Some thoughts about social perception and employment discrimination law: a modest proposal for reopening the judicial dialogue

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SOME THOUGHTS ABOUT SOCIAL PERCEPTION AND EMPLOYMENT DISCRIMINATION LAW: A MODEST PROPOSAL FOR REOPENING THE JUDICIAL DIALOGUE

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INTRODUCTION

In the past, like many others, have written extensively about institutionalized discrimination. Most recently, in 1992, we demonstrated how the

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federal courts, and particularly the Supreme Court, had significantly weakened Title VII of the Civil Rights Act of 1964 by construing procedural rules in a consistently pro-defendant manner.5 Five years later, our primary concern remains: the Supreme Court has narrowed the meaning of discrimination and limited plaintiffs' abilities to vindicate their rights.

Our initial intention was to follow our 1992 article6 with a proposal for amending Title VII in a way that would integrate procedural and substantive law in a more plaintiff-friendly manner. Two developments changed our mind. First, Congress, after a prolonged and heated struggle, enacted the Civil Rights Act of 1991, the stated purpose of which was to restore Title VII doctrine to where it was before some of the controversial rulings of the 1988 and 1989 Supreme Court Terms.7 Others have explained how the restoration failed in major ways: it did not fully undo the doctrinal changes created by the Supreme Court,8 and it failed to address such critical obstacles for civil rights plaintiffs as the state of mind requirement in the disparate treatment model of Title VII.9

Second, and more important, it is probably futile to expect the current Congress to go beyond what was accomplished in 1991.10 This lack of political will reflects the national anemia about discrimination and race issues.11 For whatever reasons, large segments of the white population believe

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4 Substance, supra note 1, at 233-36. Cf. Ronald Turner, Thirty Years of Title VII's Regulatory Regime: Rights, Theories and Realities, 46 ALA. L. REV. 375, 381 (1995) ("The current Title VII regulatory regime is inherently limited and cannot and will not adequately address questions of actual and alleged discrimination as those questions arise . . . .").
5 Substance, supra note 1.
that government has done more than enough for people of color. Many judges seem to agree. The growing number of summary judgments and directed verdicts in favor of defendants in Title VII cases indicates judicial antipathy for finding that employer behavior has been motivated by racial prejudice. With much reluctance, we concluded that in this climate, suggestions for further tinkering with the language of Title VII would not achieve our goal: helping plaintiffs vindicate their rights. Adding new language to Title VII is unlikely to increase the probability of judges finding for plaintiffs if they are highly skeptical about the existence of discrimination generally or are unwilling to draw inferences of discrimination in close cases. Regardless of statutory language, jury factfinding is likely to reflect the opinions of the community at large about racial justice.

At least since Brown v. Board of Education, the courtroom has been a significant forum for wrestling with issues of racism and discrimination. The tragic result of the pro-defendant leanings of the current judiciary has been a dramatic decrease in the role of courts as a forum for the exploration of racial issues. The numerous procedural hurdles placed in the path of potential Title VII plaintiffs discourage both litigants and lawyers from filing claims. It is dangerous for a society to close (or to be perceived as closing) the courtroom door to debates as divisive and as important as those about race.

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80 See supra text accompanying notes 3-4, infra notes 152-81.


82 The 1991 Act did allow jury trials in some Title VII actions. 42 U.S.C. § 1981a(c)(1).


84 See supra note 1, passim.


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But while our statutory redrafting exercise seemed increasingly futile, our empirical research supported our instinct that society is still plagued by race-based decision making. There is too much evidence that employment discrimination persists. Moreover, there is now a large body of scholarship showing the inevitability of bias: racism occurs through unconscious cognitive processes. As former litigators and current legal educators, we had to find some ways, however modest, to begin to reintroduce the reality of racism and discrimination into the judicial dialogue. We did not want to add to the extensive literature criticizing and/or advocating new approaches to discrimination doctrine. Instead, our goal was more practical. We wanted to force judges and jurors to listen to issues of color. Perhaps we could find support outside of discrimination law which might convince the judicial system to acknowledge the painful reality of continued racism and discrimination. We began with the demands of the due process clause and the right to trial by jury: fundamental fairness and a more level playing field in the courtroom.

Part I examines how and why people engage in stereotyping and prejudiced thinking. It also summarizes the available data on the continued existence of racial discrimination in employment. Part II explains why the due process clause, the right to trial by jury, and elemental notions of fairness obligate judges and juries to listen to known facts about racism and discrimination and how this can be accomplished through jury instructions, judicial notice and expert testimony. Part III demonstrates that neither the language of the
most controversial Supreme Court opinions nor the theories of the icons of current conservative thought foreclose our modest proposal.

I. DOES PREJUDICE BASED ON RACE AND CONSEQUENTIAL DISCRIMINATION CONTINUE TO EXIST IN A SUBSTANTIAL WAY IN EMPLOYMENT DECISIONS?

Since at least the time of Copernicus, and certainly since the time of Newton,24 basing decisions on one's best attempts to find out "what is" has been thought preferable to guessing or proclaiming by fiat.25 Law has followed the same path.26 Adjudication by battle, ordeal, and oath taking progressed to trial by evidence before a judge or judge and jury.27 The idea developed that the law should be applied in a consistent, predictable manner to facts ascertained in a rational way.28 Legislatures hold hearings, hoping to discover underlying data. Since the advent of the Brandeis brief,29 appellate courts have thought it important to take account of empirical data in a large number of disciplines.30

24 The modern era in world history is often characterized by a reliance on objective reality. See Kenneth L. Karst, Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation, 43 UCLA L. REV. 263, 336 (1995). Of course, this does not mean that wise people think that they can capture all, or even a portion, of reality in a way that they are sure that their descriptions will be true forever. Indeed, modern thinking teaches the limits of knowledge and vocabulary.
25 See BERNARD COHEN, REVOLUTION IN SCIENCE 79 (1983).
26 It was thought to be progress that legal institutions, both in law making and application, earnestly attempted to discern underlying facts in a serious way. See STROUD F. C. MILES, HISTORICAL FOUNDATIONS OF THE COMMON LAW 30-32 (1969).
27 Id. at 356-60.
29 See Muller v. Oregon, 208 U.S. 412 (1908). See also Karst, supra note 24, at 5-6.

It is difficult to believe that any court would wish to base decisions on assumptions or facts known to be untrue. To put it more positively, it is critical that law takes "what is" seriously. If racism and discrimination continue to play a substantial role in employment decisions, it would be dishonest and cynical to ignore that in the adjudication of employment discrimination claims.31 Thus it is urgent that we not be casual when we try to ascertain the facts about racism and discrimination.

Do racism and employment discrimination exist in the United States in a significant way? They do. Despite the rhetoric, decision makers, whether employers, judges, or jurors, are not color-blind.32 We are not suggesting that an employer, even if unusually self-conscious, will always be aware of prejudice.33 We mean that, despite the civil rights movement,34 most white people (whether consciously or unconsciously) still harbor some negative thoughts or assumptions about people of color which often lead to discriminatory treatment of African Americans.35

A. Cognitive Processes

Social psychologists and cognitive psychologists have produced an impressive body of research supporting the theory that racism occurs through unconscious cognitive processes. These psychologists study (often empirically) the

35 See Flagg, supra note 33, at 983-85. See also Kegler, supra note 22, at 1188.
phenomena of stereotypes, prejudices, racism, and discrimination as processes through which people perceive and order their social worlds. Social cognition, the field of psychology which analyzes these processes, borrows methods from cognitive psychology and applies them to issues of social psychology. Social cognition is the study of how people interpret, analyze, remember, and use information that they perceive about the social world.

The basic premise of social cognition is "information overload," the theory that the normal human mind cannot possibly notice, let alone analyze and use, every bit of social information it encounters. The amount of potential information is staggering. As a result, adult minds become extremely efficient at screening, sorting, and storing information.

Research has shown that individuals ordinarily process information as quickly and efficiently as possible through shortcuts or "cognitive strategies." This efficiency sometimes means being less than fully logical, thorough, or accurate. Moreover, people are generally unaware of their own mental processes and are unable to report the true reasons for their behavior.

Dividing up the social world into categories is an example of a cognitive strategy. Most common among these divisions is an "us" versus "them" distinction. In this type of social categorization, sharply contrasting feelings and beliefs are attached to members of each group. Generally, favorable traits are assigned to the individual's own group, and disfavorable traits are assigned to outgroups or "others."

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86 See Krieger, supra note 22, at 1188.
87 Id. at 1188.
88 Id. at 1188-89. Consider all of the information about others that you could absorb in a day as you walk down the street, read newspapers, magazines, and books, glance at mail, watch television, and interact with friends.
91 Id. at 246-47. See also Flagg, supra note 33, at 937; Krieger, supra note 22, at 1188.
92 See Krieger, supra note 22, at 1188-89.
93 See id. at 1191-92 and authorities cited therein.
94 John C. Turner, Towards A Cognitive Redefinition of the Social Group, in SOCIAL IDENTITY AND INTERGROUP RELATIONS 17, 30 (Henni Tajfel ed., 1982). Indeed, research has shown that people generally like people whom they perceive to be similar to them and dislike those they perceive to be different. See Donna Byrne & Terry J. Wong, Racial Prejudice, Intergroup Attraction and Assumed Dissimilarity of Attitudes, 65 J. ABNORMAL AND SOC. PSYCHOL. 246 (1962); Robyn M. Dawes, Cooperation for the Benefit
events that occur together.\textsuperscript{51} For example, cab drivers often refuse to pick up African American riders because of previous bad personal experiences.\textsuperscript{52} The driver makes a decision to reject the passenger based on the only information he has other than his past experience: the race of the person flagging the cab.\textsuperscript{53} Although most African Americans are law abiding citizens, the driver knows that some have been known to pull a gun on cab drivers. That is enough to make the driver wary of every African American.\textsuperscript{54} This type of processing facilitates the formation of stereotypes, promotes negative attitudes between groups, generates inappropriate expectations, and leads to dehumanization of outgroup members.\textsuperscript{57}

