
BETTER SAFE THAN SUBJECTIVE: THE PROBLEMATIC INTERSECTION OF PREHIRE SOCIAL NETWORKING CHECKS AND TITLE VII EMPLOYMENT DISCRIMINATION*

I. INTRODUCTION

It takes less than a minute. An employer receives a resume and types the applicant's name into an Internet search engine. Assuming that applicant is among the two-thirds of the world's Internet population¹ visiting sites like Facebook,² Myspace,³ Twitter,⁴ and LinkedIn,⁵ the employer is directed to the applicant's social networking profile.

Instantly, the employer obviates Title VII mandates prohibiting employers from inquiring about an applicant's gender, race, national origin, and religion. The social networking profile provides the employer with various fields of personal information the applicant has opted to share, such as gender, age, religious affiliation, political preference, marital status, familial status, sexual orientation, education, interests, and activities. The photo- and video-sharing capabilities of these sites may additionally provide the employer with insight as to the applicant's race, disability status, and lifestyle choices.

This scenario is increasingly common—employers now routinely utilize social networking sites in order to research, reject, and decide to hire candidates.⁶ One survey

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1. Michael A. Curley & Debra Morway, *Legal Issues Arising from the Use of Social Networks at Work*, 1034 P.L.I./PAT 95, 98 (2011) (citing *Global Faces and Networked Places*, THE NIELSEN COMPANY, 1 (March 2009), http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf).

2. FACEBOOK, <http://www.facebook.com> (last visited Oct. 28, 2012). Facebook is a social networking site that allows users to add "friends" and send them public and private messages; create and update a personal profile with information regarding education, employment, date of birth, religious affiliation, political affiliation, sexual orientation, marital status, family status; join groups and indicate personal interests; post pictures and videos, chat on line with friends; post statuses. *Id.*

3. MYSFACE, <http://myspace.com> (last visited Oct. 28, 2012). Myspace allows users to create personal profiles, add friends, and update statuses. *Id.*

4. TWITTER, <http://twitter.com> (last visited Oct. 28, 2012). Twitter is a social networking and microblogging service that allows users to send short text messages ("tweets") 140 characters in length, to friends ("followers"). *Id.*

5. LINKEDIN, <http://linkedin.com> (last visited Oct. 28, 2012). LinkedIn is a social networking website dedicated to work-related networking and allows users to post information related to education and work experience, and to connect to fellow users of the site, known as "contacts." *Id.*

6. Curley & Morway, *supra* note 1, at 100–05. The arguments presented in this Comment apply to employers that access an applicant's publicly available social networking page as well as those employers that access social networking information protected by a user's privacy settings. This Comment focuses on the

indicates that forty-five percent of employers use social networking sites to research job candidates, and of this group, thirty five percent of employers rejected potential job candidates because of content they found on social networking profiles.⁷

This Comment contends that employers who choose to engage in this seemingly innocuous practice may in fact face legal repercussions when defending against Title VII suits. Paying special attention to the intersection of prehire social networking checks, Title VII employment discrimination law, and the developing concept of implicit bias,⁸ this Comment predicts the ways that plaintiffs may use prehire social networking checks as evidence in intentional and unintentional discrimination claims. It further pinpoints problematic employer practices and outlines strategies that employers can use to rectify these problems, minimize the influence of implicit bias, and avoid litigation. This Comment also suggests that the practice of prehire social networking checks is ripe for legislative regulation.

Part II.A explains the standing legal authority regarding prehire social networking checks, Part II.B explores the components of and empirical support for the concept of implicit bias, and Part II.C evaluates the ways in which implicit bias has been recognized and integrated into Title VII jurisprudence. Part II.D then considers the courts' receipt of past social science evidence as a precursor to the fate of future implicit bias cases.

Section III analyzes the role prehire social networking checks may play in both intentional discrimination and unintentional discrimination suits. Part III.A examines

employment discrimination repercussions of prehire social networking checks; this practice also implicates privacy issues that are outside the scope of this Comment. For example, some employers have gone so far as to demand that prospective employees provide their Facebook usernames and passwords during the hiring process, a practice that has been challenged on privacy grounds. See Doug Gross, *Facebook Speaks Out Against Employers Asking For Passwords*, CNN.COM (Mar. 23, 2012, 10:25 AM), <http://www.cnn.com/2012/03/23/tech/social-media/facebook-employers/index.html?c=tech>; see also Dana Farrington, *A Job At What Cost? When Employers Log In To Dig In*, NPR.ORG, (Mar. 21, 2012), <http://m.npr.org/news/front/149095385?page=0> (recounting the story of a prospective employee who was asked for his Facebook username and password during a job interview). The ACLU has spoken out against this practice, and multiple states are considering legislation that would prohibit employers from asking an applicant for his username and password on privacy grounds. See Sam Favate, *Can Job Applicants Be Asked For Facebook Passwords?*, WALL ST. J. L. BLOG (Mar. 21, 2012, 12:14 PM), <http://blogs.wsj.com/law/2012/03/21/can-job-applicants-be-asked-for-facebook-passwords/?mod=e2tw>; see also Martha C. White, *Lawmakers Try to Ban Facebook 'Shoulder Surfing' by Employers*, TIME.COM (Mar. 20, 2012), <http://moneyland.time.com/2012/03/20/lawmakers-try-to-ban-facebook-shoulder-surfing-by-employers/> (describing Maryland, Illinois, and California state bills).

