harassment doctrine as courts have incorporated negligence into their understanding of employers’ liability for harassment. See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 758–759 (1998) (“[A]lthough a supervisor’s sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and

While Charles Lawrence was among the first to seriously consider implicit bias as applied to equal protection law, David Oppenheimer, Linda Hamilton Krieger, Ann McGinley, Tristin Green, Noah Zatz, and others have explored these ideas in an employment discrimination context.⁶³ Each approached the issue of flexible intent somewhat differently, offering proposals to expand the meaning of disparate treatment law to incorporate negligence, structural discrimination, or implicit bias or seeking to show the ways in which existing doctrine already permits some of the flexibility that psychological research recommends.

Oppenheimer's article broke new ground in 1993 by proposing the adoption of negligence principles in disparate treatment cases.⁶⁴ To begin, Oppenheimer examined psychological and sociological research that demonstrates the ways in which discrimination generally results from "unintended and unconscious stereotyping"⁶⁵ and argued that as a result of this research, intentional discrimination should be expanded to include negligence discrimination "when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur."⁶⁶ In making this argument, Oppenheimer maintained that employment cases should be analyzed as tort cases⁶⁷ and demonstrated the ways in which negligence has already impacted discrimination law, in particular, in the areas of disparate impact discrimination, failure to accommodate claims, and harassment claims.⁶⁸ Given that principles of negligence already infiltrate some areas of Title VII doctrine, it is not a stretch, he argued, to apply those concepts to disparate treatment doctrine as well.⁶⁹

Building on Oppenheimer's work on negligent discrimination, Linda Hamilton Krieger dramatically expanded the conversation on intent by examining cognitive psychology research and highlighting the ways in which biased decisions can emanate not from motivations but from

failed to stop it."). *See also* *Sofia v. McWilliams*, No. 01-5394, 2003 U.S. Dist. LEXIS 5622, at *24 (E.D. Pa. March 31, 2003) ("[A]n employer can be liable . . . where its own negligence is a cause of the harassment") (quoting *Ellerth*, 524 U.S. at 759). In addition, as Noah Zatz has pointed out, third-party harassment claims demand affirmative action on the part of employers that is a dramatic shift from the standard discriminatory intent in other disparate treatment cases. *See Zatz, supra* note 19, at 1364–65.

⁶³ *See generally* Oppenheimer, *supra* note 4, Krieger, *supra* note 4, McGinley, *supra* note 5; Zatz, *supra* note 19. There has also been much discussion of implicit biases based on implicit attitudes or stereotypes and the role that the Implicit Association Test (IAT), which seeks to measure an individual's implicit biases, should play in discrimination litigation. *See, e.g.* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

⁶⁴ Oppenheimer, *supra* note 4 at 900.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ A number of scholars have recently taken issue with the Supreme Court's tendency to view Title VII as a statutory tort and to import tort doctrines into employment discrimination law even when they do not make sense from a policy or doctrinal perspective. *See, e.g.*, Sperino, *supra* note 13, at 1052; Chamallas, *supra* note 13, at 1316; Sullivan, *supra* note 13, at 1459.

⁶⁸ Oppenheimer, *supra* note 4, at 917–966.

⁶⁹ *Id.* at 967–70.

“categorization-related judgment errors characterizing normal human cognitive functioning.”⁷⁰ Krieger observed that the existing disparate treatment model, in asking whether a decision was “because of group status,” is asking whether the decision maker had a discriminatory purpose or motive.⁷¹ The *McDonnell Douglas* burden shifting model and even the investigation of the use of stereotypes essentially aims to “unmask[] discriminatory intent.”⁷² In other words, “there is no discrimination without an invidiously motivated actor.”⁷³ Krieger argued, however, that this existing approach is based on a false assumption about the operation of bias in the decision maker’s mind and, more specifically, the notion that the “employer will be aware [of the role of bias in his decisions] even if he is not honest (or careless) enough to admit it.”⁷⁴ Having reviewed several decades of psychological research, Krieger contended that cognitive bias functions instinctually or automatically and can only be controlled through “subsequent ‘mental correction.’”⁷⁵ To that end, she suggested a rethinking of discrimination doctrine and advocated a disparate treatment theory that acknowledges both the conscious and subconscious nature of discrimination and that awards compensatory and punitive damages only upon proof of “the conscious use of his or her group status in the decision-making process.”⁷⁶

Several years later, Ann McGinley noted the growing body of scholarly work expounding on the meaning of intent and, despite that, the enduring and simplistic approach adhered to by courts.⁷⁷ McGinley highlighted the ways in which existing rubrics for finding unlawful discrimination already permit the inclusion of implicit bias in behavior made unlawful by Title VII.⁷⁸ For example, McGinley pointed out that in most disparate treatment cases analyzed either under stereotyping theory or the pretext approach,⁷⁹ “the evidence . . . proves only that the decision was infected by illegal considerations. It does not prove whether those considerations are conscious or unconscious on the employer’s part.”⁸⁰ McGinley also highlighted the counter-evolution occurring in courts that attempt to adhere to a narrow definition of intent, and she proposed a turn away from this rigidity and towards a more open approach that incorporates psychological and sociological evidence on the unconscious nature of bias.⁸¹

Approaching this problem from a different angle, Tristin Green and others have explored the notion that discrimination is “influenced, enabled, and even encouraged by the structures,

⁷⁰ Krieger, *supra* note 4, at 1165.

⁷¹ *Id.* at 1167.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1216.

⁷⁶ *Id.* at 1241–42, 1243.

⁷⁷ McGinley, *supra* note 5, at 417.

⁷⁸ *Id.* at 420.

⁷⁹ See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing pretext approach to proving discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (creating stereotyping theory of discrimination).

⁸⁰ McGinley, *supra* note 5, at 475.

⁸¹ *Id.* at 420.

practices, and dynamics of the organizations and groups within which individuals work.”⁸² Terming this a “structural account of disparate treatment,”⁸³ Green pointed to modern workplace dynamics including team-based work, informal work assignments, and discretion and subjectivity in evaluation that often depends on social interaction and feedback from “multiple sources, including peers, supervisors, customers, and subordinates.”⁸⁴ She contended that disparate treatment discrimination should not be focused solely on the state of mind of one single decision maker but should also hold employers liable for “organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics.”⁸⁵ This proposed expansion of intent under Title VII would, by necessity, look beyond purposeful behavior and encompass workplace structures that, although not intended to bias protected groups, perpetuate and endorse implicit bias.

More recently, Noah Zatz similarly demonstrated in his article examining third-party harassers, that courts have begun an unacknowledged broadening of the meaning of intent and liability under Title VII.⁸⁶ Building on Oppenheimer’s work advocating incorporation of negligence principles in disparate treatment doctrine, Zatz coined the term “membership causation” to explain how third-party harassment doctrine fits in with existing antidiscrimination theory.⁸⁷ Instead of looking to discriminatory intent, he focused on the way in which an employer is found liable in such cases and argued that intent falls out of the picture when courts focus on whether the employer negligently failed to prevent harassment that was based on protected status (or “membership causation”).⁸⁸ Zatz argued that third-party harasser doctrine actually imports a failure to accommodate approach into harassment law and that this approach can be expanded beyond the hostile work environment context, including cat’s paw theory of disparate treatment and pregnancy and religious practice discrimination.⁸⁹ Like McGinley and Oppenheimer, Zatz demonstrated an unacknowledged expansion of the meaning of intent under Title VII and advocating for a more open recognition that the doctrine is flexible and could be even more so.⁹⁰

C. *The Scholarship Gap on Intent: Liability Levels*

⁸² Green, *supra* note 4, at 92. See also Tristin Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). Cf. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 40 (2006) (arguing that a structural approach “may be asking antidiscrimination law to do too much of the work of responding to society’s inequalities.”).

⁸³ Green, *supra* note 4 at 93.

⁸⁴ *Id.* at 103, 110–111.

⁸⁵ *Id.* at 145.

⁸⁶ Zatz, *supra* note 19, at 1364–65.

⁸⁷ *Id.* at 1362.

⁸⁸ *Id.* at 1364.

⁸⁹ *Id.* at 1415. The cat’s paw theory of disparate treatment imposes “employer liability when the ultimate decision maker, although personally unbiased, was influenced to a greater or lesser degree by biased subordinates.” Sullivan, *supra* note 13, at 1433.

⁹⁰ Zatz, *supra* note 19, at 1433–1437.

As described above, most of the scholarship on discriminatory intent has, for obvious reasons, focused on expanding the meaning of intent either doctrinally or legislatively. Whether focusing on negligence or implicit bias, scholars have advocated rethinking existing disparate treatment doctrine, openly acknowledging existing expansions of the doctrine and applying them more broadly, or amending Title VII to make this expansion more formal.⁹¹ We agree that in order to properly capture injustice in the workplace and the current state of psychological knowledge about the functioning of the human brain and decision making realities, an expansion of the meaning of intent under Title VII is warranted. What is missing from the existing discussion,⁹² and what this article adds is a consideration of the possible gradations of intent that could be included in Title VII and their impact on liability in the form of damages.

As Amy Wax noted, disparate treatment employs an “all-or-nothing recovery rule” in that a plaintiff may recover full compensatory damages if he or she proves that the adverse action was a result of protected status discrimination.⁹³ This rule is understandable in a system that assumes the existence of conscious motive and intent upon proof of causation. That is, if conscious bias is the only unlawful state of mind acknowledged by the law, proof of that unlawful state of mind should yield full recovery. However, the expansion of the meaning of intent should also lead to a rethinking of this rule both from a justice/fairness and public policy perspective, because a formal expansion of intent may be more palatable to employers that are, perhaps, rightfully concerned about an expansion of discrimination law into the realm of implicit bias or negligence, if there is also a concomitant reduction in liability. The following section will explore the connection between intent and liability in criminal law that can serve as a theoretical model for necessary changes to the employment discrimination regime.⁹⁴

II. THE MODEL OF CRIMINAL LAW AND ITS INTENT-BASED PENALTIES

The goals, theory, and policy behind criminal law and employment discrimination law have obvious parallels and also some well-established differences. As one of the authors of this article has previously argued, when courts haphazardly borrow concepts or doctrinal principles across these two areas of law, there are negative consequences for employment discrimination litigants and for the development of law in general.⁹⁵ Nonetheless, criminal law can, with appropriate

⁹¹ See *supra* text accompanying notes 60–84.

⁹² As will be discussed, *infra*, Professor Krieger is the one notable exception, as she begins a discussion of the impact on liability, proposing allowance of backpay only for implicit bias and compensatory and punitive damages for conscious disparate treatment. This article contends that greater distinctions are needed in the form of gradations of liability in compensatory damages themselves. See *infra* Part III.

⁹³ Wax, *supra* note 4, at 1212.

⁹⁴ We do not suggest that criminal law is a perfect analogy here or that the mental state categories used by the Model Penal Code should be adapted wholesale into employment discrimination law. Rather, we contend that criminal law’s approach to the issue of mental state, its allowance for varying degrees of intent, and its linking of liability to the degree of intent demonstrated are concepts that should be applied to employment discrimination law as well.

⁹⁵ See Eisenstadt, *supra* note 4, at 32–41 (exploring the “problematic outcomes that are possible if courts begin importing criminal law’s doctrinal and analytical choices into employment cases: (1) confusion over the proper role of intent in discrimination, and (2) an obscuring of the complexity of fault in employment cases.”).

consideration of the similarities and differences, offer a useful model for employment discrimination law, particularly in the meaning of intent and how an expansion of intent may impact liability findings.

A. *Similarities in the Bodies of Law Justify the Use of Criminal Law as a Model*

There is a somewhat natural tendency to see criminal law as wholly different in purpose, tone, and approach from civil law, where employment discrimination finds its home in U.S. law. Julie Suk has discussed this inclination in her comparison of the U.S. and French approaches to discrimination:

Almost all legal systems draw a sharp line between criminal and civil offenses. The primary goals of criminal and civil liability differ: The goal of criminal law is to punish bad acts, whereas civil causes of action enforce the rights of private parties through compensation. . . . Criminal conduct tends to be widely regarded by the society as morally reprehensible, meaning that others have a moral right to be free from such conduct. Tortious conduct, by contrast, simply has social costs for which the actor ought to pay the price. Criminal law expresses public values more so than tort law.⁹⁶

These differences in turn justify the “separate procedural regimes for criminal and civil liability that operate very differently with regard to information gathering, protection of defendants’ rights, and standards of proof” in each system.⁹⁷ But the idea that employment discrimination law is purely civil and most closely resembles tort law misses many of the inherent similarities between the policies underlying criminal law and the explicit goals that supported the passage of Title VII and other anti-discrimination statutes.

The primary similarity between criminal law and civil rights law can be found in both systems’ desire to “speak to a wider audience” than the litigants in any one case.⁹⁸ The criminalization of acts, in addition to providing justice for a particular victim, imposes society’s moral condemnation.⁹⁹ Crimes are violations of both the victim’s rights and of a societal code of

⁹⁶ Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L. REV. 1315, 1317–1318 (2008). Suk’s article argues that “discrimination, like many complex social problems, is neither inherently criminal nor civil in its substantive goals. Yet, it comes to appear substantively criminal or civil as a result of its procedural path. In destabilizing the criminal-civil distinction in employment discrimination law,” Suk “aims to encourage the development of regulatory approaches to complex social problems that combine features of both types of enforcement system.” *Id.* at 1319.

⁹⁷ *Id.* at 1318.

⁹⁸ Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 113 (1983).

⁹⁹ *Id.* (“Most theorists have identified moral condemnation by the community as an essential element of traditional criminal offenses. . . . The criminal “not only harms the victim, he undermines rules and distinctions of significance beyond the specific case.”) (citing Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958); Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 148).

conduct.¹⁰⁰ Similarly, employment discrimination laws are grounded in two basic purposes of equal importance—remedying individual victims of discrimination and preventing and ultimately ending workplace discrimination overall.¹⁰¹ To that end, Title VII authorizes the bringing of private suits by victims of discrimination but also permits the Equal Employment Opportunity Commission to bring suits against employers, an enforcement mechanism that is not available in general tort cases.¹⁰² Congress made these purposes and mechanisms clear when enacting Title VII, noting that

the purpose of [Title VII] is to eliminate . . . discrimination in employment based on race, color, religion, or national origin. The title authorizes the establishment of a Federal . . . Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.¹⁰³

As Suk notes, “[Title VII’s] proponents envisioned the problem of discrimination as a broad public problem, not merely a private-law tort that required enforcement by a strong administrative agency.”¹⁰⁴ Although political compromise somewhat diluted the authority and power of the EEOC when Congress passed the Act, later amendments restored greater power to the EEOC and renewed the emphasis on the legislative purpose of eliminating a societal ill, not merely remedying individual wrongs.¹⁰⁵ As Don Welch has noted, “Title VII is a statute concerned not only with punishing individuals who intentionally engage in discriminatory acts, or with equity in the dealings of individual employer with individual employee, but also with the broad sweep of societal employment practices which produce decisions based on impermissible criteria.”¹⁰⁶

¹⁰⁰ *Id.*

¹⁰¹ See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH & LEE L. REV. 395, 399–400 (1999) (examining the dual goals underlying employment discrimination law and arguing that arbitration of discrimination claims does not fulfill these important purposes).