Perhaps the most basic type of bias concerning the way individuals think about others is the "own race bias" phenomenon, whereby memory for the faces of an individual's own race is superior to memory for faces of different races.\textsuperscript{55} This illusion of outgroup homogeneity persists even in cases where an individual has a great deal of contact with the outgroup.\textsuperscript{59}

In sum, people continually use cognitive shortcuts—exaggerations, over-simplifications, generalizations—to allow them to prioritize and, in some gross way, make sense of the overload of incoming information. Racial stereotyping is one method that people employ almost automatically in order to understand their surroundings. Psychologists attribute racism in large part to these automatic cognitive processes rather than to conscious activity; cognitive shortcuts often will override even volitional good will.\textsuperscript{60}

Empirical studies demonstrate that negative racial stereotyping persists in the United States in the manner that social cognition theory predicts.\textsuperscript{5} The evidence is overwhelming that whites view African Americans as different, and in many respects, inferior and less capable. For example, a report released by the National Opinion Research Center at the University of Chicago in January 1991 "found that a majority of whites still believe that both blacks and Hispanics are not only more inclined than whites to prefer welfare, but are also lazier, more prone to violence, less intelligent, and less patriotic."\textsuperscript{62} Sixty-two percent of whites, another survey showed, consider blacks to be less hard working than whites.\textsuperscript{63} A survey of employers in Chicago focusing explicitly on:

- employer perceptions of blacks and their attractiveness as job candidates
- found that employers consistently relate race to inferior education, lack of job skills, and unreliable job performance. The authors concluded that "Chicago's employers did not hesitate to generalize about race or ethnic differences in the quality of the labor force. Most associated negative images with inner-city workers, and particularly black men."\textsuperscript{64}

A survey of young Americans aged fifteen to twenty-five showed that the negative racial stereotyping of "the other" also infects the young.\textsuperscript{65}
B. Empirical Studies About Employment

It is not debatable that as a society we have failed to eliminate the painful legacy of slavery. Indeed, the persistence of discrimination in employment is fully and amply documented. Perhaps the most systematic recent study took place in Washington, D.C. and Chicago by the Urban Institute during the summer of 1990. Four hundred and seventy-six "hiring audits" were conducted.

Discrimination against African Americans was widespread:

In one out of five audits, the white applicant was able to advance farther through the hiring process than his equally qualified black counterpart. In other words, the white was able to submit an application, receive a formal interview, or be offered a job when the black was not. Overall, in one out of eight—or 15 percent—of the audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits. In sum, when equally qualified black and white candidates competed for a job, differential treatment, when it occurred, was three times more likely to favor the white applicant than the black.

There are a number of reasons to believe that these results actually underestimate the amount of employment discrimination. The net data on outcomes in the hiring process do not include the "instances of discouraging treatment (negative comments, longer waits for scheduled appointments, cursory inter-

views), which were experienced by black applicants in as many as half of the audits."

Since the study was based on job openings advertised in newspapers, it does not show the presumably greater discrimination that results when positions are filled by word of mouth, postings at the job site, or the use of recruiters or employment agencies; these less public mechanisms will often totally exclude blacks from the hiring process. Moreover, the auditors who participated in the study were college students, overqualified for the positions for which they applied, articulate, conventionally dressed, and described as having prior work experience.

Every study we have found reaches similar conclusions. For example, in 1993, the Employment Council of Greater Washington, Inc. found African American testers were treated worse than their white partners at a net rate of twenty-four percent.

The New York Times recently reported the results of a study of the Office of Personnel Management for fiscal year 1992: "Black federal employees were more than twice as likely to be fired as their white, Latino or Asian counterparts . . . . The disparity was seen regardless of occupational category, pay level, education, agency, geographic location, age, performance rating, seniority, or attendance record."

Another recently released study by Jared Bernstein, a labor economist at the Economic Policy Institute, noted that "[d]espite significantly closing the educational gap, black Americans trail whites in wages and employment op-
opportunities..." 78 Yet another study, released in 1990, showed that white employees have significantly greater upward job mobility than blacks. 79

There is also considerable evidence that raters evaluate the job performance of blacks less favorably than the job performance of whites, especially when the raters are themselves white. 80 And, there is evidence that African American managers have significantly fewer opportunities for advancement. 81

There is indirect evidence that African American managers do not receive significant career support from their immediate supervisors. 82 Moreover, Af-

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78 Lawrence Mishel & Jared Bernstein, The State of Working America (Economic Policy Inst. 1994-95). The authors attribute the disparity to continued job differences between blacks and whites and to labor market trends that more adversely affect blacks. The study found that blacks lost ground relative to whites in the 1980s despite closing the hourly wage gap during the 1970s: "Interestingly, the wage gap actually grew faster for those black males with more education." Id. at 187. Mishel and Bernstein found that the gap also widened for black women in the 1980s. Id. See also M.V. Lee Badgett, Rising Black Unemployment: Changes in Job Stability or in Employability? 22 REV. OF BLACK POL. & ECON. 55, 55 (1994) (discussing growing gap in unemployment rates between blacks and whites in the 1970s and 1980s).

79 Almost 47% of white women, 39.1% of white men, 26.3% of black men, and 18.3% of black women moved from secondary sector occupations to primary sector occupations. Thomas D. Boston, Segmented Labor Markets: New Evidence from a Study of Four Race-Gender Groups, 44 INDUS. & LAB. REL. REV. 99, 112 (1990).


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82 See Jeffrey H. Greenhaus et al., Effects of Race on Organizational Experiences, Job Performance Evaluations and Career Outcomes, 33 ACAD. MGMT. J. 64, 66-68 (1990). Housing discrimination and the distance of inner-city African Americans from job opportunities explain part of the negative differential treatment of blacks in finding jobs and in wages. However, a 1985 study found that only 6% of the black-white earnings differential can be explained by the greater concentration of blacks in the inner city, while at least 15% is due to employment discrimination. Jonathan S. Leonard, The Interaction of Residential Segregation and Employment Discrimination, 21 J. URB. ECON. 323, 326 (1987) (citing Richard Price & Edwin Mills, Race and Residence in Earning Discrimination, 17 J. URB. ECON. 1, 17 (1985)). But see John Vrooman & Stuart Greenfield, Are Blacks Making It in the Suburbs? Some New Evidence on Intrametropolitan Spatial Segmentation, 7 J. URB. ECON. 155, 165 (1980) (using an analysis similar to that of Price and Mills, another study found that as much as 40% of the racial earnings gap could be closed by the absence of inner-city black males to suburban locations). Cf. Francine D. Blau & Marianne A. Ferber, Discrimination: Empirical Evidence from the United States, 77 AM. ECON. REV. 316, 317-18 (1987) (basing their conclusions on econometric studies, the authors reported that labor market discrimination continues to have a substantial negative effect on the earnings of women and blacks that, or put another way, the differences in wages not based on productivity of women or African Americans when compared to white males is statistically significant: "it is impressive that substantial unexplained race and sex pay differentials remain even in the most conservative estimates... . Mean estimates of adjusted earning ratios range from .62 to .81 for women and .67 to .81 for blacks, depending on the specification. The unexplained portion of the gross differential ranges from 51% to 87% for women and from 39% to 66% for blacks.").

83 Greenhaus et al., supra note 80, at 66-68.


85 Displacement Rates, Unemployment Spells, and Reemployment Wages by Race, Federal Document Clearing House, Inc., RPT Number: 90047-94-229 FS, 5, p. 3 (Sept. 16, 1994) ("Displacement Rates"). "The high African American displacement rate was partially due to the concentration of the recession on industries and occupations in which African Americans were disproportionately represented; however, differences persisted after controlling for industrial and occupational affiliations, education levels, and worker age." Moreover, once displaced, African American workers were unemployed slightly longer than workers in the other groups, on average... . For workers losing jobs in the 1990-91 recession, the average African American unemployment spell lasted 12 weeks while the average white worker experienced 11 weeks of unemployment; average unemployment spells were 10 weeks for Hispanics... . Once reemployed, African Americans had the highest relative losses in weekly earnings, experiencing an average decrease of 10.1 percent. In contrast, the average Hispanic worker had relative losses of 4.0 percent.

consistently experienced the worst labor market outcomes throughout the decade regardless of the state of the economy. 44

There is a very small amount of contrary information. A study in Denver found that only large employers (with fifteen or more employees) discriminate against young black and Hispanic men applying for entry-level employment jobs. 45 But we know of no studies that show a total absence of racism and discrimination in employment. One looks in vain for empirical data from which to conclude that racism has been eradicated. 46 Even Richard Epstein, a leading law and economics critic of employment discrimination statutes, does not suggest that racism does not exist. Rather, he argues that employment discrimination laws are unnecessary because the unfettered operation of the "neutral" free market will cure discrimination as it is in the employer's economic interest to hire the most qualified employees regardless of race. 47 Indeed, Epstein considers it acceptable for some African Americans to lose some employment opportunities solely because of their race. 48

Professor Sunstein has explained why the free market does not cure and, indeed, may exacerbate employment discrimination. 49 An employer may well believe that the racism of consumers or his other employees will make it more profitable to hire white employees. Moreover, other classic disadvantages of the oppressed, such as less education and fewer previous opportunities, 50 may lead the employer to conclude that it is more efficient not to hire African Americans at all. In other words, an employer may decide that it is rational to put less time, energy, and money into the human capital of people of color. In these ways, racism and the market act together to further, not eliminate, employment discrimination. 51

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44 Displacement Rates, supra note 83, at 5.
46 Notwithstanding the empirical data, there are some who act as if discrimination has disappeared from the American scene. Roger Clegg, Deputy Assistant Attorney General of the Civil Rights Division of the U. S. Department of Justice from 1987-91, recently concluded a symposium on the Civil Rights Act of 1991 with an Epilogue:

The fact that systemic, invidious discrimination is now a thing of the past is an achievement that all Americans—and especially those who were active in the civil rights movement—should be proud of. A heavy burden has been lifted from America's shoulders, and a dark blot has been cleansed from the national character. That so much was accomplished, that society was truly transformed, in less than a generation is a cause for celebration, not denial. The time has come to declare victory in the civil rights war, and move on.