¹⁰² See Joyce E. Taber, Comment, *An Unanswered Question about Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC from Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 AM. U.L. REV. 281, 288 (2000) (“Title VII does not provide merely for private suits to enforce the law; rather, the statute provides for dual enforcement through both private suits by individuals and independent suits by the EEOC.”) (citing 42 U.S.C. 2000e-5(a) to (k) (1994) (EEOC has enforcement powers under Title VII to prevent employment discrimination); 2000e-5(f)(1) (1994) (authorizing suits by both the EEOC and private individuals to enforce Title VII)).

¹⁰³ H.R. REP. NO. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401. (cited in Frederick M. Thurman, Jr., Comment, *Summers's Folly: The After-Acquired Evidence Doctrine vs. Employer Culpability*, 25 CUMB. L. REV. 191, 192–93 (1994/1995)).

¹⁰⁴ Suk, *supra* note 94, at 1351.

¹⁰⁵ *Id.* (describing the original intentions of the Act’s drafters and political compromises that weakened the role of the EEOC).

¹⁰⁶ Welch, *supra* note 3, at 751. See also Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 317 n.105 (1982) (discussing deterrence as an important objective of Title VII).

Furthermore, both criminal law and employment discrimination fashion remedies that emphasize the societal nature of the wrongs they intend to correct. “By imposing non-monetizable penalties such as stigma and imprisonment, criminal sanctions prevent the conversion of property rules into liability rules.”¹⁰⁷ Similarly, Title VII allows for, and the EEOC often prioritizes, equitable remedies that enjoin discriminatory practices or mandate policy changes for an entity in its entirety, a remedy that seeks to protect society from discrimination rather than simply offering a remedy to the particular victim who initiated the claim.¹⁰⁸

Beyond these similarities in the overall goals of each system, the role of intent also functions similarly in both criminal law and employment discrimination, making criminal law a particularly useful model when contemplating the impact of changes to the meaning of intent in discrimination cases. Karlan, although discussing the similarities between intent in criminal law and constitutional civil rights claims, points to a parallel that is equally applicable to workplace civil rights law: “In both fields, requiring proof of intent to establish a violation allows courts to condemn offensive attitudes while protecting legitimate activities.”¹⁰⁹ Workplace discrimination laws are particularly sensitive to the need to balance a desire to eradicate discrimination with the importance of employers’ freedom to operate their businesses as needed.¹¹⁰ As such, a focus on intent is central to maintaining this balance between condemning behavior and allowing an employer freedom to conduct legitimate activities as it sees fit.¹¹¹ Perhaps as a result of these inherent similarities, scholars have, in the past looked to criminal principles and concepts and sought to import them into employment discrimination. For example, Sandra Sperino, in advocating a theory of direct corporate liability under Title VII, has argued in favor of “borrowing the emerging concept of corporate character from criminal law.”¹¹²

Similarly, criminal law offers a useful model for analyzing intent in employment discrimination simply because scholars and practitioners have carefully considered the meaning and implications of criminal intent, resulting in the creation of the Model Penal Code’s approach to *mens rea*.¹¹³ The criminal law and the policy considerations justifying its approach thus offer a well-thought out paradigm to which employment discrimination law can turn.

B. *The Structural Framework of Intent in the Criminal Law*

¹⁰⁷ Karlan, *supra* note 96, at 114.

¹⁰⁸ See Letter from Todd A. Cox, Director Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission, to The Honorable Tim Walberg, Chairman, Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives (July 1, 2014), http://www.eeoc.gov/eeoc/legislative/hearing_record_july.cfm.

¹⁰⁹ Karlan, *supra* note 96, at 111.

¹¹⁰ See *infra* Part III.D.

¹¹¹ See also Mark Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943, 983 (1984) (noting that the “motive-centered intent requirement” in some discrimination cases is more akin to the approach found in criminal law as opposed to tort law).

¹¹² Sandra Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 775 (2010).

¹¹³ See *infra* Part II. B.

Criminal liability generally demands proof of some mental activity of the offender that pertains to the illicit conduct.¹¹⁴ Fundamental principles of criminal jurisprudence dictate that a crime consists in general of two segments, (a) a wrongful deed (*actus reus*) committed with (b) “a mental state . . . [that] expresses the intentionality necessary for an act to constitute a crime” (*mens rea*).¹¹⁵ Typically an essential element to any crime, this mental state requirement, “the criminal law’s mantra,”¹¹⁶ developed in the common law from a normative notion of culpability or moral blameworthiness,¹¹⁷ with a broad focus upon a demonstration of “a wicked mind bent on an immoral motive”¹¹⁸ or a “vicious will,”¹¹⁹ to a narrowed, “elemental” conception of the particular mental state specified in a criminal offense’s definition.¹²⁰

The *mens rea* requirement “flows from our society’s commitment to individual choice,”¹²¹ as it ideally serves to limit punishment to those actors who formed the requisite mental state and whose conduct satisfies the other elements of the crime,¹²² thereby shielding individuals from criminal liability for inadvertent or innocent conduct.¹²³ The following sections provide a brief overview on the hierarchical structuring of culpable mental states as well as the philosophical and policy-based principles that underlie the *mens rea* concept.

¹¹⁴ Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 636 (1993); AM JUR 2D CRIM. L. § 117 (2015).

¹¹⁵ *In Interest of G.T.*, 597 A.2d 638, 640 (Pa. Super. Ct. 1991). *Accord* *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980); *Nesbitt v. Hopkins*, 907 F. Supp. 1317, 1324 (D. Neb. 1995); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* 270 (1986) (arguing that a foundational principle in criminal law “is that conduct, to be criminal, must consist of something more than mere action . . . some sort of bad state of mind is required as well.”).

¹¹⁶ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 10.02, at 126–27 (4th ed. 2006) (*quoting* *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 490 (E.D.N.Y. 1993)). *Accord* *Morissette v. United States*, 342 U.S. 246, 250 (1952) (noting that the *mens rea* concept is “universal and persistent in mature systems of law”).

¹¹⁷ *See* Frank Remington & Orrin Helstad, *The Mental Element In Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 648–49 (1952) (discussing the development of the concept of *mens rea*); Dressler, *supra* note 114, at 126–27 (same).

¹¹⁸ Gardner, *supra* note 112, at 641.

¹¹⁹ 4 WILLIAM BLACKSTONE, *COMMENTARIES* *21.

¹²⁰ Dressler, *supra* note 114, at 127. *Accord* Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449, 454–59 (2012) (analyzing broad and narrow notions of mental state classifications); BLACK’S LAW DICTIONARY 1075 (9th ed. 2009) (defining *mens rea* as “the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime”).

¹²¹ DRESSLER, *supra* note 114, at 129 (*quoting* *United States v. Cordoba-Hincapie*, 825 F.Supp. 485, 495 (E.D.N.Y. 1993)). *Accord* *Staples v. United States*, 511 U.S. 600, 605 (1994) (“[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”) (*quoting* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978)).

¹²² Samuel W. Buell & Lisa Kern Griffin, *Adjudicating the Guilty Mind: On the Mental State of Consciousness of Wrongdoing*, 75 L. & CONTEMP. PROB. 133, 138 (2012).

¹²³ *See generally* Garnett v. State, 632 A.2d 797, 809 (Md. 1993). *But see* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 482 (1989) (arguing that “[m]ens rea is a one-dimensional concept limited to describing intended cause and effect without accounting for why the individual acted.”).

Many criminal statutes contain a requirement for a particular culpable mental state, but if a statute is silent in this regard, the applicable *mens rea* may be implied from the statute's terms.¹²⁴ Identifying those particular mental states that should define criminal conduct has long frustrated courts and legislatures until well into the twentieth century, as an enduring tradition of ambiguity surrounded concepts of *mens rea* and definitions of particular mental states, with over eighty disparate, confusing intent terms littered throughout criminal statutes.¹²⁵ The arrival of the American Law Institute's Model Penal Code (the "Code") significantly clarified this muddled area of jurisprudence by creating a unified, conceptually cohesive structure to the analysis of *mens rea*.¹²⁶

Widely noted as among its greatest achievements,¹²⁷ the Code condensed the plurality of mental state categories into a simplified, well-defined set of four discrete types: purposely, knowingly, recklessly, and negligently.¹²⁸ Contemporary scholars and criminal codes largely agree in their recognition of these four discrete mental states as the definitive categories of culpability.¹²⁹ The Code defines each of these culpability terms in relation to each of the three types of *actus reus* components to a particular offense, namely the actor's conduct, the result of that conduct, and the attendant circumstances surrounding that conduct.¹³⁰ Scholars classify the four culpability terms along a continuum that begins with purposely and concludes with negligently.¹³¹

1. Acting Purposely under the Model Penal Code

Under the Code, a person acts purposely with respect to a material element of a criminal offense that involves the nature or result of the person's conduct when "it is his conscious object to engage in conduct of that nature or to cause such a result."¹³² If the element of the offense

¹²⁴ See AM JUR 2D CRIM. L. § 117 (2015).

¹²⁵ Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 952–53 (1999); Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 692–93 (1983).

¹²⁶ Ellen Liang Yee, *Forfeiture of the Confrontation Right in Giles: Justice Scalia's Faint-Hearted Fidelity to the Common Law*, 100 J. CRIM. L. & CRIMINOLOGY 1495, 1533 (2010); Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 575 (1988); Dannye Holley, *The Influence of the Model Penal Code's Culpability Provision on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 230 (1997) (arguing that "[t]he Code obliterated ill-defined, confusing common law language and concepts and replaced them with four specifically defined hierarchical levels of culpability in relation to the three objective element types used to define crimes.").

¹²⁷ See, e.g., Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO S.J. CRIM. L. 179, 179 (2003).

¹²⁸ .See MODEL PENAL CODE § 2.02(1) ("[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense."). The Code also acknowledges strict liability as an additional category. *Id.*

¹²⁹ Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 931 (2000).

¹³⁰ MODEL PENAL CODE § 2.02(2); Robinson, *supra* note 123, at 693, 696.

¹³¹ V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U.L. REV. 355, 367 (1999).

¹³² MODEL PENAL CODE § 2.02(2)(a)(i).

involves the attendant circumstances, a person acts purposely if “he is aware of the existence of such circumstances or he believes or hopes that they exist.”¹³³ Purposely requires that the actor “understand and intend the probable consequences of his actions.”¹³⁴ Hence, one who causes a certain result acts purposefully if “he consciously desires that result, whatever the likelihood of that result happening from his conduct.”¹³⁵ If a criminal statute requires that the illicit conduct be carried out with purpose, the prosecutor typically must present evidence showing that it was the accused’s “conscious object” to engage in the illicit conduct.¹³⁶

Courts and state legislatures often use “purposely” interchangeably with “intentionally,”¹³⁷ as acting purposely substitutes for acting intentionally or with intent from the common law.¹³⁸ Purposely also corresponds roughly with the common-law term of specific intent;¹³⁹ it is the most stringent culpability standard.¹⁴⁰ Moreover, acting purposely shows the highest level of criminal culpability,¹⁴¹ as it demonstrates the highest level of a person’s awareness.¹⁴²

2. Acting Knowingly under the Model Penal Code

While purposely centers on a person’s “conscious object” to engage in illicit conduct or to bring about a certain result, knowingly, the “next lower level of culpability,”¹⁴³ centers on a person’s “awareness.”¹⁴⁴ The Code explains that a person acts knowingly with respect to his conduct or the attendant circumstances when “he is aware that his conduct is of that nature or that such

¹³³ *Id.* at § 2.02(2)(a)(ii).

¹³⁴ Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 456 (2006).

¹³⁵ *United States v. Bailey*, 444 U.S. 394, 404 (1980) (internal quotation marks and citation omitted). *See also* Alexander, *supra* note 127, at 942 (explaining that to act with criminal purpose, individuals must believe that their conduct increases the risk of harm, even if the increased risk of harm is quite slight).

¹³⁶ Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1010 n.240 (1986).

¹³⁷ *See* Robinson, *supra* note 123, at 698 n.65 (“Several jurisdictions use the label ‘intentional’ to refer to the . . . Code’s ‘purposeful’ culpability.”); MODEL PENAL CODE § 1.13(12) (“[I]ntentionally or with intent means purposely”).

¹³⁸ Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 641 (2005).

¹³⁹ *United States v. Bailey*, 444 U.S. 394, 405 (1980). *See also* *State v. Primeaux*, 328 N.W.2d 256, 259 (S.D. 1982) (“[I]n order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur”).

¹⁴⁰ Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 220 (1997).

¹⁴¹ *See* Gregory Walker, *The Personal Liability of Corporate Officers in Private Actions Under the Sherman Act: Murphy Tugboat in Distress*, 55 FORDHAM L. REV. 909, 924 n.71 (1987) (“[T]he highest of four possible levels of criminal culpability is to act with ‘purpose.’”).

¹⁴² Denno, *supra* note 136, at 641.

¹⁴³ Walker, *supra* note 139, at 924 n.71.

¹⁴⁴ Yee, *supra* note 124, at 1535; Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 222 (1990) (“Like the philosophical notion of knowledge, criminal knowledge requires certainty and a corresponding absence of doubt.”).

circumstances exist,” and, with respect to the result of his conduct, when “he is aware that it is practically certain that his conduct will cause such a result.”¹⁴⁵

“Knowingly” under the Code encompasses the willful blindness doctrine, which maintains that defendants cannot escape liability by “deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances,” under the rationale that defendants who behave in this way are as culpable as those who have actual knowledge.¹⁴⁶ The doctrine applies where a defendant (i) subjectively believes that there is a high probability that a fact exists and (ii) takes deliberate actions to avoid learning of that fact.¹⁴⁷ The Code accordingly defines “knowledge of the existence of a particular fact” to encompass a situation where “a person is aware of a high probability of [the fact’s] existence, unless he actually believes that it does not exist.”¹⁴⁸ Thus, when knowledge of a particular fact is an element of a criminal offense, prosecutors may satisfy the knowledge requirement by showing the defendant’s awareness of a high probability of the particular fact’s existence.¹⁴⁹ In other words, “one ‘knows’ something only if he or she is certain of it.”¹⁵⁰

The term knowingly loosely corresponds with the common-law term of general intent.¹⁵¹ Distinguishing knowingly from purposely may be slight in practice,¹⁵² but commentators note that purposely shows a more “aggressively ruthless” mental state than the “mere callousness” inherent in knowingly.¹⁵³ A person acts knowingly regarding a particular result when he is virtually certain that his action will cause that result, whereas a person acts purposely when he has a positive desire to cause that result.¹⁵⁴

3. *Acting Recklessly under the Model Penal Code*

¹⁴⁵ MODEL PENAL CODE § 2.02(2). *Accord* United States v. Bailey, 444 U.S. 394, 404 (1980) (explaining that a person acts knowingly if he is aware “that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.”) (internal quotation marks and citation omitted); 1A FED. JURY PRAC. & INSTR. § 17:04 (6th ed.) (“[T]he term ‘knowingly’ . . . means that [the defendant] was conscious and aware of [his action], realized what [he] was doing or what was happening around [him], and did not [act] because of ignorance, mistake, or accident.”).

¹⁴⁶ Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068–69 (2011).

¹⁴⁷ *Id.* at 2063. “[P]ersons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.” *Id.* at 2069.

¹⁴⁸ MODEL PENAL CODE § 2.02(7).

¹⁴⁹ *See* Robbins, *supra* note 142, at 194 (explaining that under the willful blindness doctrine, “the prosecution need only show that the defendant recognized the likelihood of a particular fact.”).

¹⁵⁰ *Id.* at 222.

¹⁵¹ State v. Primeaux, 328 N.W.2d 256, 259 (S.D. 1982) (“[I]n a general intent crime, the prohibited result need only be reasonably expected to follow from the offender’s voluntary act, irrespective of any subjective desire to have accomplished such result.”).

¹⁵² *See* Hagemann & Grinstein, *supra* note 138, at 221 (“In practice, the distinction between the two highest levels of criminal culpability, willfully and knowingly, is fairly slight.”).

¹⁵³ Denno, *supra* note 136, at 642 (*quoting* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 819 (1980)).

¹⁵⁴ *See* Robinson, *supra* note 123, at 694 (“The essence of the narrow distinction between these two culpability levels is the presence or absence of a *positive desire* to cause the result; purpose requires a culpability beyond the knowledge of a result’s near certainty.”) (emphasis in original).

A person acts recklessly under the Code in connection with a material element of a criminal offense “when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.”¹⁵⁵ This risk must be of such type and degree that, given the nature and purpose of the defendant’s conduct and the attendant circumstances known to the defendant, the disregard of this risk “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the [defendant’s] situation.”¹⁵⁶ Thus, to act with criminal recklessness, the actor must be aware of the risk and consciously disregard it.¹⁵⁷ In contrast to knowingly, recklessly covers an actor’s disregard of risk that is “substantial” but less than “practically certain.”¹⁵⁸ The Code recommends recklessly as the default minimum *mens rea* criterion for any element if a legislature does not otherwise specify in a criminal statute.¹⁵⁹

In behaving recklessly, the actor culpably chooses to disregard a substantial and unjustifiable risk via “conscious risk creation.”¹⁶⁰ “The culpability of disregarding a risk derives from a conscious departure from a level of legally permissible risk-taking.”¹⁶¹ Together with purposely and knowingly, recklessly requires a subjective analysis of the actor’s mental attitude, rather than an objective analysis using a reasonable person standard,¹⁶² under the premise that it is “unjust to measure liability for serious criminal offenses on the basis of what the defendant should have believed or what most people would have intended.”¹⁶³

4. *Acting Negligently under the Model Penal Code*

A person acts negligently regarding a material element of a criminal offense when “he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.”¹⁶⁴ The Code explains that “[t]he risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the

¹⁵⁵ MODEL PENAL CODE § 2.02(2)(c).

¹⁵⁶ *Id.*

¹⁵⁷ See Kenneth W. Simons, *Retributivism Refined—or Run Amok?*, 77 U. CHI. L. REV. 551, 563 (2010) (analyzing the Code’s definition of recklessness); Simons, *supra* note 125, at 189 (noting that “it is fairly clear from the [Code] commentary (though not from the text) that the defendant needs to be aware only that the risk is substantial, not that it is unjustifiable”).

¹⁵⁸ See Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 899 (2007); Denno, *supra* note 136, at 643 (“One fine-lined distinction between knowledge and recklessness relies, respectively, on the certainty of the risk - high probability in contrast to substantial (and unjustifiable) risk.”) (internal quotation marks and citation omitted); Robbins, *supra* note 142, at 222 (“It is this distinction between certainty and probability that separates knowledge from the legal concept of recklessness: both involve awareness, but recklessness describes recognition of probability while knowledge requires certainty.”).

¹⁵⁹ See Simons, *supra* note 125, at 188 (discussing the Code’s decision to make recklessness the default mental state).

¹⁶⁰ MODEL PENAL CODE § 2.02 cmt 3, at 236 (Official Draft and Revised Comments 1985).

¹⁶¹ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 262 (1978).

¹⁶² Denno, *supra* note 136, at 646.

¹⁶³ MODEL PENAL CODE § 2.02 cmt. 2 at 235 (Official Draft and Revised Comments 1985).

¹⁶⁴ *Id.* at § 2.02(2)(d).

circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."¹⁶⁵

The least culpable mental state,¹⁶⁶ criminal negligence relies upon an objective standard, unlike the three other culpability types that adopt a subjectivist, "actual state of mind of the actor" approach.¹⁶⁷ In other words, purposely, knowingly and recklessly refer to actual mental states, whereas negligently is a non-intentional fault standard.¹⁶⁸ Fault in negligent action lies in the set of facts and circumstances surrounding the offense, rather than in a particular mental state.¹⁶⁹ Additionally, negligence distinguishes itself from recklessness in that negligence features an actor failing to perceive a substantial risk, whereas recklessness features an actor who perceives the risk but disregards it.¹⁷⁰

C. Public Policy Reinforces the Culpability Requirement in Criminal Law

Discerning the moral blameworthiness and criminal responsibility of a person's actions largely centers on the person's state of mind when carrying out those actions. Indeed, robust scholarship in modern criminal law focuses upon the state of mind of the accused as a central organizing mechanism for assessing crimes and assigning levels of punishment.¹⁷¹ There is a well-developed understanding of the critical relationship between the actor's state of mind and the seriousness of a particular criminal offense.¹⁷² The Model Penal Code for instance prescribes

¹⁶⁵ *Id.*

¹⁶⁶ See Simons, *supra* note 125, at 195 (explaining that the Code "views its four basic mental states or culpability terms as hierarchically ordered: all else being equal, purpose is more culpable than knowledge, which is more culpable than recklessness, which is more culpable than negligence.").

¹⁶⁷ MODEL PENAL CODE § 2.02 cmt. 2 at 236 (Official Draft and Revised Comments 1985); Denno, *supra* note 136, at 646. *But see* Peter W. Low, *The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?*, 19 RUTGERS L.J. 539, 549 (1988) (arguing that because "the baseline for negligence is the context as the actor perceived it[,] [n]egligence . . . involves a subjective inquiry (what the actor actually knew about the context) and an objective inquiry (the inferences that should have been drawn from what the actor knew).").

¹⁶⁸ See Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"?* *Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 224 n.6 (2002) ("'Negligence,' is more aptly described as a culpability term, not a 'mental state.'")

¹⁶⁹ Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 449, 453 (2005).

¹⁷⁰ See Arthur T. O'Reilly, *Command Responsibility: A Call to Realign the Doctrine with Principles of Individual Accountability and Retributive Justice*, 40 GONZ. L. REV. 127, 150 (2004); Denno, *supra* note 136, at 643-44 ("When comparing 'recklessness' to 'negligence,' the difference is one of culpable 'awareness' (recklessness) as opposed to culpable 'unawareness' (negligence) of a substantial risk.").

¹⁷¹ See Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 354-55 (1994) (discussing the role of culpability in modern criminal law).

¹⁷² *Id.* at 356. See also Susan B. Gellman & Frederick M. Lawrence, *Agreeing To Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 435 (2004) ("The severity of a crime is a function of both the culpability of the actor and the harm caused.").

different grades of homicide based upon the defendant's culpability level,¹⁷³ hence in many jurisdictions, "knowing and intentional killers are punished as murderers, [whereas] those who are 'reckless' . . . are punished only for manslaughter."¹⁷⁴ Tailoring the levels of blameworthiness and of punishment appropriate for the wrongdoer to that person's degree of culpability, where "lesser culpability justifies a mitigated punishment,"¹⁷⁵ reflects the central position culpability carries in criminal jurisprudence.¹⁷⁶

1. *Retributive and Utilitarian Philosophies Underlie the Culpability Requirement*

Two overarching philosophies manifest in the criminal law, retributivism and consequentialism, buttress this culpability-liability relationship.¹⁷⁷ Classic retributive theory posits that the government should punish offenders proportionally to the seriousness of their wrongdoing, with that seriousness largely determined by the offenders' level of culpability.¹⁷⁸ The hierarchy of culpable mental states, from negligently to purposely, reflects fundamental retributive notions, where the increasingly culpable mental state range reflects the community's increased condemnation of the perpetrator's conduct while also simultaneously delineating the community's standards for acceptable behavior.¹⁷⁹ As Professor Dressler notes, "the mens rea requirement is consistent with the retributive principle that one who does not choose to cause social harm, and who is not otherwise morally to blame for its commission, does not deserve to be punished."¹⁸⁰

The culpability requirement for criminal liability also satisfies the philosophical tenets of consequentialism, which emphasizes the elimination of future harm and the promotion of social

¹⁷³ MODEL PENAL CODE § 210.1-4. The U.S. Supreme Court has explained that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, 463 U.S. 277, 290 (1983).

¹⁷⁴ Simons, *supra* note 155, at 505.

¹⁷⁵ GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 462 (1978). *Accord* Simons, *supra* note 125, at 188 ("[M]oral culpability is, and criminal liability should be, based on a conscious choice to do wrong.").

¹⁷⁶ *See* Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 585 (2015) (examining how the culpability requirements remain central in criminal law).

¹⁷⁷ *See, e.g.*, Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 20 n.111 (1998) ("Both utilitarian theories of deterrence and retributivist theories of just dessert require a culpable state of mind."). Consequentialist theories in the criminal law justify the sanctioning of wrongdoing "as the means of obtaining certain socially desirable consequences – rehabilitation of the offender, incapacitation of the offender, and deterrence of other would-be offenders." *Developments in the Law - Corporate Crime: Regulating Corporate Behavior through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1231 (1979). Retributivist theories in turn justify such sanctions by appealing to notions of just deserts, where "[i]mposing criminal sanctions on a guilty person is justified, not because of the consequences which will result, but because it is morally proper to punish that person." *Id.* at 1231–32.

¹⁷⁸ Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 670 (2014).

¹⁷⁹ *See* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 843 (2000) (discussing the expressive function of criminal law); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 956 (2000) ("The concept of fault, and in particular the notion of mens rea—the conception of fault as an intentional state on the occasion of wrongdoing—is an essentially retributivist idea.").

¹⁸⁰ Dressler, *supra* note 114, at 158–59.

welfare.¹⁸¹ Issuing different levels of punishment to those who are culpable at different degrees can reinforce a society's respect for its criminal justice system,¹⁸² accordingly "the culpability scale simply reflects levels of resistance to social and criminal prohibitions."¹⁸³ Scholars have examined how maintaining a hierarchy of mental state distinctions may deter unlawful conduct effectively,¹⁸⁴ thus serving the utilitarian purpose of discouraging behavior that the community has deemed harmful.¹⁸⁵ The *mens rea* requirement promotes the concept of deserved punishment, which, researchers have shown, leads to deterrence, because it reinforces respect for law and a community's informal enforcement of appropriate conduct.¹⁸⁶

2. *The Culpability Requirement Harmonizes with the Proportionality Doctrine under Criminal Law*

The proportionality doctrine, which maintains in the context of sentencing that a person should face punishment to the precise degree of the culpability of his actions, dovetails with the principles underlying the culpability requirement for criminal offenses.¹⁸⁷ Proportionality aims to ensure that a person receives punishment appropriate to the offense committed.¹⁸⁸ As *mens rea* operates to prevent disproportional punishment and punishment for blameless conduct, the *mens rea* concept and its hierarchical ordering of mental states provide a proportionality-based approach to liability in the criminal law.¹⁸⁹ Proportionality would accordingly dictate that a court punish higher levels of *mens rea* more harshly than its lower levels.¹⁹⁰ Together, as guideposts

¹⁸¹ See, e.g., Kenneth W. Simons, *Rethinking Mental States*, 72 B.U.L. REV. 463, 503–05 (1992) (providing a utilitarian analysis of mens rea).

¹⁸² See Geraldine Szott Moohr, *Playing With The Rules: An Effort To Strengthen The Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685, 690 (2011).

¹⁸³ Yvonne Zylan, *Passions We Like ... And Those We Don't: Anti-Gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 16 MICH. J. GENDER & L. 1, 28–29 (2009).

¹⁸⁴ See *id.* at 503; Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1247–49 (1985) (discussing how the role of intent is consistent with the purpose of deterrence, "for intent appears to be linked to the factors that, according to theory, call for, or increase the level of, sanctions").

¹⁸⁵ See Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1416 (1986) (analyzing mens rea from a utilitarian perspective).

¹⁸⁶ See Moohr, *supra* note 180, at 690; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

¹⁸⁷ See Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 12 NEW CRIM. L.R. 69, 73 (2009) (describing the proportionality doctrine).

¹⁸⁸ Dressler, *supra* note 114, at 53.

¹⁸⁹ See Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127 (2009) (detailing the mens rea – proportionality relationship); Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 778 (1999) ("Proportionality would require that a mens rea of premeditation be punished more severely than a mens rea of negligence.").