48 Epstein, supra note 88, at 76-79. Similarly, in his book, Professor D'Souza argues that stereotyping is, in fact, rational and that some discrimination is rational, even though individual African Americans might be injured. See D'Souza, supra note 2, at 24 ("Rational discrimination is based on accurate group generalizations that may nevertheless be unfair to particular members of a group"). But Epstein and D'Souza severely undervalue, in our view, the costs imposed on an individual black worker who is turned down for discriminatory reasons. Epstein claims that the black worker can simply move on to the next potential employer, thus continuing to search freely for a desirable job. Surely, however, this account ignores the designation, frustration and anger that the victim of discrimination experiences. J. Hustler Verkerke, Free to Search, 105 Harv. L. Rev. 2080 (1992) (reviewing Epstein, supra note 88).


51 "In the broadest terms, economists have found that blacks operate at a disadvantage in the labor market relative to comparable whites in terms of earnings, occupations, and employment levels.... Most economists would attribute at least some of this difference to discrimination in the market.... " Michael Fix et al., An Overview of Auditing for Discrimination, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 1, 8 (Michael Fix & Raymond J. Strukl eds., 1993). The authors add, however, that "analyses of discrimination in employment have generated substantial consensus that blatant discrimination in hiring and wages has been largely eliminated.... and that there is little, if any, discrimination against black women in comparison with white women...." Id. at 9. See The Black Youth Employment Crisis (R. Freeman & H. Holzer eds., 1980); Albert Rees, An Essay on Youth Joblessness, 214 J. Econ. Lit. 613 (1986).
II. Taking Account of Racism in the Litigation Process

The data we have presented suggests a troubling problem in the adjudicative process. Fact-finders, be they judges or juries, are likely to be as subject to unconscious racial bias as the rest of society. The wiring in the brain which causes humans unconsciously to see those unlike themselves as different does not suddenly disappear upon the taking of an oath to be an impartial judge or juror. If white society tends at some level to believe negative stereotypes about African Americans, it is understandable that the members of that society who act as factfinders will, with or without malicious intent, apply those prejudices when they filter the evidence they hear and see at trial. Thus the evidence presented by African American litigants will be discounted and the evidence of white employers will be viewed positively. Moreover, the same cognitive process that causes us to denigrate “the other” is likely to influence white Americans to believe that employment discrimination is largely a past plague and that efforts to deal with it, such as affirmative action, have already gone too far.

A. The Right to an Impartial Jury and the Difficulty of Achieving Juror Neutrality

We begin our discussion with juries because of the rich body of law about juror impartiality. The adjudicative process presupposes a neutral, impartial decision maker. This is not just a matter of intuitive fairness; the right to trial by an impartial jury is constitutionally guaranteed.

The right to an impartial jury “is not mere exhortation.” The due process clause demands that the courts take such steps as are necessary to protect the litigant’s right to a neutral jury. More than one hundred years ago, the Supreme Court acknowledged that racism can interfere with the right to a fair and impartial tribunal.

See also Thiel v. Southern Pac. Co., 328 U.S. 217, 229 (1946). The Sixth Amendment provides in criminal cases that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI. The Seventh Amendment provides that “[i]n suits at common law . . . the right of trial by jury shall be preserved.” U.S. CONST. amend. VII. And, as Thiel makes clear, although the Seventh Amendment lacks the words “by an impartial jury,” that protection is also assured to civil litigants. Thiel, 328 U.S. at 220. See also McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (noting voir dire is an important tool to protect the right to an impartial jury in a civil case).

The Fifth and Fourteenth Amendments also protect the right to an impartial jury. See U.S. CONST. amend. V. The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1979). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 343 (1976). At the same time, the requirement preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done.” Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). Neutrality also ensures that people will be able to present their cases to arbiters who are not predisposed to finding against them.

The requirement of neutrality has been zealously guarded by the Supreme Court, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure. See Marshall, 446 U.S. at 242. See also Irvin v. Dowd, 366 U.S. 717, 722 (1960) (“The right to jury trial guarantees . . . a fair trial by a panel of impartial, ‘indifferent’ jurors.”); Reynolds v. United States, 98 U.S. 145, 155 (1878) (“The theory of the law is that a juror who has formed an opinion cannot be impartial.”).

The right to an impartial jury carries with it the concomitant right to take reasonable steps designed to ensure that the jury is impartial.” Ham v. South Carolina, 409 U.S. 524, 532 (1973) (Marshall, J., concurring in part and dissenting in part). But see Brown v. United States, 411 U.S. 223, 231-32 (1973) (“[A] defendant is entitled to a fair trial, but not a perfect one, for there are no perfect trials.”) (quoting Lorak v. United States 344 U.S. 604, 619 (1953)). To fulfill the mandate of the Due Process clause that judges take reasonable steps to insure the impartiality of the jury, the trial judge has wide discretion: “The obligation to impanel an impartial jury lies in the first instance with the trial judge . . . [and] federal judges have been accorded ample discretion” in the methods they adopt to impanel an impartial jury. Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981). See also Griggs v. Wisconsin, 400 U.S. 505, 509 (1971) (“There are many ways to try to assure the kind of impartial jury that the Fourteenth Amendment guarantees.”).

See also Strader v. West Virginia, 100 U.S. 303, 309 (1879) (“It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.”). In 1979, the Supreme Court continued to acknowledge the capacity of racism in America to inter-
Perhaps the most logical and easiest way to insure juror impartiality is voir dire—the questioning of jurors—and the use of "for cause" and peremptory challenges. A judge must conduct a voir dire investigation into racial prejudice when racial issues are inextricably intertwined with the material issues of a case, and the failure to do so may be a violation of due process.

Although voir dire is an important way to detect subconscious racism, it does not solve one major problem. Neither judges nor jurors are apt to be aware of the racism inherent in their cognitive processes. Indeed, the Supreme Court has often acknowledged that jurors are subject to unconscious prejudices, biases and influences which voir dire, or any other form of questioning, cannot disclose: "The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand

fore with the administration of justice:

We cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strumler, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558-59 (1979). In 1986, Justice Brennan stated: "The reality of race relations in this country is such that we simply may not presume impartiality . . . ." Turner, 476 U.S. at 39 (Brennan, J., concurring in part and dissenting in part). See also Powers v. Ohio, 499 U.S. 400, 415 (1991) ("The Fourteenth Amendment mandate that race discrimination be eliminated from all official acts . . . is most compelling in the judicial system.").

99 See Powers, 499 U.S. at 414 (noting that "where racial bias is likely to influence a jury, an inquiry must be made into such bias").

98 See Ham, 409 U.S. at 527.

97 See Ristaino v. Ross, 424 U.S. 589 (1976). In Rosales-Lopez, 451 U.S. at 191 n.3, the Court stated: "Since the courts are seeking to assure the appearance and reality of a fair trial, if the defendant claims a meaningful ethnic difference between himself and the victim, his voir dire request should ordinarily be satisfied.

96 [Subconscious, as well as express, racial fears and hatreds operate to deny fairness to the person despised; that is why we seek to insure that the right to an impartial jury is a meaningful right by providing the defense with the opportunity to ask prospective jurors questions designed to expose even hidden prejudices. . . . [M]ight not . . . that same juror be influenced by those same prejudices in deciding whether, for example, to credit or discredit white witnesses as opposed to black witnesses at the guilt phase?"] Turner, 476 U.S. at 42 (Brennan, J., concurring in part and dissenting in part). Accord Durrin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981).

And if unconscious stereotyping were grounds for striking a juror, one might have to strike every juror who is of a different race than the parties involved. Moreover, the Supreme Court has made it clear that peremptory challenges cannot be based solely on race. Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that potential jurors cannot be excluded on account of race). See also Edmonson v. Leeville Concrete Co., 500 U.S. 614, 628 (1991); Ramirez, supra note 32, at 778. Cf. I.E.B. v. Alabama, ex rel. T.B., 511 U.S. 127, 136 n.9 (1994) (comparing the different behavior of female and male jurors).

of things we cannot detect or isolate in its verdict and whose influence we cannot weigh."

Many decisions acknowledge that current techniques for impaneling impartial juries do not provide effective methods for addressing unconscious racism: "The safeguards of juror impartiality, such as voir dire and protective instructions to the trial judge, are not infallible; it is virtually impossible to shield jurors from every influence . . . that might theoretically affect their vote." As early as 1909, the Supreme Court noted that:

Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

The following section suggests a means to diminish the distortion that occurs when jurors and judges bear stories through a skewed cognitive filter.

99 Teague v. Lane, 489 U.S. 288, 343 (1989) (Brennan, J., dissenting) quoting Cassell v. Texas, 339 U.S. 282, 301-02 (1950) (Jackson, J., dissenting). The Supreme Court and individual Justices have stated the same concept in slightly different ways: "[C]onscious and unconscious prejudice persists in our society and . . . it may influence some jurors. \"Common experience and common sense confirm this understanding,\" Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring). "A judge's own conscious or unconscious racism may influence him." Turner, 476 U.S. at 106. The influence of that lurking in an opinion once formed is so persistent that it unconsciously frightens detachment from the mental processes of the average man." Irvin, 366 U.S. at 727. "One may not know or altogether understand the imponderables which cause one to think what he thinks . . . ." Dennis v. United States, 333 U.S. 162, 171 (1948). The Ninth Circuit put it this way: "Unspoken biases and prejudices . . . continue to go up in our minds. While we may not recognize the ways in which our cultural experience has influenced our beliefs about race, the color lines that partition our cities bear witness to its destructive effect." United States v. Bishop, 959 F.2d 820, 827-28 (9th Cir. 1992) (quoting Charles R. Lawrence III, The End, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 322 (1987)).


1. The Case for Cautionary Jury Instructions About Stereotyping, Prejudice, and Discrimination

The best method for ameliorating the problem of unconscious racist feelings on the part of the jurors is probably the easiest and least controversial. We propose that the trial judge caution jurors about unconscious cognitive stereotyping by pointing out the human tendency to see life and evaluate evidence through a clouded filter that favors those like themselves.\footnote{Felder federal court judges have wide discretion in the form and language of jury instructions, as long as the law is correctly stated. See Malley-Duff & Ass'ts v. Crown Life Ins. Co., 734 F.2d 133, 147 (3d Cir. 1984); Bass v. International Ibd. of Boilermakers, 630 F.2d 1058, 1061-62 (5th Cir. 1980); Smith v. Borg Warner Corp., 626 F.2d 384 (5th Cir. 1980); Baker v. Co. v. Preferred Risk Mut. Ins. Co., 569 F.2d 1347 (5th Cir. 1978); Coughlin v. Capital Cement Co., 371 F.2d 290, 300 (5th Cir. 1978); Accord Manning v. Landa Constr. Co., 953 F.2d 1090, 1092 (8th Cir. 1992); Grogan v. Garner, 806 F.2d 829, 836-37 (8th Cir. 1986). The Supreme Court, too, supports giving wide latitude to judges formulating jury instructions: "[t]he judge is not bound to charge the jury in the exact words proposed to him by counsel. The form of expression may be different. The duty of the judge is to instruct the jury correctly and in substance cover the relevant rules of law proposed to him by counsel, there is no error in refusing to adopt the exact words of the request." Cunningham v. Springer, 204 U.S. 647, 658 (1907) (citing Continental Improvement Co. v. Stead, 93 U.S. 161, 166-67 (1877)). It appears that the standard for evaluating jury instructions on racial bias is similar to the standard for evaluating general jury instructions. There does not seem to be any bar to warning the jury about racial bias in the decision making process, and it is encouraged in a general manner in the Tenth Circuit: "[i]t is the function of a judge to admonish the jury that they should deliberate together in an atmosphere of mutual deference and respect giving due consideration to the views of the others in the knowledge that in the end their verdict must reflect the composite views of all." Benson v. United States, 376 F.2d 49, 50 (10th Cir. 1967) (quoting Burroughs v. United States, 351 F.2d 556, 558 (10th Cir. 1966) (quoting Burroughs v. United States, 363 F.2d 63, 434 (10th Cir. 1966))). The court went on to say that such a statement would be most influential when given before the jury begins deliberating. Id. See also United States v. Curry, 38 F.3d 1219 (9th Cir. 1994) (removing the jurors involved in a race-related fight during jury deliberation and admonishing the remaining jury about racial bias was not an abuse of discretion but was necessary to maintain order and civility). It is also clear, however, that there is no affirmative duty for the judge to give instructions regarding the danger of racial bias in the deliberative process. In United States v. Dickinson, 695 F.2d 765 (3d Cir. 1982), the court found neither error nor a due process violation when the district court failed to instruct the jury to refrain from considering defendants' Islamic religion or racist views in reaching its verdict. In Massachusetts state courts, a judge in the exercise of his discretion may instruct a jury that in determining the weight to be given to an eyewitness interracial identification, they may consider the fact that the identification by a person of a different race than the defendant may be less reliable than identification by a person of the same race. Commonwealth v. Hynat, 647 N.E.2d 1168, 1171 (Mass. 1995). See also Commonwealth v. Charles, 489 N.E.2d 679 (Mass. 1983); Commonwealth v. Burgos, 627 N.E.2d 471 (Mass. App. Ct. 1994); Commonwealth v. Home, 330 N.E.2d 353 (Mass. App. Ct. 1982). The decision to allow expert testimony on the issue of cross-racial identifications is also within the judge's discretion. Commonwealth v. Walker, 653 N.E.2d 1080, 1084 (Mass. 1995). It is possible that judges may make the same error in cases of cross-racial identification. See, e.g., Albert W. Abschuler, Racial Quotas and the Jury, 44 DUKE L.J.}
The parties are entitled to an impartial jury, and you should be aware that all of us tend to stereotype others, particularly those unlike us, in a negative way. In accordance with your oath to be impartial jurors, please try to adjust and take account of your own prejudices. Further, as the judge will instruct, please do not assume that employment discrimination is a thing of the past in America. Unfortunately, it still persists despite legislation to deal with the problem.

A defendant's lawyer might respond in closing argument in this way:

It is understandable in our society that an African American might assume that she did not get hired or did not get a promotion because of her race; unfortunately, there is employment discrimination in America. But the fact that one sincerely believes she has been discriminated against does not make it true. You should weigh the evidence before you because the issue is not whether there is general discrimination in America but whether this particular defendant violated Title VII. And the evidence shows that there were good reasons why the plaintiff was not hired, and none of those reasons had anything to do with the color of her skin.199

It is not unusual for trial judges to give cautionary instructions about the duty of jurors and about the potential prejudice which may creep into their deliberations.200

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199 We, of course, are not advocating the use of the "race card." Attorneys should limit their use of unconscious bias arguments during closing to the educational purpose we have discussed and not attempt to inflame the jury, as most commentators believe. See, e.g., Albert R. Hunt, Politics and People: A Flawed Verdict, But Tread Carefully, WALL ST. J., Oct. 5, 1995, at A3; George Skelton, Race Cards Succeed All Too Often, L.A. TIMES, Oct. 5, 1995, at A3.

200 As this Article was going to press, the authors received a fax from a former student, Cynthia Stout, enclosing a race-stereotyping jury instruction which Stout had requested in a criminal trial in Alaska. The instruction, which was given to the jury, asks jurors to apply a "race-switching" exercise, that is to imagine at the same time occurred, but to switch the race of the defendant and victim. Stout's co-counsel got the idea from an article on race in the criminal context. See Cynthia Kiwi Young Lee, Race and Self-Defense: Toward a Normative Conception of Reasonableness, 81 MINN. L. REV. 567 (1996). A copy of the fax is on file with the Emory Law Journal.

Standard general instructions include language like this: "The law does not permit you to be governed by sympathy, prejudice or public opinion." EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.01 (2d ed. 1987 & Supp. 1995). Another standard instruction reads: "This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding same or similar status in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice." Id. § 71.03.

More specifically, judges can give jury instructions cautioning jurors to be unbiased and unprejudiced against corporations. 3 HON. LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS: CIVIL, Pub. No. 485, Instruction 72-I (1996). Section 72.01, Corporate and Corporate Responsibility.

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As Justice O'Connor recently explained:

[J]urors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice . . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decision making . . . . Modern judicial systems therefore incorporate safeguards against such influences. Rules of evidence limit what the parties may present to the jury. Careful instructions direct the jury's deliberations.

Courts have become increasingly aware of the importance of instructions in increasing or reducing the potential prejudice of jurors. For example, in State v. Wanrow, the Washington Supreme Court held that reading the jury an instruction on self-defense using only the masculine gender where the defendant was female was reversible error because "the persistent use of the masculine gender leaves the jury with the impression the objective standard to be applied is that applicable to an altercation between two men."

A jury trial concerning employment discrimination is a most appropriate place to air the issues we are talking about. The American jury has historically been an important part of democratic government. The jury trial is a way to educate lay people about important social and political issues, the law.
and the obligations of citizenship in a community.\textsuperscript{114} As one of the few places where the average citizen can directly participate in the governmental process, the jury trial provides an ideal forum for a dialogue about racism, cognitive processes, and the persistence of employment discrimination.\textsuperscript{115}

A strong argument against the jury charge we suggest is that it might not do much good. If prejudice is unconscious and deeply embedded, then a brief lesson about cognitive processes will not help. Prejudice is difficult to unlearn.\textsuperscript{116} But cognitive theory and empirical studies both provide reasons to be guardedly optimistic. There is data that suggests people can override their racism in decision making. Even though stereotyping occurs, there is evidence that the importance of not being racist can conquer racial cognitive processes.\textsuperscript{117} As one author recently put it, "c)-controlled processes are the key to escaping unconscious discrimination."\textsuperscript{118} Many people are able to override instinctive stereotypic thinking because of a cognitive or rational desire to be fair or egalitarian.\textsuperscript{119} Moreover, "[r]eminding decision makers of their [more laudatory] personal beliefs . . . may help them to resist falling unconsciously into the discrimination habit."\textsuperscript{120} Last, there is a good deal of evidence demonstrating that juries try to take legal instructions seriously.\textsuperscript{121}

\textsuperscript{114} Id. See also Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 929 (1987) (arguing that the jury law was intended to be a counter-force to the expert, and sometimes ill-informed, judge).


\textsuperscript{116} See generally Armour, supra note 107, at 750-59.

\textsuperscript{117} Id. at 756-57.

\textsuperscript{118} Id. at 756.

\textsuperscript{119} Id. at 752-44 (citing MARGO J. MONTÉTH ET AL., PREJUDICE AND PREJUDICE REDUCTION: CLASSIC CHALLENGES, CONTEMPORARY APPROACHES, IN SOCIAL COGNITION: IMPACT ON SOCIAL PSYCHOLOGY 323, 333-34 (Patricia G. Devine et al. eds., 1994); Patricia G. Devine, Stereotypes and Prejudice: Their Automatic and Controlled Components, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989); Margo J. Montéth, Self-Regulation of Prejudiced Responses: Implications for Progress in Prejudice-Reduction Efforts, 65 J. PERSONALITY & SOC. PSYCHOL. 469, 471-78 (1993)).

\textsuperscript{120} See Armour, supra note 107, at 759-60.

\textsuperscript{121} See Christopher N. May, "What Do We Do Now?": Helping Juries Apply the Instructions, 28 LOY. L.A. L. REV. 869, 878 (1995); Walter W. Steele, Jr. and Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77, 78 (1988). Consequently, even if only one juror takes the instruction to heart, she might talk about it and thereby address the issue of unconscious prejudice during the jury’s deliberative process.