¹⁹⁰ See Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 778 (1999) (discussing the proportionality and culpability principles).

for criminal justice, proportionality and culpability “function to limit the distribution of punishment.”¹⁹¹

D. *Redrafting Liability under Title VII in Light of the Criminal Law Model*

The applicability of the interrelated theories of retributivism, consequentialism and proportionality to workplace discrimination law is apparent. In general, the notion of proportionality in creating a relationship between culpability and liability is well-established in numerous areas of law beyond the criminal realm. In a case interpreting Titles VI and VII, Justice White, referencing contract and tort law, noted that “[i]t is not uncommon in the law for the extent of a defendant’s liability to turn on the extent of his knowledge or culpability.”¹⁹²

In employment law specifically, it makes sense both practically and historically to consider the mental state of the defendant when assessing liability. First, the moral condemnation that underlies the goals of Title VII suggests the importance of the defendant’s knowledge and intent.¹⁹³ In addition, Title VII is perhaps the most pronounced exception to the at-will employment doctrine that guides most employment relationships.¹⁹⁴ In an at-will environment, the law generally takes no position on the justice, fairness, or lawfulness of terminations, demotions, and other adverse employment actions unless they are motivated by unlawful discrimination.¹⁹⁵ As a result, it is not the adverse action itself but the intent behind it with which employment law is most concerned. If intent is key to a determination of the lawfulness of the action, the level of intent should be essential as well.

In light of this reality, this article proposes an amendment to Title VII that explicitly expands the meaning of disparate treatment discrimination to include lesser levels of intent, informed by the Model Penal Code’s framework, and to tie liability directly to the type of intent alleged. This approach draws particularly on Noah Zatz’s work identifying “membership causation” and particularly “internal causation” as being the operative dynamic at play in disparate treatment cases, Benjamin Oppenheimer’s arguments concerning the role of negligence in discrimination cases, and Linda Hamilton Krieger’s arguments regarding the impact that cognitive bias should have on liability in discrimination cases.¹⁹⁶

III. CREATING GRADATIONS OF INTENT UNDER TITLE VII

¹⁹¹ SANFORD H. KADISH, *CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS* 188 (5th ed. 1989).

¹⁹² *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 597 n.20 (1983).

¹⁹³ See *supra* Part II.A (discussing the legislative goals of Title VII).

¹⁹⁴ See Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1190 (2003) (noting that William Corbett, Theodore Blumoff and Harold Lewis view Title VII as constituting a significant exception to employment at will).

¹⁹⁵ See Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 63 (2008) (“[T]he vast majority of employees in the United States are at-will employees, meaning that the employer can terminate the employee for good reason, bad reason, or no reason at all.”).

¹⁹⁶ See *supra* text accompanying notes 60–84.

As described above, the Model Penal Code lays out four discrete types of intent, all of which are punishable to some degree: purposely, knowingly, recklessly, and negligently.¹⁹⁷ Looking to criminal law as a model, we contend that the notion that all disparate treatment employment discrimination is either purposeful or non-existent should be abandoned in favor of a nuanced view of intent that encompasses multiple states of mind or levels of knowledge. In addition, the notion, suggested by some research on implicit bias¹⁹⁸ that there are only two relevant levels of intent—purposeful and unconscious—is belied by the framework in use in criminal law and decades of juries concluding that defendants’ intent can fall somewhere between these two poles.

As previously described, scholars have discussed for several decades expanding the meaning of intent beyond conscious or purposeful. Some seeking to expand the meaning of intent in employment discrimination cases have focused on the more flexible notions of intent that have been adopted in harassment, disparate impact, and accommodation cases and suggested the importation of those concepts to disparate treatment as well.¹⁹⁹ Others have focused on the ways in which bias operates in human decision making and, additionally, the existing doctrinal frameworks that make expansion of disparate treatment intent plausible.²⁰⁰ Building on these contributions, we contend that any expansion of disparate treatment intent should contemplate varying levels of knowledge and intentionality, all of which show culpability to some degree, but some of which suggest a greater level of culpability as is the case in criminal law. Maintaining an all-or-nothing approach to liability regardless of state of mind makes expansion of intent less likely and less defensible and also ignores the role discrimination law should play in society along with the justice and fairness implications of that role.

implicit

A. *Proposed Gradations of Intent and Liability Under Disparate Treatment Discrimination*

1. Gradations of Intent

For purposes of determining discriminatory intent under Title VII, several gradations of intent should be included in the meaning of intentional or disparate treatment discrimination. Exactly which gradation categories and how they are interpreted in discrimination law may be the subject of some debate and should be the focus of significant study that is beyond the scope of this article. Nonetheless, in order to explore how liability may tie to various gradations of intent in discrimination law, we propose one possible approach to this question.

¹⁹⁷ See *supra* Part II.B.

¹⁹⁸ See *infra* text accompanying note 234.

¹⁹⁹ See Oppenheimer, *supra* note 4, at 935 (on negligent discrimination); Zatz, *supra* note 19 (on third party harassment).

²⁰⁰ See Krieger, *supra* note 4 (on cognitive bias and decision making); McGinley, *supra* note 5 (on existing flexibility in disparate treatment doctrine).

As a first step, it is important to note that in employment cases, in contrast to most criminal cases, there is an added level of complexity in determining intent because there are often two actors whose intent is relevant. In disparate treatment cases, the decision maker acts as an agent of the employer, and thus his or her intent is imputed to the employer.²⁰¹ In harassment cases, the unlawful conduct of a supervisor can again be imputed to the employer,²⁰² or, when the harasser is a co-worker or third party, the employer may be liable if it “knew or should have known” about the harassment and failed to stop it.²⁰³ As Zatz and Oppenheimer have shown, harassment cases incorporate such negligence-style standards into the meaning of intentional action.²⁰⁴ But in these cases, it is the negligence of the employer, not the harasser, that determines liability.²⁰⁵ In applying multiple gradations of intent to disparate treatment discrimination, a court must first determine whose intent is being evaluated (the actual decision maker or the entity known as the employer or both) and then make the relevant determination.

The Model Penal Code lays out four basic mental state categories: purposely, knowingly, recklessly, and negligently.²⁰⁶ For purposes of revising Title VII, we propose the following four categories of discriminatory intent: purposeful, reckless, negligent, and implicit. While purposeful and knowing are distinct categories in criminal law due to the former’s focus on a person’s “conscious object” and the latter’s focus on a person’s “awareness,”²⁰⁷ this distinction may be difficult to apply to discrimination cases where evidence of intent is often circumstantial at best.²⁰⁸ As a result, the two categories could be collapsed into the “purposeful” category for purposes of discrimination. In addition, there is a need in discrimination cases to add a category

²⁰¹ See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441 (2013) (describing reliance on agency principles to determine vicarious liability of employer); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (“Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress’ decision to define ‘employer’ to include any ‘agent’ of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”).

²⁰² *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”) The *Faragher* Court also created an affirmative defense in cases where no tangible employment action is taken. The employer must show “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Id.*

²⁰³ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 758-59 (1998).

²⁰⁴ See generally Oppenheimer, *supra* note 4 (discussing prevalence of negligence principles in harassment doctrine); see also Zatz, *supra* note 19, at 1381 (“Third-party harasser cases, however, cannot be governed by the agency principles applicable to supervisors. By definition, the harasser is not the employer’s agent. Recognizing this point, courts rest employer responsibility on negligence principles, not vicarious liability for intentional discrimination. The employer’s liability under Title VII is direct rather than derivative.”).

²⁰⁵ *Id.*

²⁰⁶ See *supra* Part II.B.

²⁰⁷ *Id.*

²⁰⁸ See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1456 (1996) (“The element of intent to discriminate has become increasingly difficult to prove because normally there is no access to direct evidence of the employer’s discriminatory motives. As a result, plaintiffs have turned to circumstantial evidence to prove discriminatory intent.”).

not covered by the Model Penal Code, namely implicit intent. This category is distinct from “strict liability,” a category in criminal law that makes an act unlawful without requiring any demonstration of a criminal mental state.²⁰⁹ Implicit bias involves an objectionable mental state of which the decision maker him or herself is honestly unaware. While there is no current analog for implicit bias in criminal law, a number scholars have begun to discuss its application to hate crime legislation, in which the perpetrator’s biased mental state is relevant to a finding of guilt but may, in fact, be unacknowledged by the accused himself.²¹⁰

In order to explore the ways in which these four levels of intent could apply to a discrimination case, it is useful to turn again to the Ellen Pao case in which the plaintiff alleged both traditional and non-traditional forms of biased conduct. In her complaint, Pao laid out a series of behaviors that formed the basis of her discrimination claim, including: (1) sexual advances and pressure by a more senior colleague that were brushed off by management after Pao reported the conduct; (2) retaliation for rejecting these sexual advances including exclusion from business meetings and email discussions; (3) limitations on Boards of Director positions and investment sponsorships that affected her compensation when male Junior Partners faced no such limitations; (4) the assignment of smaller shares of investment profits than her male colleagues; (5) negative treatment including “constantly being interrupted and ignored during meetings;” (6) exclusion from firm-related social events involving major investment partners because women would “kill the buzz;” (7) a performance review that unfairly focused on interpersonal skills and clashes with her peers and other partners; and (8) a comment by a senior partner that “the personalities of women do not lead to success at [the firm] because women are quiet,” among other claims.²¹¹

The jury in the Pao case rejected Pao’s contentions that she was the victim of sex discrimination and retaliation.²¹² In particular, the jury answered “No” to the four questions asked on the verdict form: “(1) Was Ellen Pao’s gender a substantial motivating reason for Kleiner Perkins’ not promoting her to the levels of senior partner as well as general partner? (2) Were Pao’s conversations in December 2011 and/or her January 4th 2012 memo . . . in which she complained about the alleged gender discrimination she encountered at the firm, a substantial motivating reason for her not being promoted to senior partner and general partner? (3) Did Kleiner Perkins fail to take all reasonable steps to prevent gender discrimination against Ellen

²⁰⁹ See Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 402 (1993) (“Strict liability permits the conviction of a criminal defendant in the absence of mens rea.”).

²¹⁰ See, e.g., Jennifer S. Hunt, *Implicit Bias and Hate Crimes: A Psychological Framework and Critical Race Theory Analysis*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING 247-65 (Richard L. Wiener, et. al., eds. 2007); Margaret Bull Kovera, *Implications of Automatic and Controlled Processes in Stereotyping for Hate Crime Perpetration and Litigation*, in SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING 227-246 (Richard L. Wiener, et. al. ed. 2007).

²¹¹ Complaint, Pao v. Kleiner Perkins Caufield & Byers LLC, et al., No. CGC 12 520719 (Cal. Super. Ct. May 10, 2012).

²¹² Colleen Taylor, *In Final Verdict, Jury Rules Against Pao On All Four Claims In Ellen Pao Vs. Kleiner Perkins, TECH CRUNCH*, Mar. 27, 2015, <http://techcrunch.com/2015/03/27/the-jury-has-reached-a-verdict-in-ellen-pao-vs-kleiner-perkins/>. See also Verdict Form, Pao v. Kleiner Perkins Caufield & Byers LLC, et al., No. CGC 12 520719 (Cal. Super. Ct. Mar. 27, 2015), <http://www.sfsuperiorcourt.org/sites/default/files/pdfs/Pao%20Verdict.pdf>.

Pao? (4) Were Pao’s conversations in December 2011 and/or her January 4th 2012 memo and/or her filing of this lawsuit a substantial motivating reason for Kleiner Perkins’ decision to terminate Pao’s employment in October 2012?”²¹³

Jurors who spoke about the trial after the verdict described it as one of the most difficult decisions they have ever made, saying that even though they found in favor of Kleiner Perkins, they “wanted to see the firm ‘punished,’ believed Kleiner’s culture was lawless, and agreed that venture capital’s gender imbalance was ‘appalling.’”²¹⁴ The fact that they held these beliefs but found in favor of the defense on all questions suggests a disconnect between the formal questions asked or, in other words, the legally actionable claims, and the jurors’ perception of the existence of bias. As one commentator noted, “The discrepancy between jurors’ beliefs and their verdict emerged not just because subtle sexism is hard to prove, but because it wasn’t even on their menu.”²¹⁵

Under these circumstances, it is worthwhile to consider how the case might have played out differently given more menu options. What if Title VII encompassed reckless, negligent, and implicit bias in addition to purposeful intent? Would the evidence Pao presented have been viewed as actionable by a jury? Using this case as a model, below are possible forms of each proposed intent level:

Purposeful discrimination is, of course, the easiest to understand. It involves the conscious and purposeful use of a protected category to make employment decisions. Had Pao’s attorneys demonstrated that senior partners consciously gave her lower performance reviews, rejected her investment proposals, or excluded her from profit-sharing opportunities because she is a woman, and, for example, they wanted the firm to remain an “old boys club,” Pao’s attorneys would have proven purposeful discrimination.²¹⁶

In contrast, reckless discrimination could involve the conscious disregard of a substantial and unjustifiable risk of biased decision-making or behavior, such as a manager’s refusal to investigate complaints of biased actions. For example, Pao claimed that she complained to senior partners both verbally and in writing but that these complaints were largely disregarded and that she was instead viewed as a complainer with a “female chip on her shoulder.”²¹⁷ Her claims, if proved, might rise to the level of reckless discriminatory conduct.

Negligent discrimination is related to but distinct from reckless discrimination in that negligent discrimination could involve the taking of a risk that the employer knew about or should have

²¹³ *Id.*

²¹⁴ Natasha Tiku, *Five Uncomfortable Truths about the Ellen Pao Verdict*, VERGE, Apr. 2, 2015, <http://www.theverge.com/2015/4/2/8328115/ellen-pao-kleiner-perkins-venture-capital-verdict>.

²¹⁵ *Id.*

²¹⁶ The question of how exactly to prove this and other forms of discrimination is a complicated one that will be addressed *infra* in Part IV.A.