Perhaps equally compelling is the argument that our proposal would be unfairly prejudicial to defendants since, our detractors would argue, the jury is being encouraged to conclude that because unconscious stereotyping and employment discrimination exist in society as a whole, this particular defendant discriminated against this particular African American plaintiff. In other words, our proposal may be criticized for allowing generalized social guilt to serve as a foundation for individual liability.\textsuperscript{122} Indeed, evidence law, whether by rule or common law,\textsuperscript{123} does not ordinarily allow character evidence of previous bad behavior to permit the inference that the defendant behaved poorly in the instant case.

Careful analysis belie this argument. Our instruction is necessary to readdress the already defendant-oriented notion that stereotyping and employment discrimination no longer exist. The slight corrective provided by our charge may improve the jury’s due process-commanded impartiality. Moreover, our charge is not character evidence. It merely asks the jury to consider the natural proclivity to stereotype and tells them that employment discrimination remains a problem in our country. Finally, as we pointed out previously, the charge cuts both ways.\textsuperscript{124}

2. Judicial Notice as a Second-Best Solution

It should not be necessary to resort to judicial notice to get evidence of cognitive processes and the continuing existence of substantial employment discrimination admitted. Judicial notice deals with "judicative facts," (the facts of the particular case) as opposed to "legislative facts" (those relevant to legal reasoning and the lawmaking process).\textsuperscript{125} Our suggested jury charge does not relate to the facts of the particular case; it relates to an attitude which the factfinder should bring to bear on the case. Therefore, it is either a "legislative fact" or a merely cautionary, common sense reminder to juries.

\textsuperscript{122} As the Supreme Court observed in another context: "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

\textsuperscript{123} FED. R. EVID. 404(a).

\textsuperscript{124} See supra note 109 and accompanying text.

\textsuperscript{125} FED. R. EVID. 201(a) advisory committee note ("It is apparent that [the] use of non-evidence facts in evaluating the judicative facts of the case is not an appropriate subject for a formalized judicial notice treatment.").
If, however, a trial judge characterizes these concepts as adjudicative, judicial notice would be appropriate. Both the cognitive processes and the persistence of discrimination instructions are without factual challenge. Admittedly, what we are dealing with here is not like the direction of a river or the day of the week—typical facts that have been judicially noticed.25 According to the Federal Rules of Evidence, judicial notice falls into two categories: either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.26 The notions that humans stereotype others in negative ways and that substantial employment discrimination still exists clearly meet subsection (2), for the reasons we demonstrated earlier.27

While courts have taken judicial notice of a number of issues that may influence a jury’s decision making process, this has typically occurred at the appellate level. Texas appellate courts have taken judicial notice that a jury is more likely to find against a defendant protected by insurance28 and that verdicts against such defendants tend to be larger.29 New Mexico courts take judicial notice that abortion is a highly charged emotional issue which has the potential for inflaming the jury.30 New York courts have taken judicial notice that negative publicity regarding an industry occurring at the time of trial increases the danger of prejudice towards a defendant.31

It is not unusual for courts to take judicial notice of racism itself. For example, in Tennessee, a federal district court took judicial notice of the long history of social, economic, and political oppression of African Americans within the state.32 The Fifth Circuit has held that, in a voting rights suit, the District Court was warranted in taking judicial notice that blacks in the county had historically been victims of official discrimination.33

3. The Appropriateness of Expert Testimony, If Necessary

Expert testimony about cognitive processes and the persistence of discrimination would be relevant and appropriate. Under statutory rules of evidence and at common law in many jurisdictions, expert testimony can be given to help the factfinder understand the evidence.133

There are several instances in which experts are permitted to assist the jury in evaluating the evidence. For example, some courts now permit expert testimony about “rape trauma syndrome,” not to prove the occurrence of a rape but to “rebut misconceptions about the presumed behavior of rape victims” and “[to disabuse] the jury of widely held misconceptions . . . so that it may evaluate the evidence free of the constraints of popular myths.”34 Using similar reasoning, the California Appeals Court held it was not error for the trial court to admit testimony on “Child Abuse Accommodation Syndrome,” where the expert limited his testimony to victims as a class and did not make a diagnosis of the particular victim or a detailed analysis of the actual facts at hand.35
Experts have also been permitted to assist the jury's assessment of the evidence with respect to complex social phenomena, such as domestic violence. In a 1985 case about a battered wife who repeatedly drove her car into her husband's automobile while he was inside it and then, after he escaped, struck him again, killing him, a federal district court found that

the psychological effects of repeated sexual abuse are beyond the understanding of the average layperson and that the testimony should be admissible for the purposes of informing the jury that there is an identifiable class of persons characterized as 'battered women.' The evidence would explain why the mentality and behavior of such women are at a variance with the ordinary lay perception of how an abused spouse would be likely to act.\textsuperscript{139}

The Eighth Circuit has held expert testimony admissible in order to help the jury understand why a battered wife might accuse her husband before a grand jury of raping her and her 15-year old niece, provide a detailed account of this and other incidents of physical abuse and then, at trial, recall her testimony.\textsuperscript{140}

There are similarities between expert testimony on family abuse and expert testimony on cognitive stereotyping and the persistence of employment discrimination. Lay people do not know much about cognitive psychology. Questions of cognitive strategies and information overload are not commonplace ideas. Nor are lay people apt to know of the overwhelming evidence of widespread discrimination.

\textsuperscript{139} People v. McDonald, 690 P.2d 709, 719 (Cal. 1984), in which the court emphasized that the expert witness "would not have testified that any particular prosecution witness lacked the capacity to perceive, remember and relate; rather, he would simply have informed the jury of certain psychological factors that may impair the accuracy of a typical eyewitness identification ... ." This testimony was held to be necessary as "factors bearing on eyewitness identification ... ." Id. at 720. It is this approach that Alaska, Arizona, Colorado, Illinois, and Maryland have taken. See supra note 136.


We offer expert testimony as the least desirable alternative because the use of experts can be time consuming and costly at both the pretrial and trial stages of litigation. In jury cases, the brief instruction we have proposed is much less costly, requires very little time and, because the instruction is given by the judge, may also be a more effective means of improving the neutrality of jurors.

B. The Right to an Impartial Judge and the Difficulty of Surviving a Motion for Summary Judgment

We focused in the preceding sections on jury impartiality. There is a final group of arguments against our proposal: i) jury instructions will not help in the case where the judge is the factfinder; ii) even in the jury case, it is the judge who sets its tone; and iii) summary judgment, directed verdict, and judgment non obstante veredicto are judicially controlled obstacles that typically remove employment discrimination cases from the jury. In short, a critic might argue that our suggestions about juries are largely irrelevant because they do not directly relate to the judges who control the process.

This is a powerful critique. Of course judges, being human, are prone to the same prejudices as the rest of us. They too hear stories through a skewed cognitive filter and, like much of the public, may believe that employment discrimination is largely a phenomenon of the past. Over seventy-five years ago, Justice Benjamin Cardozo, in The Nature of the Judicial Process, spoke to the hidden prejudices of even the most fastidious judges:

I have no quarrel ... with the doctrine that judges ought to be in sympathy with the spirit of their times. ... But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.\textsuperscript{141}

\textsuperscript{141} BENJAMIN N. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 174-75 (1921). See also Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 41 (1918), reprinted in O.W. HOLMES, COLLECTED LEGAL PAPERS (1920) ("What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism.")
Nonetheless, judges take an oath to be fair and impartial. One federal judge stated the obvious this way: "Federal judges must remain impartial and independent to properly perform their judicial function. . . . Even the appearance of partiality must be avoided." The question becomes how one calls upon the better nature of judges so that they will take account of both the persistence of discrimination in our society and their own cognitive limitations.

The first thing to remember is that prejudice can be mitigated. Recall the studies we discussed in connection with jury bias indicating that people's desire to be fair can trump their prejudices. Moreover, there is a variety of ways to educate judges: judicial conferences, judicial education programs, court bias studies and the litigation process itself. Giving the instruction we have suggested may, over time, raise the consciousness of the judiciary; the very act of instructing jurors about the unconscious and instinctive nature of stereotyping might make judges reexamine their own cognitive processes. Moreover, frequent reminders about cognitive bias and the continued existence of employment discrimination—in briefs, oral arguments, and motions—may be effective. Indeed, we plan to send copies of this article to all of the judges we know and to request an opportunity to discuss it with them.

It goes without saying that our proposals about educating factfinders are of no use if Title VII plaintiffs never get to a jury. This criticism requires an examination of St. Mary's Honor Center v. Hicks,46 a recent Supreme Court opinion read by many to compel summary judgment against plaintiffs lacking direct or "smoking gun" evidence of racially motivated discrimination.

44 "I do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as under the Constitution and laws of the United States. So help me God." 28 U.S.C. § 453 (1994).

45 United States v. Brown, 690 F. Supp. 1423, 1430 (E.D. Pa. 1988) (citing United States v. Arnold, 678 F. Supp. 1463, 1471 (S.D. Cal. 1988); CODE OF JUDICIAL CONDUCT CANONS 2, 3 (1990)). Interestingly, we found much less law on judicial impartiality than juror impartiality. This is possibly because judges do not instruct themselves, and/or because the legal community believes judges already engaging in bias.

46 See supra notes 117-20 and accompanying text.

47 There is now a significant number of these studies. See, e.g., Supreme Judicial Court Commission to Study Racial and Ethnic Bias in the Courts, Equal Justice, Eliminating the Barriers (Massachusetts) (1994). For commentary on bias studies, see Todd D. Peterson, Studying the Impact of Race and Ethnicity in the Federal Courts, 64 GEOR. WASH. L. REV. 173 (1996); Lynn Hecht Schafran, Gender and Justice: Florida and the Nation, 42 Fla. L. Rev. 181, 182-86 (1990).