²¹⁷ See David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES, Mar. 27, 2015, http://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html?_r=0.

been aware of.²¹⁸ For example, a supervisor might act negligently if he were to utilize criteria for evaluating employees that he should have known to be unnecessary and exclusionary to minority workers or if he were to rely on wholly discretionary or subjective employee evaluation criteria that are susceptible to the infiltration of bias.²¹⁹ In Pao's case, she claimed that her performance reviews focused excessively on interpersonal skills and clashes with her peers and other partners. She also alleged that senior partners had made negative comments about women's personalities and resulting lack of success at the firm. While not demonstrating a purposeful or even reckless intent to discriminate, evidence of managers focusing extensively on women's personalities in their evaluations could be evidence of negligence if the plaintiff can also demonstrate, perhaps through social science expert testimony, that such criteria tend to negatively impact women but are not actually essential to effective job performance.²²⁰

Finally, implicit bias may be the most murky and difficult-to-prove category of discrimination. However, it largely entails the allowance of biased attitudes to permeate a workplace despite the actors or decision makers themselves not being conscious of the existence of such bias. Several of Pao's claims seem to fall into this category, including her allegation that women were constantly interrupted or ignored during meetings, that women were not invited to firm social events, and that women were limited in the number of Boards of Director positions and investment sponsorships that they were permitted. Absent evidence that senior partners took these actions consciously to stunt the development of female junior partners, these allegations cannot be classified as purposeful discrimination. Similarly, absent evidence that they were aware of or should have been aware of their actions' negative impact on women's success at the firm, these allegations are not typical of recklessness or negligence. Rather, it is the subconscious creation of a culture of bias that Pao claimed was responsible for impeding her progress. Her allegations call to mind a recent magazine cartoon that was clearly meant to highlight the role and problem of implicit bias. In the cartoon, a group of men and one woman sit around a conference table and the caption reads: "That's an excellent suggestion, Miss

²¹⁸ This is in contrast to disparate impact discrimination where a neutral policy impacts a protected group but the employer need not have knowledge (or intent) of that impact to be culpable. 42 U.S.C. §§ 2000e-2(k)(1)(A){B} (Supp. V 1993); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding facially neutral practices having discriminatory effect violate Title VII).

²¹⁹ *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 489-90 (citing *Rowe v. General Motors Co.*, 457 F.2d 348 (5th Cir. 1972), which acknowledged that subjective promotion standards lend themselves to discrimination and *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) acknowledging subjective hiring criteria as vulnerable to subtle discrimination). *See generally* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing subjective and discretionary hiring and promotion criteria as a source of subtle discrimination).

²²⁰ Our proposal to make the negligent use of stereotypes a downgraded form of discrimination may result in lesser liability for claims that are currently classified simply as intentional. *See, e.g.* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (holding that reliance on sex-based stereotypes constitutes sex discrimination). This is a difficult compromise to make. Our approach allows in more conduct as discriminatory but may mean smaller recoveries for specific types of conduct. This, among other reasons, is why the exact meanings of gradations of intent require further examination.

Triggs. Perhaps one of the men here would like to make it.”²²¹ It is funny because it rings painfully true and yet it is not quite actionable under Title VII. While it is impossible to say with certainty whether formal inclusion of these categories in Title VII would have saved Ellen Pao’s case, it certainly would have offered the jury more menu options in making its decision.

2. Gradations of Liability

Having considered a possible approach to gradations of intent under Title VII, it is our contention that any amendment that expands the meaning of intentional discrimination should likewise alter the available relief. If Congress were to amend Title VII to include purposeful, reckless, negligent, and implicit discrimination, it should accordingly provide reduced compensatory damages based on the level of intent proven at trial.²²² Consider as an example the following possible structure for intent-based damage awards: Purposeful discrimination – 100% recovery of compensatory damages (with optional punitive damages); Reckless discrimination – 80% of compensatory damages; Negligent discrimination – 60% of compensatory damages; Implicit discrimination – 30% of compensatory damages and/or mandated negotiation. Given that implicit bias, although highly detrimental to its victims and workplaces in general, involves the decision maker’s lack of self-knowledge and awareness of his or her own bias, mandated negotiation between employee and employer regarding reinstatement may be effective in rehabilitating employment relationships and workplace cultures.²²³ Courts could require employer and employee to attempt negotiation with the understanding that failure to reach an agreement would result in an automatic 30% of compensatory damages award to the employee. It is perhaps naively optimistic to think that mandated negotiation might lead to reinstatement in some cases and healthier workplaces overall, but until implicit bias is better understood by society in general, there is immense value in simply mandating open discussion of the issue between employers and employees.²²⁴

In proposing gradations of liability, we do not suggest alterations to backpay, but instead recommend that the statute continue to mandate full backpay for all types of intentional discrimination.²²⁵ Retaining full backpay regardless of intent level is an effort to continue to

²²¹ Joe Croucher, *The Greatest Minority of All*, FILIBUSTER UK, Feb. 18, 2016,

<http://filibuster.org.uk/2016/02/18/the-greatest-minority-of-all/> (containing cartoon by artist Riana Duncan).

²²² In reducing only compensatory damages, this proposal would not affect a plaintiff’s ability to recover full backpay and attorneys’ fees.

²²³ It is worth noting that Amy Wax’s critique of proposals to incorporate implicit bias into Title VII is particularly concerned with the concept of a damages system that is tied to the *probability* that a harm was due to an actionable cause. In other words, she is concerned with awarding damages based on the unproven belief that bias was involved. *See Wax, supra* note 4, at 1220. This article, however, proposes linking liability to a demonstrated intent level, not to the probability that bias caused the adverse action. Wax also suggests that victims of implicit bias have some ability and obligation to reduce the risk that they will be victims. *Id.* at 1201. We find this notion of victim-blaming to be highly problematic, *see Selmi, supra* note 22, at 1233, and are not proposing reduced liability as a means of accounting for the victim’s supposed role in the creation of bias.

²²⁴ *See Zachary Kramer, The New Sex Discrimination*, 63 DUKE L.J. 891, 942 (2014) (arguing that creation of dialogue between employer and employee about accommodation of sex practices is a worthy goal in and of itself).

²²⁵ 42 USCS § 2000e-5(g).

“make whole” the innocent victim of unlawful discrimination while taking into account the levels of culpability that can constitute a violation of Title VII. In addition, this proposal does not affect mandated payment of attorneys’ fees for successful plaintiffs. The payment of attorneys’ fees plays an essential role in incentivizing the filing of all worthy claims even those that will not lead to a substantial damages award.²²⁶

This proposal emerges from a concern, running parallel in criminal law, about proportionality, retributivism, and consequentialism as important and interrelated concepts in discrimination law. These ideas cannot be effectuated without gradations in liability that relate directly to the level of culpability proven. The availability of punitive damages should not be the only distinction between types of discrimination. Nor should the availability, as Krieger has proposed, of compensatory damages be the only distinction. Krieger suggests allowing compensatory and punitive damages only in cases of conscious bias while treating all other disparate treatment cases (involving implicit bias) essentially akin to disparate impact cases that allow for backpay and injunctive/declaratory relief.²²⁷ Krieger recognizes only two categories of intent—conscious and implicit—and ignores the other gradations that criminal law recognizes and that could be applied to employment discrimination with proportional remedies. By using disparate impact remedies as a model, Krieger uses a blunt instrument—the availability of compensatory damages in their entirety—to distinguish between relief available for conscious discrimination and implicit discrimination, where a more nuanced tool is necessary. In contrast, the above-proposed percentage system recognizes the importance of compensatory damages for all types of intentional discrimination but reduces the amount recoverable in relation to intent level.

B. *Theoretical and Practical Justifications for Intent-Based Liability*

From a theoretical perspective, intent-based liability is an expression of the balancing of employer and employee interests, which has always been an essential goal of Title VII. This view of Title VII as a balancing of interests pervades the legislative history, the statutory language itself, and courts’ subsequent interpretations. As Chad Derum and Karen Engle demonstrate, “Title VII itself is carved out of a balance that takes employer interests into account.”²²⁸ They point specifically to the 1963 House Report on Title VII that, “[w]ith no apparent sense of contradiction . . . outlined two opposing views of Title VII’s impact”:²²⁹

Management prerogatives [under Title VII] . . . are to be left undisturbed to the greatest extent possible. Internal affairs of employers . . . must not be interfered with except to the limited extent that correction is required in discrimination

²²⁶ See Marjorie A. Silver, *Evening the Odds: The Case for Attorneys’ Fee Awards for Administrative Resolution of Title VI And Title VII Disputes.*, 67 N.C.L. REV. 379, 380 (1989) (“[T]o ensure that aggrieved individuals have access to legal representation, Congress has promulgated over the years various statutes that confer upon courts the power to award attorneys’ fees to parties who prevail on their civil rights claims.”).

²²⁷ Krieger, *supra* note 4, at 1243.

²²⁸ Derum & Engle, *supra* note 192, at 1211.

²²⁹ *Id.*

practices. [The EEOC's] primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies . . . are strictly filled on the basis of qualification.²³⁰

In addition to evidence of this balance in the legislative history of Title VII, the statutory provisions themselves contribute to the prevailing sense that Title VII is a product of compromise. As Mary Ellen Maatman points out, Title VII's "bona fide occupational qualification (BFOQ)" and "business necessity" defenses "balance employers' interests against Title VII's anti-discrimination mandate by ensuring that Title VII enforcement will not . . . interfere unnecessarily with legitimate business operations and decisions. Employers may not discriminate, but Title VII preserv[es] . . . an employer's remaining freedom of choice."²³¹ In addition to codifying the business necessity defense, the 1991 Amendments also added caps on damages based on employer size that can be seen as an attempt, once again, to balance employer interests with Title VII's overarching goal of eradicating discrimination.²³²

This tension between employer and employee interests continues to motivate courts' interpretations of its provisions.²³³ The Supreme Court noted in 1973 that "there are societal as well as personal interests on both sides of [the Title VII] equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship . . ."²³⁴ In 1994, the Third Circuit elaborated on this notion, carefully laying out the balancing act that is Title VII, which aims to eradicate discrimination while maintaining elements of employer liberty and management rights:

The federal anti-employment discrimination laws were designed not to impinge directly upon employer free choice; that is, not to interfere unnecessarily with legitimate business operations and decisions. For example, the federal employment discrimination laws do not alter the employment-at-will doctrine except in limited respects. Their goal instead is to restore the victim of the

²³⁰ *Id.* (citing H.R. Rep. No. 88-914, pt. 2, at 29 (1963), reprinted in UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 2028, 2150 (1968). *But see* Marley S. Weiss, *Risky Business: Age and Race Discrimination in Capital Redeployment Decisions*, 48 MD. L. REV. 901, 994-1001 (1989) (arguing that the oft-quoted passage in a House Report that notes "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible" is merely a "response to opponents who charged that the bill would lead to racial quotas in the workplace, and to pervasive government interference with the day-to-day minutiae of hiring, promotion, assignment, and other personnel decisions" and that that the goal of eradication of discrimination is meant to supersede employer interests in most instances).

²³¹ Mary Ellen Maatman, *Listening to Deaf Culture: A Reconceptualization of Difference Analysis under Title VII*, 13 HOFSTRA LAB. L.J. 269, 269-71 (1996) (citing 42 U.S.C. § 2000e-2(e) (BFOQ defense) and 42 U.S.C. § 2000e-2(k) (business necessity defense) and noting that the BFOQ defense does not apply to race or color discrimination and that the business necessity defense was a judicial invention that was subsequently adopted in the statute itself as part of the 1991 Amendments). *See also* Zatz, *supra* note 19, at 1405 (arguing that disparate treatment has a "nearly absolute quality" while disparate impact and accommodation cases routinely involve affirmative defenses that demonstrate a balancing of employer and employee interests).

²³² *See* 42 USCS § 1981a(b)(3).

²³³ Derum & Engle, *supra* note 192, at 1212 (citing McGinley, *supra* note 206 (Title VII "reveals a tension between concepts of equality and liberty . . . that has repeatedly appeared in the cases decided under the Act since its passage.")).

²³⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

employer's illegal conduct to the position he or she would have occupied absent the discrimination.²³⁵

A proposal to expand the meaning of intent and concomitantly limit the liability of defendants should, in keeping with Title VII's overall approach, give voice to both employee and employer concerns. Intent-based liability is a means of expanding employer liability within the natural boundaries established by the statute.

There are also several practical benefits in adopting intent-based liability in Title VII that focus primarily on the impact on employers and their endorsement of anti-discrimination laws. First, the creation of a culpability scale in Title VII would likely reinforce a respect for the law itself. Intent-based liability furthers a sense of fairness that has, perhaps, been lacking in prior proposals to expand the meaning of intentional discrimination. This emphasis on fairness or justice is at the heart of the *mens rea* requirement in criminal law. Numerous scholars have opined that the notion of deserved punishment and basic fairness in the law reinforces respect for law and will buttress a community's informal enforcement of appropriate conduct.²³⁶ This focus on matching exposure to culpability levels would likely engender greater respect for anti-discrimination laws in general among employers.

Second, the incorporation of reduced liability into the basic structure of Title VII will be an inducement for employers to support a change to Title VII that expands the meaning of intent. The additional exposure to liability brought about by such an amendment is countered, to some extent, by the promise of reduced damages in cases where conscious intent cannot be proved. Given the current state of politics, it is obvious that any attempt to amend civil rights statutes must be borne of a compromise between those who are affected by its provisions.²³⁷ It is impossible to imagine statutory changes to Title VII that are not endorsed by at least a portion of employer and employee advocacy groups. It is simply practical to consider concessions to employers when attempting to expand the scope of unlawful conduct under the statute. Intent-based liability is just such a concession.²³⁸

²³⁵ *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1240 (3d Cir. Pa. 1994) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (“[Title VII] was not intended to ‘diminish traditional management prerogatives.’” (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (stressing that an “important aspect of [Title VII] is its preservation of an employer’s remaining freedom of choice”)).

²³⁶ See *supra* note 179. See also Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Criminal Justice*, 7 OHIO ST. J. CRIM. L. 307, 315 (2009) (“[P]eople are more likely to obey the law if they think it is legitimate and/or consistent with their values.”); David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence* (Ross School of Business Working Paper No. 1293, 2015) at 47 n.206 (“Legitimacy is the ‘belief that authorities, institutions, and social arrangements are appropriate, proper, and just’ and ‘when it is possessed, leads people to defer voluntarily to decisions, rules, and social arrangement.’” (quoting Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376 (2006))).

²³⁷ See Jason Grumet, *4 Simple Steps to End Political Gridlock*, U.S. NEWS, OCT. 29, 2014,

<http://www.usnews.com/opinion/articles/2014/10/29/end-washington-gridlock-with-compromise-and-earmarks>.

²³⁸ Amy Wax contends that rational employers should already want to eliminate implicit bias in the workplace for economic reasons. See Wax, *supra* note 4, at 1144. However, as is well-known by anyone who has ever litigated an employment discrimination case, employers are not always rational actors in this area.

C. Title VII's Existing Liability Structures Support the Adoption of Degrees of Liability

Despite the lack of graded intent and liability under Title VII, there are nods to the concept in the law as it stands. First, Title VII, as amended in 1991, makes a distinction between disparate treatment and disparate impact discrimination (which does not require the demonstration of any conscious or unconscious mental state) in determining which categories of damages are available. Under the statute, only those plaintiffs who demonstrate intentional discrimination can claim backpay, compensatory damages (including frontpay and emotional distress damages), and, in some cases, punitive damages.²³⁹ In contrast, plaintiffs claiming disparate impact discrimination may only receive backpay damages.²⁴⁰ This nod to intent-based liability thus distinguishes between intentional and disparate impact discrimination but does not contemplate gradations of liability within disparate treatment discrimination.

Within intentional discrimination itself, there is, under Title VII, the additional possibility of punitive damages for a small subset of cases. The statute authorizes punitive damages where “the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”²⁴¹ At first glance, the availability of punitive damages thus appears to tie additional damages to a more egregious or reprehensible form of intent—creating, in other words, intent-based liability. However, the Supreme Court in its only decision examining this clause, eliminated the use of punitive damages to truly distinguish between gradations of intent. In *Kolstad v. American Dental Association*, the Court explained that “malice or with reckless indifference” means that the employer discriminated “in the face of a perceived risk that its actions will violate federal law.”²⁴² The focus, according to the Court, is on the employer’s knowledge of discrimination law and whether the employer made discriminatory decisions, thereby ignoring the illegality of such an action.²⁴³ In other words, as Joseph Seiner explains,

there could thus be a subset of cases where an employer intentionally discriminated but is not ultimately liable for exemplary relief. Most notably, the employer might not have knowledge of the federal law that it is violating. Or the

²³⁹ 42 U.S.C. §1981a. Punitive damages are available only in cases involving “malice” or “reckless indifference,” which the Supreme Court has defined as the employer knowing that it may be acting in violation of federal law. *See Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 536–37 (1999).

²⁴⁰ *Id.*

²⁴¹ 42 U.S.C. §1981a(b)(1).

²⁴² *Kolstad*, 527 U.S. at 536.

²⁴³ This interpretation is problematic in that it considers the employer’s actual knowledge and disregard for Title VII’s mandates rather than creating an affirmative obligation to know and operate within the bounds of federal anti-discrimination law. *See also* Jason Pogorelec, Note, *Under What Circumstances did Congress Intend to Award Punitive Damages for Victims of Unlawful Intentional Discrimination Under Title VII*, 40 B.C. L. REV. 1269, 1274-75 (1999) (arguing for an “egregious conduct requirement” for punitive damages under Title VII rather than the Court’s focus on knowledge of the law).

employer may act intentionally but with the view that its discrimination does not violate the statute or that its conduct falls within an exception.²⁴⁴

In essence, the question for courts in determining the availability of punitive damages is not the level of intent (unconscious, negligent, reckless, or purposeful) of the defendant but rather whether the defendant had knowledge of federal antidiscrimination law or believed its actions violated the law. As the Court itself stated, “[t]he terms ‘malice’ or ‘reckless indifference’ pertain to the employer’s knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.”²⁴⁵ In addition, the Court created a defense to a punitive damages claim where the employer demonstrates that it acted in good faith by, for example, “‘implementing programs or policies to prevent discrimination in the workplace’ or other ‘prophylactic’ measures.”²⁴⁶ An employer can thus avoid expanded liability by adopting anti-discrimination policies, mandating diversity education, and the like even while it continues to base its employment decisions on discriminatory beliefs. In addition to the obvious drawbacks of such restrictions on the availability of punitive damages, under this interpretation, it also cannot possibly serve to create an intent-based liability scheme under Title VII. Punitive damages are available in the ever-shrinking number of cases that involve an employer who understands the requirements of federal antidiscrimination law but has not seen fit to implement antidiscrimination policies or alter its behaviors and decision-making processes in keeping with the law. Punitive damages do not, however, alter liability for gradations in state of mind (beyond knowledge of the law), unlike the Model Penal Code.

The only other suggestion of liability gradations under Title VII appears in the mixed motive context. The 1991 Act mandates that successful plaintiffs in mixed motive cases may receive only declaratory relief, injunctive relief, and attorney’s fees but not compensatory damages or backpay.²⁴⁷ As a result, if an employer can demonstrate that the adverse action resulted from a combination of legitimate and discriminatory motives, liability is severely limited. Nonetheless, the mixed motive approach does not contemplate a limitation on liability if there is no legitimate

²⁴⁴ Joseph Seiner, *Punitive Damages, Due Process, and Employment Discrimination*, 97 IOWA L. REV. 473, 479 (2012).

²⁴⁵ Kolstad, 527 U.S. at 535. It is worth noting that in reaching a conclusion about the meaning of the Title VII punitive damages clause, the Court looked to its decision in *Smith v. Wade*, 461 U.S. 30 (1983), examining punitive damages in the § 1983 context. The *Kolstad* Court noted its prior explanation of reckless indifference as incorporating a “criminal indifference to civil obligations.” Kolstad, 527 U.S. at 535–36 (citing *Smith*, 461 U.S. at 37 n.6, 41).

²⁴⁶ Seiner, *supra* note 242, at 480 (citing Kolstad, 527 U.S. at 545).

²⁴⁷ Title VII, 42 U.S.C. 2000e-5(g)(2)(B)(i)-(ii) (Supp. V 1993). This section provides as follows:

B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -

(i) may grant declaratory relief, injunctive relief . . . , and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.

motive at all. In other words, this modification of liability impacts damages when factors other than discriminatory intent complicate causation, but it does not alter liability when intent itself is muddled.

D. Intent-Based Liability in Practice

Adding a reduced liability scheme to Title VII disparate treatment relief need not add complexity at every stage of litigation. In practice, this amendment would only become truly relevant at the verdict stage, when a jury must make the ultimate decision about the level of intent exhibited by the defendant. At the commencement of a case, the plaintiff would have several options under this scheme: (1) make the level of intent alleged explicit in the complaint, (2) wait and discuss the intent level at the summary judgment phase (if relevant), or lastly (3) leave this discussion to trial at which point the factfinder would make a final assessment. At summary judgment, whether or not the plaintiff has specifically alleged a mental state, the judge would assess the claim with the understanding that disparate treatment includes multiple gradations of intent (from unconscious to purposeful) but need not make a determination about which state of mind motivated the defendant's behavior in a particular case. Of course, plaintiffs' counsel would need to be mindful of this expansion of intent as early as the initial client meeting when determining whether the employee has a potentially successful claim. As litigation proceeds, it would likewise be important to consider the intent level that will be alleged during each stage of litigation, particularly in the discovery phase as the need to gather evidence related to intent levels will impact the phrasing of deposition questions, document requests and interrogatories, for example.

Nonetheless, the primary change proposed by this scheme appears at the trial stage when juries will have to pinpoint the level of intent. As is common in employment discrimination cases, a specific verdict sheet should be used to ask the jury to make this determination about intent.²⁴⁸ However, just as juries are not informed about Title VII's existing caps on damages related to employer size, juries need not be told about the statute's limitations on damages related to each intent level.²⁴⁹ The jury should be asked to determine the intent level and assign the damages as it sees fit, and the judge can then reduce the damages according to the statutory scheme.

²⁴⁸ See, e.g., Ninth Circuit Manual of Model Civil Jury Instructions - Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation, <http://www3.ce9.uscourts.gov/jury-instructions/node/166>.

²⁴⁹ See 42 U.S.C. § 2000e-5(g)(2) (capping compensatory and punitive damages based on the employer's number of employees with a maximum of \$300,000). See also Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1364–1365 (“In an interesting twist, the 1991 Act also expressly required that ‘the court shall not inform the jury of the limitations [on damages].’ Thus, when called upon to measure damages in federal employment discrimination cases, juries are expected to make their calculations without knowing the ultimate limit that the caps impose. The cap non-disclosure clause has been touted as a method of maintaining the ‘integrity’ of jury damages calculations: if informed of the caps, jurors could purposely attempt to evade them or might be unconsciously biased by the cap number. A variety of courts and commentators have suggested that nondisclosure of damage caps, more generally, should be the rule whenever a damage cap exists.”) (citing 42 U.S.C. 1981a(c)(2)).

As is likely clear by this point, the above proposal requires an amendment to Title VII and cannot be accomplished by judicial reinterpretation alone. And, as discussed above, there are precedents in Title VII's existing construction that suggest that an intent-based liability amendment would harmonize with the statute's concerns and processes.²⁵⁰ However, as Samuel Bagenstos argues with respect to co-worker harassment, the adoption by courts of negligence (and presumably recklessness) standards may fit "uneasily with the formal structures the Supreme Court has erected for Title VII claims."²⁵¹ The existing, firm distinction between disparate impact claims that require no evidence of intent and disparate treatment claims that focus explicitly on the reason for or intent behind the adverse action leaves little room for courts to infer alternate standards absent clear statutory direction.²⁵² As a result, to effectuate gradations of intent and liability with altered proof structures and damage awards, Congress must amend the statute to lay out specifically which states of mind should be covered and the concomitant percentage of damages available for each. Such an amendment would likewise require a rethinking of the rubrics with which courts approach employment discrimination claims in order to account for the increased flexibility in the meaning of discriminatory intent.

IV. INCORPORATING INTENT-BASED LIABILITY: CHALLENGES AND VIRTUES

Unsurprisingly, this proposal to create intent-based graduated damages under Title VII is not without obstacles. There are several concerns raised in the literature on implicit bias and structural discrimination that are relevant here as well, in addition to challenges created by the percentage scheme proposed above. This section will address (1) the notion of proof problems and the ability of a jury to distinguish between purposeful discriminatory conduct and that which is motivated by less-than purposeful intent; (2) Amy Wax's questioning of incentives created by expansion of intent and her contention that employers will find it close to impossible to deter implicit bias; and (3) the various practical concerns created by new reductions in compensation for victims of discrimination.

A. *Distinguishing Between Mental States*

The question of how courts, juries and parties should deal with evidentiary support in implicit bias or negligent discrimination cases is not a small one. Accepting that implicit bias plays a role in many employment decisions involving racial, religious, ethnic, and gender minorities is quite different from compiling evidence of such implicit bias that would be sufficient proof in court. Melissa Hart argues that it may, in fact, not be possible "to separate the cases in which unconscious discrimination actually played a role from those in which it did not (and the research raises substantial questions about whether there are any cases in which

²⁵⁰ See *supra* Part III.B.

²⁵¹ See Bagenstos, *supra* note 15, at 161.

²⁵² *Id.* at 161–63 (citing Zatz, *supra* note 19 at 1386–1406) (discussing Zatz's consideration of third-party harassment and suggestion of a reasonable accommodation standard for Title VII that Bagenstos argues is difficult to adopt given the existing structure of Title VII).

unconscious bias plays no role)” leading to apparent difficulty assessing “which plaintiffs should win and which should lose.”²⁵³ The above proposal to expand Title VII intent beyond the two existing poles of unconscious and purposeful and incorporate gradations including negligence and recklessness will likely lead to the same complaints—how will parties gather evidence of less-culpable mental states and how will juries distinguish between them?

The implicit bias proof problem largely arises because of the *McDonnell Douglas* pretext approach to proving discrimination. As described earlier, this approach calls for the plaintiff to make out a prima facie case, the defendant to respond with a legitimate nondiscriminatory reason for the adverse employment action, and then the plaintiff to respond with evidence that the employer’s reason was merely pretext for discrimination.²⁵⁴ Upon proving pretext, *McDonnell Douglas* and its progeny allow for a demonstration of discriminatory intent without direct evidence of biased motive.²⁵⁵ How then, within this scheme, can a plaintiff demonstrate that the elusive discriminatory intent was purposeful or implicit? If an employer persists in denying the presence of bias, how can a fact finder distinguish between a lying decision maker and one who him or herself is unaware of the operation of bias in the decision making process?

A number of scholars who have examined the role implicit bias should play in employment discrimination law have, by necessity, considered this problem as well. For example, Patrick Shin, in contemplating whether “implicit bias [should] be a basis of disparate treatment liability under Title VII” was careful to note the argument that there are not yet “practicable, scientifically accepted methods” for proving implicit bias and that this issue might then push scholars not to consider doctrinal or normative questions about the proper role of implicit bias in Title VII.²⁵⁶ Nonetheless, Shin perseveres in considering the normative question, asking readers to assume first, that implicit bias is real and second, that it is provable in individual cases.²⁵⁷ At the very least, we make the same assumptions in proposing gradations of intent and concomitant liability. It is important to tackle these questions whether or not the majority of district courts or juries are already willing or able to distinguish implicit bias in specific cases.

In addition, as Audrey Lee describes, there have been advances in combatting the proof problem, namely the introduction of expert psychological evidence that can help fact finders make the all-important distinction between purposeful and implicit bias.²⁵⁸ The pretext stage, she suggests, is the place where “evidence of social science empirical research on unconscious bias may have the strongest impact.”²⁵⁹ Lee posits that an expert could testify to the psychological

²⁵³ Hart, *supra* note 8, at 776. See also Wax, *supra* note 4, at 1169 (noting the difficulty of detecting when implicit bias infects subjective decision making).

²⁵⁴ See *supra* text accompanying note 30.

²⁵⁵ *Id.*

²⁵⁶ Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67, 69, 71 (2010).

²⁵⁷ *Id.* at 72-75.

²⁵⁸ Lee, *supra* note 217, at 496-97.

²⁵⁹ *Id.* at 496.

research into the way in which humans codify information and rely on implicit stereotyping and then leave it to “plaintiff’s counsel to make the argument that the facts at issue—including factors such as the number of minorities employed, organizational structure, and evaluation procedures—strongly suggest that the unconscious bias of the decision-maker has a role in the adverse employment action.”²⁶⁰ Alternatively, the expert could opine on the particular case at issue and analyze whether implicit bias played a role in the decision making.²⁶¹ At that point, the decision would fall to the fact finder to determine not only the credibility of witnesses who assert that bias did not impact their decisions but also whether implicit bias may have informed their choices without their knowledge.