46 This was the prediction of both jurists and commentators. See, e.g., Justice Souter's dissenting opinion in Hicks, 509 U.S. at 525-43; William R. Corbin, The "Full" of Sunsmith, The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons From McKennon and Hicks, 30 Ga. L. Rev. 305, 349 (1996) ("[W]hen in isolation, Hicks looks bad enough for plaintiffs proceeding under the employment discrimination statutes. Viewed in light of the progression of cases which over the last two decades have eroded plaintiffs' rights under those laws, it looks worse."); Thomas A. Cuniff, Note, The Price of Equal Opportunity: The Effectiveness of Title VII After Hicks, 43 CASE W. RES. L. REV. 507, 508 (1992) ("[T]he immediate reaction to Hicks in the legal community was that the Court had worked a major change in the procedural framework of Title VII cases."). But see Norren G. Whitson, Note, St. Mary's Honor Center v. Hicks: The Title VII Shifting Burdens Steps Back, 25 LOY. CHI. L.J. 269, 306-01 (1994) (Hicks does not make "proving Title VII employment discrimination cases more difficult for plaintiffs.").

47 Note, Developments in the Law: Employment Discrimination, 109 HARV. L. REV. 1568, 1576 (1996) ("[D]evelopments."). The burden shifting framework for disparate treatment cases was initially set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) as follows: 1) the plaintiff must introduce a prima facie case; 2) the defendant then can articulate a legitimate nondiscriminatory reason for its disparate treatment of the plaintiff; and 3) the plaintiff must show that the reason offered by the defendant is false or pretextual, i.e., that the defendant was subjectively motivated by a discriminatory animus. For a full discussion, see Substantive, supra note 1, at 229-30.


49 See, e.g., Samuels v. Raytheon Corp., 934 F.2d 388 (1st Cir. 1991); Holder v. City of Raleigh, 867 F.2d 821 (4th Cir. 1989); Benzie v. Illinois Dept. of Mental Health and Developmental Disabilities, 810 F.2d 146 (7th Cir. 1987).

50 Commentators have noted the uncharacteristically ambiguous nature of Justice Scalia's opinion in Hicks. See, e.g., Developments, supra note 147, at 1593 (it is ironic that Justice Scalia, so often the champion of bright-line rules and simple rules, has in fact molded the McDonnell Douglas doctrine by raising more questions than he purported to answer: "Jody H. Odell, Case Comment, Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment, 69 NOTRE DAME L. REV. 1251, 1267 (1994) ("Despite the majority's assertion that there is nothing inconsistent in its opinion between these two readings, subsequent interpretation of the Hicks decision re-
did not wholly adopt either the "pretext-only" or "pretext-plus" position.\footnote{Whitson, supra note 146, at 290-91. See Michael J. Lambert, Comment, St. Mary's Honor Center v. Hicks: The "Pretext-Maybe" Approach, 29 NEW ENG. L. REV. 163 (1994). See also Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078 (6th Cir. 1994), discussed infra at note 181.} Instead, it appears to have carved out a middle ground in the dispute, holding that the plaintiff has to convince the factfinder that the defendant's supposedly nondiscriminatory reasons were not simply a pretext but rather a pretext for invidious (i.e., racially motivated) discrimination.\footnote{Hicks, 509 U.S. at 511. Although the Court rejected the Eighth Circuit's notion that a pretext-only showing was sufficient to compel judgment for the plaintiff as a matter of law, it did not rule out the possibility that a pretext-only showing could support a finding of discrimination for the plaintiff.}\footnote{Justice Souter's opinion was joined by Justices White, Blackmun, and Stevens.}\footnote{Hicks, 509 U.S. at 534-36 (Souter, J., dissenting). Justice Souter was concerned that the majority opinion would force employees to refute all possible reasons for their employers' disparate treatment—even those not specifically relied on by the employer. Id. at 537-38. Such a requirement, he reasoned, would make pretrial discovery and the trial itself prohibitively expensive for plaintiffs. Id.}\footnote{Id. at 535-36 (citation omitted).}\footnote{See, e.g., Saulpough v. Monroe Community Hosp., 4 F.3d 134, 141-42 (2d Cir. 1993) ("We read Hicks as doing no more than reiterating the longstanding rule that despite shifting burdens of production, a plaintiff always shoulders the ultimate burden of proof").} In his dissent, Justice Souter\footnote{Id. at 535-36 (citation omitted).} argued that the majority's formulation would make it unreasonably difficult to prevail in a Title VII case, particularly where, as in Hicks, the plaintiff was able to convince the factfinder that his employer was lying but had no direct evidence of racial animus.\footnote{See Developments, supra note 147, at 1597 (asserting that the impact of the Hicks opinion has been "both overstated and counterproductive . . . [with regard to] the adjudication of motions for summary judgment.").}\footnote{That is not to say that we endorse the Hicks decision. Rather, we agree with Professor Brookins's analysis:}\footnote{The decision in St. Mary's Honor Center v. Hicks had presumptive even for the United States Supreme Court. Rather than flastly stating that McDonnell Douglas Corp. v. Green . . . and its progeny were wrongly decided, the Court effectively told most federal courts, the labor bar, academia, and Congress that they had flatly misread McDonnell Douglas and Texas Dept of Transportation v. Burdine for the last twenty years and that the Court's belated interpretation is the proper one.}\footnote{Yet the Court looked neither to legislative history nor to Title VII for guidance in this complex area of the law. When confronting language that explicitly contradicted its position, the Court swept it aside, not byintellect or reasoned analysis, but mostly by fiat. Furthermore, the Court selectively applied evidentiary rules to achieve its purpose of protecting employers, even though employers are the putative beneficiaries of Title VII's protection. America has all but eliminated blatant discrimination from the workplace. The Court through Hicks undermined efforts to eliminate the more virulent subtle strain.}\footnote{Brookins, supra note 148, at 994 (footnotes omitted). In other words, we believe that when an employer proffers an incredible reason for the adverse treatment of an employee in a racial discrimination case, the inference of discrimination is so strong that the plaintiff should win as a matter of law. Accord Deborah A. Calloway, St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONV. L. REV. 997, 1038 (1994); Corbett, supra note 146, at 350-51.}\footnote{As we have noted elsewhere, in a nonracist world, there could be dozens of reasons why an employee or prospective employee is disparately treated: the employer prefers tall people, the employer's neighbor was favored, the employer does not like Southern accents, the employer was in a bad mood, or the employee flipped a coin. See Treating Blacks As If They Were White, supra note 1, at 6.}\footnote{See Rhodes v. Gulf South Oil Tools, 75 F.3d 989 (5th Cir. 1996) (rehearing en banc) (DeMoss, J., concurring in part and dissenting in part; Developments, supra note 147, at 1592 n.88.}\footnote{Justice Scalia relied on Federal Rule of Evidence 301 to repudiate the Eighth Circuit's position that the factfinder's rejection of the defendant's proffered reasons compels judgment for the plaintiff. Rule 301, which follows the "burden of proof" theory of presumptions, provides that the defendant's production of admissible evidence "burdens the presumption of discrimination created by the plaintiff's prima facie case. See Fed. R. Evid. 301 advisory committee note. See also Landscapes, supra note 148, at 104-06.}\footnote{Because the initial presumption of discrimination did not shift the burden of persuasion from the plaintiff to the defendant, the Court held that the Eighth Circuit could not resurrect the presumption—once St. Mary's had rebutted it—to compel judgment for plaintiff Hicks. Hicks, 509 U.S. at 531.}\footnote{We realize that Justice Souter asserted that other portions of the Scalia opinion do not support the automatic presumptive inference that we have described. But we see no other reasonable way to interpret} that the plaintiff's articulated reasons are unworthy of credence.\footnote{We—and several circuits—agree.}\footnote{considered the of Community Affairs v. Burdine for the last twenty years and that the Court's belated interpretation is the proper one.}}

Others have argued that the language of Hicks does not necessarily portend the dire consequences for plaintiffs predicted by Justice Souter, particularly at the summary judgment stage.\footnote{That is not to say that we endorse the Hicks decision. Rather, we agree with Professor Brookins's analysis:}\footnote{The decision in St. Mary's Honor Center v. Hicks had presumptive even for the United States Supreme Court. Rather than flastly stating that McDonnell Douglas Corp. v. Green . . . and its progeny were wrongly decided, the Court effectively told most federal courts, the labor bar, academia, and Congress that they had flatly misread McDonnell Douglas and Texas Dept of Transportation v. Burdine for the last twenty years and that the Court's belated interpretation is the proper one.}\footnote{Yet the Court looked neither to legislative history nor to Title VII for guidance in this complex area of the law. When confronting language that explicitly contradicted its position, the Court swept it aside, not byintellect or reasoned analysis, but mostly by fiat. Furthermore, the Court selectively applied evidentiary rules to achieve its purpose of protecting employers, even though employers are the putative beneficiaries of Title VII's protection. America has all but eliminated blatant discrimination from the workplace. The Court through Hicks undermined efforts to eliminate the more virulent subtle strain.}\footnote{Brookins, supra note 148, at 994 (footnotes omitted). In other words, we believe that when an employer proffers an incredible reason for the adverse treatment of an employee in a racial discrimination case, the inference of discrimination is so strong that the plaintiff should win as a matter of law. Accord Deborah A. Calloway, St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption, 26 CONV. L. REV. 997, 1038 (1994); Corbett, supra note 146, at 350-51.}\footnote{As we have noted elsewhere, in a nonracist world, there could be dozens of reasons why an employee or prospective employee is disparately treated: the employer prefers tall people, the employer's neighbor was favored, the employer does not like Southern accents, the employer was in a bad mood, or the employee flipped a coin. See Treating Blacks As If They Were White, supra note 1, at 6.}\footnote{See Rhodes v. Gulf South Oil Tools, 75 F.3d 989 (5th Cir. 1996) (rehearing en banc) (DeMoss, J., concurring in part and dissenting in part; Developments, supra note 147, at 1592 n.88.}\footnote{Justice Scalia relied on Federal Rule of Evidence 301 to repudiate the Eighth Circuit's position that the factfinder's rejection of the defendant's proffered reasons compels judgment for the plaintiff. Rule 301, which follows the "burden of proof" theory of presumptions, provides that the defendant's production of admissible evidence "burdens the presumption of discrimination created by the plaintiff's prima facie case. See Fed. R. Evid. 301 advisory committee note. See also Landscapes, supra note 148, at 104-06.}\footnote{Because the initial presumption of discrimination did not shift the burden of persuasion from the plaintiff to the defendant, the Court held that the Eighth Circuit could not resurrect the presumption—once St. Mary's had rebutted it—to compel judgment for plaintiff Hicks. Hicks, 509 U.S. at 531.}\footnote{We realize that Justice Souter asserted that other portions of the Scalia opinion do not support the automatic presumptive inference that we have described. But we see no other reasonable way to interpret} Hicks reiterated the existing doctrine that a disparately treated African American employee who is qualified for a job or benefit given to a white employee is presumed to have been discriminated against. In so doing, the Hicks majority implicitly affirmed our primary assertion in this paper—that racism is still prevalent in the workplace.\footnote{More importantly, a portion of Justice Scalia's majority opinion, which has since become known as the "permissive passage," tacitly recognizes that the same racism that justifies the McDonnell Douglas presumption of discrimination also permits an inference that discrimination was the driving force behind an African American employee's disparate treatment when his employer's proffered reason is not credible. The precise doctrinal implication of the permissive passage is still far from clear. However, we believe that a literal reading readily supports a Title VII plaintiff's right to survive summary judgment and to present her pretext-only evidence to the factfinder.}
The critical language is as follows:

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 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, "[i]n addition, no additional proof of discrimination is required."263

The focus is on the substantive quality rather than the quantity of a plaintiff's evidence.264 As long as a plaintiff makes a strong showing of her employer's discriminatory animus, whether that evidence technically contributes to her showing of pretext or supplements her already sufficiently showing of pretext, she has met her burden of production.265 The point is this: a plaintiff still has the burden of persuading the factfinder that the employer’s pretext is, in fact, a pretext for invidious discrimination.266 But in emphasizing that factfinders could infer discrimination from a showing of pretext alone, Justice Scalia endorsed the idea that Title VII plaintiffs who have evidence of pretext earn the opportunity to present that evidence at trial. It fol-

Justice Scalia's language. Accord Developments, supra note 147, at 1596 ("[s]everal permissive answers was a direct response to concerns voiced by the dissent, so it cannot have slipped in inadvertently") (footnote omitted). Furthermore, the Equal Employment Opportunity Commission (EEOC) also has taken the position that plaintiffs who establish prima facie cases and offer evidence of pretext can withstand motions for summary judgment. EEOC Enforcement Guidelines on St. Mary's Honor Center v. Hicks, reprinted in DAILY LAB. REP., Apr. 13, 1994, at F3. See also EEOC v. IPMC, Inc., 136 F.R.D. 163, 164 (E.D. Mich. 1994). This position is supported by the general rule that summary judgment is particularly inappropriate when "the inference which the parties seek to have drawn deal with questions of motive, intent, and subjective feelings and reactions." Empire Elec. Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962).

263 Hicks, 509 U.S. at 511 (1993) (alterations in original) (citation omitted). Justice Scalia repeats the same thought in a footnote: "rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, [although] there must be a finding of discrimination." Id. at 511 n.4.

264 See Miller v. Cigna Corp., 47 F.3d 586, 596 (3d Cir. 1995) (asserting that the quantitative and bipolar approach of the "pretext-only?"/"pretext-plus? standards was rejected by the Supreme Court majority in Hicks).

265 Although the Hicks permissive passage endorses the pretext-only standard by allowing an inference of discrimination upon a mere showing of pretext, a plaintiff still may have to offer a pretext-plus volume of evidence to convince a given factfinder that the employer invidiously discriminated against her. By all accounts, it appears that a plaintiff must offer evidence beyond that which is required to establish a prima facie case of discrimination. Diamond Shamrock, 29 F.3d at 1084.

266 "[T]he Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'" Hicks, 509 U.S. at 511 (citations omitted).

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The grant of summary judgment, though appropriate when evidence of discriminatory intent is totally lacking, is generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case because of the "elusive factual question" of intentional discrimination . . . .

Issues of fact and sufficiency of evidence are properly reserved for the jury. The only issue to be considered by the judge at summary judgment is whether the plaintiff's evidence placed material facts at issue.166

Similarly, the D.C. Circuit upheld a Title VII plaintiff's jury verdict against her employer because, "[a]ccording to Hicks, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination."

In sharp contrast, the First, Fourth, and Fifth Circuits have treated plaintiffs who lack direct evidence of discriminatory animus quite harshly both at summary judgment and at trial.111 For example, in LeBlanc v. Great American Insurance Co.,173 the First Circuit affirmed summary judgment for the employer in an age discrimination case,174 stating that

in the context of a summary judgment proceeding, Hicks requires that . . . the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age . . . . Thus, the plaintiff cannot aver sum-

166 Hainston v. Gainesville Sun Pub'l Co., 9 F.3d 913, 921 (11th Cir. 1993). Accord Howard v. B.F. Oil Co., 32 F.3d 520, 526 (11th Cir. 1994) ("[Hicks] indicates that evidence from which a jury could find that the articulated reasons for decision are false is enough to create a genuine issue for trial.") (citations omitted).
167 Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (citation omitted).
168 See, e.g., Woods v. Friction Materials, Inc., 30 F.3d 255, 261 n.3 (1st Cir. 1994) (Affirming summary judgment for employer, the court admitted that "the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the factfinder to find for the plaintiff." However, the court was quick to point out: "We do not think that the Supreme Court meant to say that such a finding would always be permissible."). Accord Smith v. Starnes Computer, Inc., 40 F.3d 11 (1st Cir. 1994).
170 5 F.3d 826 (1st Cir. 1993).

mary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer.175

Other circuits have had second thoughts about the proper interpretation of the permissive passage. A series of Third Circuit opinions is illustrative: while it had originally favored a pretext-only interpretation,176 the Third

175 LeBlanc, 5 F.3d at 843 (citation omitted). Despite plaintiff LeBlanc's seemingly amicable circumstantial evidence of discriminatory animus, the First Circuit found that he had "adduced insufficient evidence for a reasonable trier of fact to infer that Great American's decision to terminate his employment in October 1990 was motivated by age animus . . . . Indeed, LeBlanc's arguments are based largely upon conclusory allegations, improbable inferences, and unsupported speculation." Id. at 849.
176 The Fourth Circuit also has been quick to substitute its own judgment of a plaintiff's evidence. Reversing a bench decision for plaintiff in Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995), the Fourth Circuit substituted its own judgment for the district court finding that the defendant's proffered reason for issuing a terminal contract to the plaintiff was not only unworthy of credence but was a pretext for invidious discrimination. The Fourth Circuit noted that its own review of the record showed that the plaintiff had not met his ultimate burden of persuasion. Id. at 378. The Fourth Circuit has even required that Title VII plaintiffs present evidence that "satisfies the ultimate burden of persuasion" in order to survive summary judgment. See Mitchell v. Data General Corp., 12 F.3d 1310, 1315 (4th Cir. 1993) (where the appellate panel angrily accused the district court of trying to "instill [its] findings from review" by characterizing them as credibility determinations).
177 The Fifth Circuit has engaged in similar credibility assessments of plaintiffs' evidence, dismissing the permissive passage as "obviously dicta," Rhodes v. Gulfern Oil Tools, 39 F.3d 537, 542 (5th Cir. 1994), because Hicks made two changes which are critically important to the resolution on this case: (a) first, whatever the term "pretext" may have meant in the past, under Hicks it can now only mean "pretext for discrimination;" and (b) second, when read as a whole and considering the controversy between the majority opinion and the dissent in [Hicks], it is clear that the Supreme Court ruled against the theory of "pretext only.

Id. at 545. This decision was modified in the en banc rehearing of Rhodes, where the full panel interpreted the permissive passage as allowing a pretext-only approach. Rhodes v. Gulfern Oil Tools, 75 F.3d 989 (5th Cir. 1994), rev'd en banc (affirming trial court's original judgment for plaintiff) ("Rhodes II"). The panel asserted that its change of heart was an attempt to bring its jurisprudence in line with the majority of other circuits, which have been "unwilling to upset a jury verdict for the plaintiff" when she has offered pretextual evidence that allows the factfinder to reject the defendant's proffered reasons and infer discrimination. Rhodes, 75 F.3d at 994. Despite its softened position in Rhodes II, the Fifth Circuit majority maintained throughout its opinion that some "Hickstein" inferences of employment discrimination might not be based on enough evidence to pass muster under a straight summary judgment standard. Id. at 997-99. Although acknowledging that the Fifth Circuit's decision in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969), did state "the proper test for determining whether there is sufficient evidence to submit a case to a jury in a federal court trial," concluding Judge Gamba heuristically countered that "Hicks tells us specifically what evidence constitutes "sufficient evidence" in the Title VII context." Id. at 997 (footnote omitted). He continued, "[I]f the degree that [the Fifth Circuit] use[s] Boeing as a vehicle to decide whether a jury's disbelief of a [Title VII] defendant is supported by sufficient evidence, we violate the spirit of Supreme Court precede-

... Id. at 999.
178 See, e.g., Waldon v. SL Indus., Inc., 56 F.3d 491, 495 (3d Cir. 1995) ("We joined those of our sister circuits who have read Hicks to require at summary judgment "pretext-only."). Because the factfinder
Circuit appeared to step back in its first consideration of *Sheridan v. E.I. duPont de Nemours & Co.*

While we are bound to follow our court's prior interpretation of *Hicks,* and while we acknowledge that interpretation finds support in language in the *Hicks* opinion, we question whether that interpretation is consistent with two of the fundamental principles on which *Hicks* rests. The first of these is that under the McDonnell Douglas scheme, the ultimate burden of persuasion rests at all times with the plaintiff. The second is that the "presumption" of discrimination that is created when the plaintiff makes out the elements of a prima facie case... disappears when sufficient counterproof is offered.177

But, in the en banc rehearing of *Sheridan,* Judge Sloviter, who had sharply criticized the majority's position on *Sheridan* in her "Sheridan I" concurrence,179 heeded Justice Scalia's admonition that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."180 Clarifying that the Third Circuit had been applying and would continue to apply a pretext-only approach, Judge Sloviter wrote: "a plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the defendant produced sufficient evidence to may infer from the combination of the plaintiff's prima facie case and its own rejection of the employer's proffered nondiscriminatory reasons that the employer unlawfully discriminated against the plaintiff..."