Here, again, a consideration of criminal law and its long history with the *mens rea* requirement is instructive since criminal juries have been making these difficult determinations for decades. In order to carry out their duties effectively, factfinders must be able to dependably infer a criminal defendant’s mental state at the time he or she allegedly commits the offense.²⁶² By inferring an unobservable mental state, factfinders exercise their natural mind reading capabilities, which psychology acknowledges through its influential theory of mind literature.²⁶³ Along with the majority of state codes that reflect it, the MPC codifies this mind reading, operating under the presumption that judges and juries can classify defendants’ real-world mental states into its four key categories reliably upon instruction.²⁶⁴ These codes by their operation require factfinders to distinguish between and among the four different types of intent and link those intent types to different levels of liability.²⁶⁵

²⁶⁰ *Id.* at 497. See also Melissa Hart and Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 *FORDHAM L. REV.* 37, 39 (“[A]n expert offering social framework testimony will explain the general social science research on the operation of stereotyping and bias in decision making and will examine the policies and practices operating in the workplace at issue to identify those that research has shown will tend to increase or limit the likely impact of these factors.”).

²⁶¹ *Id.* This option may face evidentiary obstacles under *Daubert v. Merrell Dow Pharm, Inc.*, 509 U.S. 579 (1993), depending on the expert’s familiarity with and examination of the specific actors and facts involved in the case at issue. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553 (2011) (disregarding social framework evidence because expert conceded that he could not opine on specific use of stereotypes in workplaces at issue in that particular case).

²⁶² Francis X. Shen et al., *Sorting Guilty Minds*, 86 *N.Y.U. L. REV.* 1306, 1306–07 (2011); Buell & Griffin, *supra* note 120, at 133, 153 (2012) (“[A]djudicators must sift through the surface level of conduct for signals about internal mental processes.”).

²⁶³ Francis X. Shen, *Privacy, Security, and Human Dignity in the Digital Age: Neuroscience, Mental Privacy and the Law*, 36 *HARV. J.L. & PUB. POL’Y* 653, 657 (2013). Theory of mind is “the ability to observe behavior and then infer the unobservable mental state that is causing it.” MICHAEL S. GAZZANIGA, *HUMAN: THE SCIENCE BEHIND WHAT MAKES US UNIQUE* 49 (2008).

²⁶⁴ Shen et al., *supra* note 260, at 1307–08.

²⁶⁵ From ancient societies through centuries of common law, legal systems have featured the sorting of culpability levels and assigning of requisite punishment, and many systems direct their factfinders to differentiate between negligent and non-negligent actions, mere negligence and recklessness, and accidental acts and intended harms, among other divisions See Robinson, *supra* note 151, at 837–46; Shen et al., *supra* note 260, at 1309–13. In addition, attorneys, judges and academics have long grappled with the boundary lines for culpability frameworks and produced robust legal commentary, but empirical examination of culpability issues, and more specifically, factfinders’ abilities to classify mental states and accordingly assign blame, is a relatively new research stream. Shen

Existing research recognizes lay jurors' abilities to comprehend varying types of mental states when analyzing wrongdoing. Early empirical studies show, for instance, how individuals analyze the seriousness of a wrongful act by evaluating the mental state accompanying that act, along with the act's harmful consequences,²⁶⁶ and how individuals generally attribute greater seriousness to wrongful acts when committed with a higher level mental state, as compared with the same acts committed with a lower level mental state.²⁶⁷ Further research posits that factfinders assign levels of individual responsibility to defendants by differentiating between acts attributable to the defendant's mental state and acts attributable to environmental factors.²⁶⁸ While some early studies suggest that factfinders may face difficulty when making more fine-tuned determinations of a defendant's mental culpability in accordance with jury instructions,²⁶⁹ other studies found in a series of experiments that individuals generally classify mental states in harmony with the MPC's mental state hierarchy.²⁷⁰

More recent empirical research provides further evidence for factfinders' core abilities to sort mental states when evaluating wrongdoing. Professor Francis Shen and colleagues tested two critical assumptions underlying the MPC: that the MPC's four culpability levels accurately mirror our moral beliefs on blameworthiness, and that jurors are able to detect the distinctions between the MPC's culpability levels.²⁷¹ The authors found in their experimental conditions that their study participants generally "behaved as the MPC assumes they would, with or without the assistance of jury instructions,"²⁷² and the authors concluded that "most of the mens rea

et al., *supra* note 260, at 1315–18 (analyzing existing empirical studies); Justin D. Levinson, *Mentally Misguided: How State of Mind Inquiries Ignore Psychological Reality and Overlook Cultural Differences*, 49 *HOW. L.J.* 1, 3 (2005) ("Scholars have not yet fully . . . empirically examined the psychological mechanisms involved in understanding others' minds in the legal setting."); Matthew R. Ginther, et al., *The Language of Mens Rea*, 67 *VAND. L. REV.* 1327, 1331 (2014) ("[S]urprisingly little research has examined how laypeople – who are most commonly charged with applying the Model Penal Code's mens rea provisions – actually interpret and apply the Code.").

²⁶⁶ Leslie Sebba, *Is Mens Rea a Component of Perceived Offense Seriousness?*, 71 *J. CRIM. LAW & CRIMINOLOGY* 124, 131–33 (1980). As noted by Professor Angeline Lillard, "The ability to posit mental states in other people is among the most subtly remarkable of human feats." Angeline Lillard, *Developing a Cultural Theory of Mind: The CIAO Approach*, 8 *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 57, 57 (1999).

²⁶⁷ Sebba, *supra* note 264, at 127, 35 (finding when mock-jurors perceive an action as more intentional, they perceive the corresponding offense as more serious). See also Daniel McGillis, *Attribution and the Law: Convergence Between Legal and Psychological Concepts*, 2 *LAW & HUMAN BEHAVIOR* 289, 292–93 (1978) (explaining how the mental state degrees in the Code mirror attribution of responsibility levels proposed in attribution theory, a dominant social psychological theory).

²⁶⁸ See Laurence J. Severance, Jane Goodman & Elizabeth Loftus, *Inferring the Criminal Mind: Toward a Bridge Between Legal Doctrine and Psychological Understanding*, 20 *J. CRIM. JUST.* 107, 108 (1992) ("Attribution theories suggest that laypeople who serve as jurors assign degrees of personal responsibility to criminal defendants by distinguishing between actions attributable to environmental factors and actions attributable to the actor's personal mental state.").

²⁶⁹ *Id.* at 108. See also Levinson, *supra* note 263, at 25–27 (discussing study results).

²⁷⁰ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 87–90 (1995).

²⁷¹ Shen et al., *supra* note 260, at 1318.

²⁷² *Id.* at 1309 ("Subjects punished across the purposeful, negligent, and blameless categories in the way the MPC hierarchy assumes – purposeful conduct was punished more than negligent conduct, and negligent conduct more than blameless conduct."). While these studies uncovered that a number of subjects had "difficulty at the

assumptions embedded in the MPC are reasonably accurate as a behavioral matter.”²⁷³ Subsequent research finds that the language used to define the MPC mental state levels and to communicate those mental states in the fact patterns is critical to a lay person’s ability to sort the culpable mental states, in that small differences in word choice can produce significant changes in study participants’ perception of mental states.²⁷⁴

This collective body of literature supports the general premise that judges and juries can classify blameworthy mental states into the MPC’s mental state categories, assess the culpability of defendants’ actions in given factual contexts using these mental state categories, and assign punishments mirroring the MPC’s hierarchy of severity.²⁷⁵ The findings suggest that the MPC in turn reflects our moral intuitions about the levels of blameworthiness.²⁷⁶ Where individuals may struggle, particularly dealing with the distinction between knowingly and recklessly,²⁷⁷ courts may craft improved jury instructions that assist factfinders in making such refined mental state determinations.²⁷⁸ While it is unquestionably a difficult decision for jurors, it is not impossible to distinguish between mental states in the criminal context, and the same experience should prove true in employment cases as well.

B. *Effectiveness of Prevention Programs*

In taking issue with proposals to expand the meaning of discriminatory intent, Amy Wax contends that the incentives created by prohibiting expanded discriminatory behavior are useless given the inability of employers to take effective precautionary measures to eliminate such behavior. Wax contends that research in cognitive psychology has failed to demonstrate that implicit bias can be

reliably manipulated or controlled either by the person harboring those biases or by outsiders seeking to redesign the decision-making process to reduce such bias. And science is not close to achieving an understanding of the rules of human

knowing/reckless boundary,” specifically with reliably distinguishing between knowing and reckless conduct, the authors suggested, *inter alia*, for courts to improve jury instructions covering this boundary between knowingly and recklessly. *Id.* The Ginther et al. study subsequently found that using clearer language to explain reckless conduct led to improved sorting abilities. Ginther et al., *supra* note 263, at 1358 (“By modifying the language of recklessness in the new experiments, we were able to bring about significant improvements to participants’ sorting accuracy.”).

²⁷³ Shen et al., *supra* note 260, at 1306.

²⁷⁴ See Ginther et al., *supra* note 263, 1358–59, 1363 (finding that “specific variations in the phrases used to define and to communicate criminal mental states can significantly increase an individual’s ability to accurately classify mental states.”).

²⁷⁵ See Shen et al., *supra* note 260, at 1354.

²⁷⁶ See *id.*, at 1347.

²⁷⁷ See *id.* at 1342 (discussing study participants’ difficulties in distinguishing between knowingly and recklessly). *But see* Robinson & Darley, *supra* note 268, at 87 (“The responses of our subjects . . . assign a higher degree of liability to the knowing versus the reckless commission of all offenses.”).

²⁷⁸ Shen et al. *supra* note 260, at 1352 (Better instructions might help create some discernable separation between K[nowingly] and R[ecklessly].”); Ginther, *supra* note 263, at 1358 (arguing that while it may “be difficult for a lay juror to grasp [varying mental states], we show that this confusion can be mitigated through careful word choice”).

psychology that would enable outsiders to manipulate decision-making conditions or teach social actors how to control their own thought processes to reduce or eliminate categorical biases on a systematic basis.²⁷⁹

In essence, she argues that making implicit bias unlawful will do little to deter its presence and impact: “Incentives are of little value if the agent is inherently incapable of responding to them.”²⁸⁰ In addition, Wax contends that taking such ineffective measures is not harmless because of the danger that employers “will respond to liability by engaging in inefficiently expensive precautions against the threat of being held liable,” wasting precious resources.²⁸¹

Almost immediately after Wax made this argument, Michael Selmi and other scholars took issue with her contention that implicit bias was impossible to control. Selmi pointed to the limited research cited by Wax and to her suggestion that there was a consensus in the psychological research that does not, in fact, exist.²⁸² Writing in 1999, Selmi pointed out that there was “substantial disagreement on the prevalence and definition of unconscious discrimination” and the ability to control it.²⁸³ Over fifteen years later, there is significantly more research showing the nature of implicit bias and methods to prevent or control its use in workplace settings. A well-established body of scholarship reflects how implicit bias can skew our thoughts, decisions and interactions with others without our conscious awareness.²⁸⁴ And, more importantly for our purposes, a steady stream of findings since that time shows that people may decrease the implicit biases they harbor and reduce the impact that such biases have upon the way they behave.²⁸⁵

1. *Implicit Biases Are Malleable*

A growing core of empirical findings in cognitive and social psychology demonstrates that one’s implicit biases may be unlearned and replaced with new mental associations.²⁸⁶ Early studies demonstrated that social contact across different social groups leads an individual to harbor less bias, particularly through contact that involves interaction on equal terms and repeated, substantive cooperation.²⁸⁷ More recent work focuses upon an additional process, known as

²⁷⁹ Wax, *supra* note 4, at 1158.

²⁸⁰ *Id.* at 1177.

²⁸¹ *Id.* at 1181.

²⁸² Selmi, *supra* note 22, at 1240.

²⁸³ *Id.* See also Leon Neyfakh, *The Bias Fighters*, B. GLOBE, Sept. 21, 2014, <https://www.bostonglobe.com/ideas/2014/09/20/the-bias-fighters/ITZh1WyzG2sG5CmXoh8dRP/story.html> (describing older approaches to implicit bias that assumed that such automatic processes were inflexible).

²⁸⁴ See generally Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCH. BULL. 117 (1994).

²⁸⁵ See generally CHERYL STAATS, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2014 20–21, <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/03/2014-implicit-bias.pdf> (detailing an overview of debiasing research results).

²⁸⁶ *Id.* at 17.

²⁸⁷ *Id.* at 20 (citing studies).

“debiasing,” that involves “environmental exposure to countertypical exemplars,” and can reduce one’s implicit bias.²⁸⁸

A growing stream of research findings reflects the ways in which debiasing operates to reduce bias.²⁸⁹ For instance, a mental imagery exercise of imagining a professional business woman led to reduced implicit stereotypes of women;²⁹⁰ exposure to images of Martin Luther King, Jr. and other African-American exemplars decreased implicit bias against African-Americans;²⁹¹ and contact with female professors and deans decreased bias against women by college-aged women.²⁹² A separate line of studies shows that students enrolled in a prejudice and conflict seminar demonstrated significantly less implicit race bias compared with students not enrolled in such a course.²⁹³ One of the most effective debiasing techniques involves showing individuals counter-stereotypical images.²⁹⁴ Encouragingly, the effects of debiasing may be long-lasting; as one study demonstrated, a “prejudice habit-breaking intervention” produced long-term reductions in study participants’ implicit race bias.²⁹⁵

2. Efforts to Reduce Implicit Bias in the Workplace

In addition to social psychology research on implicit bias, there is an increasing body of evidence on the operation of implicit bias in the workplace context. Studies show for instance how implicit bias predicts an interviewer’s rate of callback interviews,²⁹⁶ how one reads the friendliness of facial expressions,²⁹⁷ how one evaluates confident women in hiring conditions²⁹⁸ or ambiguous actions of African-Americans.²⁹⁹

²⁸⁸ See JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS* 5 (2009), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.auth.checkdam.pdf.

²⁸⁹ *Id.* (providing overview of debiasing studies).

²⁹⁰ Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes through Mental Imagery*, 81 J. PERSON. & SOC. PSYCH. 828, 837 (2001).

²⁹¹ Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSON. & SOC. PSYCH. 800, 800, 803 (2001).

²⁹² Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIM. SOC. PSYCH. 642, 654 (2004).

²⁹³ Laurie A. Rudman, et al., “Unlearning” Automatic Biases: *The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSON. & SOC. PSYCH. 856, 856 (2001).