(footnoting Fuentes v. Perskie, 32 F.3d 599, 764 (3d Cir. 1994).


177 Id. at *8 (footnote and citation omitted).


179 Judge Sloviter's concurrence states:

The reasons why the factfinder should be entitled to infer intentional discrimination from this evidence appear from the relevant caselaw. We have repeatedly acknowledged the difficulty of proving discrimination in Title VII cases.

180 Much of the majority's discussion is predicated on its concern that an employer may proffer a false reason for its actions, not to conceal the discrimination alleged but rather to conceal a different form of discrimination or some other unlawful conduct. The courts should not base their decisions on such a hypothesis. We routinely expect a party to give honest testimony in a court of law; there is no reason to expect less of a defendant charged with unlawful discrimination. If a defendant fails to come forward with the true and credible explanation, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged.


181 Hicks, 559 U.S. at 511 (1993) (footnote omitted).

raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action.181

In sum, interpretations of the permissive passage in the three years since *Hicks* remain highly variable, thus allowing a modified version of the pre-Hicks pretext-only/pretext-plus debate to continue.182

We return then to the final criticism of our proposals—that even the most neutral judge may be bound by current Title VII case law in ways that will force her to keep most employment cases from reaching the jury. We can safely say that most Title VII plaintiffs have fared better at summary judgment after *Hicks* than the opinion's critics originally predicted.183 To be

180 Sheridan, 106 F.3d at 1067. Judge Sloviter continued: "Once the court is satisfied that the [plaintiffs'] evidence meets this threshold requirement, it may not preterm the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer." Id. at 1072.

In contrast, the Sixth Circuit continues to vacillate on its application of the permissive passage. For example, in *Moran v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078 (6th Cir. 1994), the court noted that, in *Hicks,* the Supreme Court rejected both the pretext-only standard (by not compelling judgment for plaintiffs upon a showing of pretext) and the pretext-plus standard (by not allowing a factfinder to infer the ultimate fact of intentional discrimination after disbelieving the defendant's proffered reasons for its disparate treatment of the plaintiff), Id. at 1083. However, the court did emphasize that a plaintiff's evidence—no matter how strong—at least had to consist of some actual quantum of evidence beyond the prima facie case in order to show discrimination. Id. at 1084.

Similarly, in its first few opinions after *Hicks,* the Eighth Circuit heralded the permissive passage as allowing a finding of discrimination whenever "there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions..."

182 Accord Nelson v. Boeing's Eastbankers, Inc., 26 F.3d 796, 801 (8th Cir. 1994). However, in later decisions, the Eighth Circuit appears to have focused more on a requirement that plaintiffs' evidence at summary judgment must not only evidence pretext but also persuade the court entertaining the summary judgment motion that a reasonable jury could infer that the defendant's proffered reason for its actions was a pretext for discrimination. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 777 (8th Cir. 1995). See also Kowalk v. County of Le Sueur, 47 F.3d 953, 959 (8th Cir. 1995).

183 See supra note 147, at 1597-1601. This outcome reaffirms our thesis that procedure has taken on a life of its own in Title VII jurisprudence. See supra note 1, passim. For precisely this reason, Professor Malamud has advocated that the Court abandon altogether the McDonnell Douglas-Burdine proof structure. Deborah Malamud, *The Last Memet: Disparate Treatment After Hicks,* 93 MICH. L. REV. 2229 (1995). Indeed, she notes that doing so would offer "several important advantages: it would increase intellectual honesty, deter the creation of dangerous pseudo-uniform rules, and encourage a more subtle and creative understanding of discrimination in its many forms." Id. at 2320. Although she worries about the symbolic significance of declaring "after all this time, that there are no preferential rules for individual discrimination cases," she is troubled even more by the Court continuing to act "as though there are preferential standards for disparate treatment cases when, in fact, after *Hicks,* there are none..." Id. at 2324. We would have to agree with her that it may be "better to let the cold winds of litigation blow. At least the cold air will be clear." Id.

184 See supra notes 156-81 and accompanying text.
sure, many plaintiffs have not been allowed to present their cases to a jury. However, in those circuits that follow our reading of the permissive passage, trial judges will have the opportunity to give jurors our cautionary instructions. Indeed, the permissive passage's mandate that the factfinder actually make a finding of discrimination has made disparate treatment cases more subjective and fact-driven both at summary judgment and at trial in the few years since the Hicks decision. This heightened emphasis on factfinding would seem to make it an auspicious time to better educate both our judicial and lay factfinders about cognitive bias and the continued prevalence of discrimination in the workplace.

CONCLUSION

Throughout the writing of this Article, we continually asked ourselves if our proposals were but the musings of liberal law professors too long removed from the unpleasant vagaries of conservative courts. Perhaps. But even in the Supreme Court opinions most harshly criticized by civil rights advocates, there is language which condemns racial stereotyping, racial bias, and race-based decision making. For example, in City of Richmond v. J.A. Croson Co., which severely curtailed affirmative action programs, Justice O'Connor, writing for the majority, noted "the evil of private prejudice" and the illegitimacy of racial stereotyping. She noted that neither she nor her colleagues in the majority see "racial discrimination as largely a phenomenon of the past," asserting that she is "perfectly willing to find that discrimination exists." Even some of Justice Scalia's opinions contain statements condemning discrimination: "blacks have often been on the receiving end of the injustice. Where injustice is the gain, however, turnabout is not fair play."

We agree with Justice Marshall's dissent in Croson that race discrimination "has pervaded our Nation's history and continues to scar our society." And, like Justice Marshall, we are more willing than the current majority of the Court to construct remedies for society's past injustices to African Americans. But both the "conservative" and "liberal" or "moderate" wings of the Court have noted that there is still a good deal of prejudice and discrimination in our country and that negative stereotyping based on race is an evil that should be eradicated. As Justice Ginsburg pointed out in the Court's most recent full discussion of affirmative action:

The divisions of this difficult case should not obscure the Court's recognition of the persistence of racial inequality and a majority's acknowledgement of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects. Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods.

Even such icons of current conservative thought as Professors D'Souza, Hermstein and Murray, and Epstein do not argue that racism no longer exists. To be sure, they embrace arguments which permit and encourage negative views of African Americans as a group by asserting what they characterize as dysfunctional aspects of an inferior African American culture (D'Souza), the lower intelligence of blacks (Hermstein and Murray), and the undesirable inefficiencies of African American employees (Epstein). They share a belief that there are factors (intelligence and efficiency) that are more important than racial and economic justice.

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<106> In those jurisdictions, we would have to agree with Professor Corbett's assessment that the practical effect of Hicks will be that "victims of discrimination will sue less often, and those who do sue are more likely to settle for less or to lose their cases." Corbett, supra note 146, at 354 (footnote omitted).
<107> Cf. Lambert, supra note 151, at 207.
<108> Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) ("Individuals who have been wronged by unlawful discrimination should be made whole ...") (Scalia, J., concurring); Patterson v. McLane Credit Union, 491 U.S. 164, 174 (1989) ("To the contrary, Ronzell is consistent with our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin.").
<110> Id. at 492.
<111> Id. at 494.
<112> Id.
But none of them argue that discrimination is a phenomenon of the past. For instance, even though he believes much discrimination is rational, Professor D’Souza consistently points out that human beings tend to discriminate against others based on tribal or national identity. He does not deny, and in fact on at least two dozen occasions affirms, the centrality of prejudice in human thinking. And although he values efficiency over equity (equality), Richard Epstein recognizes the existence of prejudice and discrimination. Even Professors Herrnstein and Murray deplore the application of stereotypes to a particular individual. They agree that discrimination still exists despite their argument that it is due to a difference in racially inherited intelligence levels.

It is inappropriate and unhealthy for a judicial system to ignore indisputable facts. It is also dangerous. It is indisputable that people stereotype those unlike themselves and that racial discrimination exists in employment. We hope that our proposals, modest as they are, contribute to a heightened sense of impartiality and a more meaningful courtroom dialogue about racial inequality. Historically, the American courtroom has been a forum for education and citizen participation. These functions are now in jeopardy. Victims of racial oppression and the dispute resolution process itself are the worse for it.

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200 See D’SOUZA, supra note 2, at 32-33. (“Resources currently invested in promoting proportional representation could be more sensibly invested in strictly enforcing anti-discrimination laws. As Richard Posner has suggested, violators could be punished, and potential violators deterred, by awards of double or triple damages.”). Id. at 54 (citations omitted).
201 Id. at 245-87. D’Souza’s favorite example is that a cab driver is wise not to pick up a black youth in gang-like dress in an inner city neighborhood because there is a high risk of danger to the cab driver. D’Souza admits that such stereotypical thinking probably will harm innocent African Americans, but he regards such an outcome as merely unavoidable. Id. at 250-53.
202 See EPSTEIN, supra note 88, at 1.
203 See HERENSTEIN & MURRAY, supra note 106, at 318 (By asserting the higher intelligence of whites and the use of intelligence as a predictor of positive outcomes, the authors attempt to justify negative stereotypes about African Americans as a group, while condemning their application to any individual member of the group.).
204 Depending on the litigation, the judge may wish to refer specifically to another class covered by Title VII in place of, or in addition to, African Americans.