²⁹⁴ See Calvin K. Lai, et al, *Reducing Implicit Racial Preferences: I. A Comparative Investigation of 17 Interventions*, 143 J. EXPERIM. PSYCH.: GEN. 1765, 1766 (2014).

²⁹⁵ Patricia G. Devine, et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J EXP. SOC. PSYCHOL. 1267, 1276 (2012).

²⁹⁶ Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence*, 17 Institute for the Study of Labor, Discussion Paper No. 2764, Apr. (2007), <http://ftp.iza.org/dp2764.pdf>; Kang, *supra* note 286, at 4.

²⁹⁷ Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCH. SCI. 640, 643 (2003).

²⁹⁸ Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757–59 (2001).

²⁹⁹ Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 144–46 (2002). See also Irene V. Blair et

In recognition of this phenomenon, efforts are underway to reduce the influence of bias in classrooms and in the workplace. For example, a series of studies have employed procedures that disrupt the link between implicit bias and discriminatory action.³⁰⁰ One example showed that orchestras that adopted a blind screen technique to hire new musicians were more likely to hire female musicians.³⁰¹ Another study had evaluators agree to merit-based criteria up front in selecting a new police chief; upon such agreement, the evaluators showed less gender discrimination.³⁰² Other studies suggest that a company that highlights the widespread willingness of its members to “exert effort against their unconscious stereotypes . . . can have profound impacts on the reduction of discrimination against stereotyped groups.”³⁰³

Organizations seeking to reduce implicit bias may develop a workplace environment that emphasizes egalitarian norms, conduct organizational reviews, boost exposure to counter-stereotypes and stigmatized group members, follow equal opportunity hiring practices and implement diversity training programs and seminars, and experiential learning techniques.³⁰⁴ Indeed, organizations are learning that encouraging the value of equality and diversity through informative rationales, discussions of the benefits and importance of non-prejudice, and examinations of the benefits of fair and diverse workplaces and classrooms can reduce workplace prejudice.³⁰⁵ Experts in de-biasing are putting these principles into action; some for instance currently work with police departments in training officers and enacting policies and procedures that minimize discrimination.³⁰⁶ As a prominent social psychologist explains, “When people see the value in nonprejudice, they are more likely to internalize it and sustain it.”³⁰⁷ The debiasing research may be “a new avenue in the fight against discrimination,” but it has gained considerable momentum since the debate between Wax and Selmi in the late 1990s.³⁰⁸ As a result, the proposal to expand the meaning of intent and create gradations of liability should not face the same criticism it would have a decade ago. The incentives created by such an

al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCH. SCI. 674, 677–78 (2004) (providing overview of studies show that criminal defendants with more Afro-centric facial features receive harsher criminal sentences.).

³⁰⁰ See Kang, *supra* note 286, at 5 (providing overview of studies).

³⁰¹ Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 738 (2000).

³⁰² Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474, 478–79 (2005).

³⁰³ Michelle M. Duguid & Melissa C. Thomas-Hunt, *Condoning Stereotyping? How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes*, 100 J. APPLIED PSYCH. 343, 354 (2015). Accord Jodi Kantor, *Harvard Business School Case Study: Gender Equity*, N.Y. TIMES, Sept. 8, 2013, at A1.

³⁰⁴ See NCSC, STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 6–8, 14, 19, 21, http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (detailing techniques in which organizations can reduce implicit bias in the workplace).

³⁰⁵ See Lisa Legault, *Ironic Effects of Antiprejudice Messages: How Motivational Interventions Can Reduce (but Also Increase) Prejudice*, 22 PSYCH. SCI. 1472, 1476 (2011); NCSC, *supra* note 302, at 7 (“Training seminars that acknowledge and promote an appreciation of group differences and multi-cultural viewpoints can help reduce implicit bias.”).

³⁰⁶ See Neyfakh, *supra* note 281.

³⁰⁷ Legault, *supra* note 303, at 1476.

³⁰⁸ Neyfakh, *supra* note 281.

expansion—that employers will work to minimize the effects of implicit, negligent and reckless bias—will likely yield healthier and fairer workplaces.

C. *Limiting Victim Compensation*

Perhaps the thorniest aspect of the intent-based liability scheme involves the resulting reduction in victim compensation through no fault of the plaintiff. This notion is not new to Title VII. It arises in some mixed motive cases where the plaintiff is entitled only to attorney's fees and costs despite the fact that discrimination is one proven cause of the adverse action.³⁰⁹ In addition, it arises even more glaringly in cases where the statutory cap on damages limits the plaintiff's award on the basis of employer size, unrelated to actual harm suffered by the plaintiff.³¹⁰ Nonetheless, it is uncomfortable to propose a further reduction in damages when Title VII plaintiffs already have an overwhelmingly low success rate at trial, and there are numerous obstacles to recovery that impede their claims.³¹¹

Our responses to this problem are twofold. First, as to the issue of incomplete compensation, the graduated damages proposal applies only to compensatory damages and not to back pay.³¹² While perhaps unsatisfying to plaintiffs and plaintiffs' counsel, the decision to leave back pay unaffected attempts to insure that the plaintiff is, in some way, made whole at least as to lost wages. The reduction in compensatory damages to reflect employer intent level recognizes the reduced fault of the defendant but does not attempt to assign blame to the plaintiff.

Second, we recognize that the Title VII statutory caps on damages can significantly reduce awards, making a further intent-based reduction even more extreme. In fact, the statutory caps may reduce an available award to such a low level that the award no longer induces plaintiffs to bring claims or attorneys to accept their cases. The provision creating caps on combined compensatory and punitive damages resulted from a compromise necessary to secure passage of the 1991 Amendment to Title VII and is unique among civil rights statutes.³¹³ The 1991 Amendment imposes a statutory cap on damages based on the defendant's number of employees with a maximum of \$300,000 for employers with 500 or more employees.³¹⁴ Hotly contested at

³⁰⁹ See Civil Rights Act of 1991, § 107 (codified at 42 U.S.C. § 2000e-2(m) (1992)) (limiting relief in mixed motive cases to injunctive and declaratory relief, attorney's fees, and costs).

³¹⁰ See *id.* at § 102(b)(3) (codified at 42 U.S.C. § 1981a(b)(3)).

³¹¹ See Charlotte Alexander, *Misclassification and Antidiscrimination 25* (unpublished manuscript) (on file with authors) (citing studies showing that only one to two percent of Title VII plaintiffs win at trial).

³¹² It is assumed that punitive damages would only be available in cases involving purposeful discrimination, which, under the proposal, yields full relief. As a result, punitive damages are unaffected by the intent-based liability proposal.

³¹³ See generally Lynne Ridgeway Zehrt, *Twenty Tears of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. & FEMINISM 249 (2014) (describing the legislative history surrounding the damage caps in the 1990 bill and the 1991 Act, including the compromise agreed to by proponents of the 1991 Amendment that would have faced an insurmountable presidential veto absent the damage caps).

³¹⁴ See 42 U.S.C. § 1981a(b)(3) (limiting combined punitive and compensatory damages to \$50,000 for employers with 15 to 100 employees; to \$100,000 for those with 101 to 200 employees; to \$200,000 for those with 201 to 500

the time of its passage, the provision imposes recovery limits on Title VII plaintiffs that do not apply to plaintiffs filing claims under § 1981 or under the Age Discrimination in Employment Act.³¹⁵ In particular, the caps continue to function as a form of sex discrimination since plaintiffs with race-based claims can bring their claims under 42 U.S.C. § 1981 without facing any damage caps, while plaintiffs with sex-based claims must file under Title VII with the statutory caps that severely limit their recovery.³¹⁶

In addition to these problems, Congress has never altered the damage cap provision, not even to adjust it for inflation.³¹⁷ Numerous scholars have objected to this provision for a variety of reasons, including the caps' negative impact on deterrence, inconsistency across civil rights statutes, and constitutional concerns about arbitrariness and the role of juries.³¹⁸ In addition, commentators have recommended various reforms, including tying the caps to employer net worth rather than size, raising the caps to reflect inflation, raising the upper limit to account for employers with more than 500 employees, and eliminating the caps altogether.³¹⁹ As a result, we contend that an amendment to add graduated intent-based liability to Title VII should also eliminate these arbitrary employer-size-based caps on damages. A need exists to limit possible damages as a compromise position between employer and employee interests. But a change to intent-based reductions in damages is a far fairer and more reasonable approach than an arbitrary cap based on an employer's number of employees.³²⁰ Eliminating size-based caps on damages

employees; and to \$300,000 for those with more than 500 employees). *See also* Sandra Sperino, *The New Calculus of Punitive Damages For Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 726–28 (2010).

³¹⁵ *See* Zehrt, *supra* note 311, at 263–301.

³¹⁶ *Id.* at 250.

³¹⁷ *Id.* at 251.

³¹⁸ *See, e.g.,* Michael C. Harper, *Eliminating the Need for Caps on Title VII Damage Awards: The Shield of Kolstad v. American Dental Association*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 477, 480, 494 (2011) (protection of employers through statutory caps “undermines the statute’s “primary objective to avoid harm through deterrence and fails to recognize the employer's affirmative obligation to prevent violations.” (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (internal quotations omitted))); Vanessa Ruggles, Notes & Comments, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 155–158 (2006) (“[The caps] diminish the deterrent effect and the societal compensation for egregious conduct by large employers.”); Zehrt, *supra* note 311 at 301–02; Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 157 (1999) (“The use of a statutory cap as a guide for remittitur below capped amounts improperly transforms the cap into an implied schedule of damages.”).

³¹⁹ *See* Zehrt, *supra* note 311, at 305–07.

³²⁰ For the moment, this proposal to tie liability to intent level pertains only to Title VII. It is certainly possible to apply a similar formula to 42 U.S.C. § 1981 to create consistency across discrimination statutes. Absent such an application, this proposal will, in practice, only apply to discrimination on the basis of sex, national origin, and religion because a race or ethnicity claim could be filed under § 1981 instead. *See* 42 U.S.C. § 1981. It would take significantly more to bring the Age Discrimination in Employment Act (ADEA) in alignment with the approach to Title VII proposed here because the ADEA currently only allows for backpay and frontpay but not for compensatory or punitive damages and instead allows for liquidated damages (equal to backpay) for “willful violations.” *See* Craig Robert Senn, *Ending Discriminatory Damages*, 64 ALA. L. REV. 187, 191 (2012) (citing 29 U.S.C. § 626(b), 29 U.S.C. §§ 201–219 (2006)); *id.* at § 216(b)). Creating graduated penalties under the ADEA would, therefore, require a revision of the basic approach to damages under that statute.

has long been a goal of plaintiffs' advocates—perhaps their elimination within a new intent-based liability scheme may be more palatable to employers as well.³²¹

CONCLUSION

After several decades of research on implicit bias, negligent discrimination and structural obstacles to equality in the workplace,³²² it is disheartening that there has been so little movement in Congress or the courts to formally expand the meaning of discriminatory intent. Despite earlier steps toward increased flexibility and understanding in the form of the stereotyping theory of discrimination and mixed motive theory, further progress in this area has stagnated. This article proposes a rethinking of liability for disparate treatment discrimination with an eye towards incentivizing these much needed changes while making the overall system fairer and thus more palatable to employers and employees alike.

While it is not always practical or effective to analogize employment discrimination law to other fields of law, in this instance, the approach taken by criminal law is particularly instructive. The Model Penal Code's thoughtful implementation of gradations of intent, the decades of research on juries' abilities to identify specific intent levels, and the theoretical approaches tying liability to intent level are all relevant and applicable in the employment discrimination context as well.³²³ The gradations of intent and liability proposed above are an attempt to use the experiences of the criminal justice system to assist employment discrimination law in a much needed development. As Krieger, McGinley and others have ably demonstrated, there is a troubling disconnect between the state of robust psychological research on prejudice and its forms and the legal recognitions and protections against it. This article proposes a statutory amendment to Title VII creating gradations of disparate treatment discrimination and reducing compensatory damages to match the demonstrated level of intent as a means of eliminating this disconnect.

Discussions of implicit bias and flexible theories of intent are more common than ever before. From reports of police brutality against African Americans³²⁴ to students protesting racism on college campuses,³²⁵ the notion that bias appears in numerous forms, both conscious and

³²¹ Importantly, this proposal only impacts federal anti-discrimination law. As a result, filing a claim under both federal and state law could potentially yield drastically different damages. Nonetheless, should this proposal be adopted, it is possible that states would follow the federal government's lead and amend their statutes accordingly as a result.

³²² See *supra* Part I.B.

³²³ See *supra* Part II & Part IV.A.

³²⁴ See, e.g., Ediberto Roman, *Implicit Bias at the Root of Brutality Epidemic*, HUFFINGTON POST, June 10, 2015, http://www.huffingtonpost.com/ediberto-roman/implicit-bias-at-the-root_b_7549292.html.

³²⁵ See, e.g., Teresa Watanabe and Jason Song, *College Students Confront Subtler Forms of Bias: Slightings and Snubs*, L.A. TIMES, Nov. 12, 2015, <http://www.latimes.com/local/education/la-me-college-microaggression-20151112-story.html> ("Some call it the new face of racism — not the blatant acts of bias that recently led to the University of Missouri's campus unrest and resignation of the president and chancellor. Instead, a phenomenon known as

subconscious, is widespread both among scholars and in the general media.³²⁶ And yet, our employment discrimination laws, arguably the first line of defense against prejudice in the workplace, have failed to meaningfully acknowledge this development. A statutory change that both codifies the notion of flexible intent and addresses its impact on employer liability is an effective and just way to recognize social and psychological developments in this field without overburdening employers or drawing their immediate ire and protest. Like Title VII itself, this proposal aims to balance employer and employee interests while moving discrimination protection into the twenty first century.

"microaggression" — everyday slights and snubs, sometimes unintentional — is drawing widespread attention across college campuses and kicking up a debate about social justice and free speech rights. Students are sharing their experiences with microaggression on websites and Facebook pages at Harvard, Oberlin, Brown, Dartmouth, Swarthmore, Columbia, Willamette and other universities.”)

³²⁶ See, e.g., Kristen Lee Costa, *Why It's Time To Stop Calling Me Honey and Patting Me on the Head*, HUFFINGTON POST, June 12, 2015, http://www.huffingtonpost.com/kristen-lee-costa/what-my-freckle-face-and-yellow-shorts-reveal-about-implicit-bias_b_7574346.html (discussing research by scholars at Project Implicit and a variety of personal experiences).