7. Curley & Morway, *supra* note 1, at 102. Another study reports that as many as seventy percent of recruiters have rejected candidates based on information found online. See Kashmir Hill, *What Prospective Employers Hope To See In Your Facebook Account: Creativity, Well-Roundedness, & 'Chastity'*, FORBES.COM (Oct. 3, 2011, 9:26 AM), <http://www.forbes.com/sites/kashmirhill/2011/10/03/what-prospective-employers-hope-to-see-in-your-facebook-account-creativity-well-roundedness-chastity/> (describing results of study performed by Reppler and discussing the ways in which employers utilize online information to evaluate candidates).

8. See *infra* Part II.B for a discussion of implicit bias. Implicit bias is a sociological and psychological theory that suggests that actors lack intentional control over the judgments that drive their actions, and that an actor can make unconsciously biased decisions without realizing that they are discriminatorily driven. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006).

the expanded latitude an employer will have to mask pretext in the context of an intentional discrimination claim after this employer has engaged in a prehire social networking check, and Part III.B focuses on employer's loss of the ignorance defense and increased liability due to a prehire social networking check. Part III.C next predicts the way in which courts will characterize the act of checking a social networking profile with respect to discriminatory intent.

Part III.D turns to the context of an unintentional discrimination suit. This section argues that a prehire social networking check increases the risk that implicit bias will influence an employer's hiring decision—it informs the employer as to the applicant's protected trait and heightens the degree of subjectivity with which the employer evaluates the applicant's candidacy. Part III.E then predicts the courts' treatment of an unintentional discrimination suit using a prehire social networking check as circumstantial evidence. Finally, Part III.F advises employers as to how they can minimize the level of subjectivity exercised in the evaluation of an applicant's social networking profile, mitigate the influence of implicit bias, and in turn decrease the risk of litigation, and Part III.G suggests the need for legislative action.

II. OVERVIEW

A. Prehire Social Networking Checks

1. How Do Employers Use These Checks?

The decision to reject potential job candidates based on information found on social networking sites rests largely on subjective criteria in many instances. Employers indicated that these rejections were based on the discovery of: inappropriate or provocative photographs of the candidate, inappropriate or provocative information about the candidate, posted content regarding the candidate's drinking or drug use, the candidate's sharing of confidential about former employers, the candidate's bad-mouthing former employers or coworkers, content displaying the candidate's poor communication skills, comments posted by the candidate containing discriminatory content, and postings revealing that the candidate lied about his or her credentials.⁹

The decision to hire potential job candidates based on social networking information is based on similarly subjective criteria, with eighteen percent of employers reporting that content found on such sites convinced them to hire the candidate.¹⁰ Employers cited the following reasons in explaining their use of such information in hiring the candidate: fifty percent stated that the online information "provided a good feel for the candidate's personality and fit with the organization," thirty-nine percent stated that the profile "supported the candidate's professional qualifications," thirty-eight percent stated that the online content showed "the candidate was creative," thirty-five percent stated that the candidate's online profile showed he or she had "solid communication skills," thirty-three percent stated that the content indicated that the candidate was "well-rounded," and nineteen percent stated that "other

9. Curley & Morway, *supra* note 1, at 102.

10. *Id.* at 104.

people posted good references about the candidate.”¹¹ These factors are hardly quantifiable. In short, the evaluative use of information found on social networking sites is largely subjective.

2. The Projected Legal Risks of Checking Social Networking Profiles Prehire

While there is virtually no legal precedent for a suit arising from an employer’s use of social networking sites before hiring a candidate, scholars have suggested that employers may expose themselves to both privacy liability and discrimination liability in utilizing these sites.¹² Scholars have additionally outlined the risks employers may face in choosing not to perform social networking checks before hiring a candidate. For example, in the negligent hire context, were a duty to search social networking sites to be recognized, employers could incur liability in failing to check a job applicant’s social networking profile; with the availability of such online resources, “it is arguable that the employer indeed has a duty to utilize the Internet in hiring because . . . prevention of hiring a bad employee has become much less onerous.”¹³

While the discriminatory impact of prehire social networking checks has yet to be addressed, courts have recognized that certain prescreening hiring procedures result in an employer’s discriminatory treatment of minority classes.¹⁴ An employer’s use of word-of-mouth recruitment is one such procedure. The Third Circuit analyzed a word-of-mouth hiring process through which white employees tended to recommend their neighbors, friends, and family members, who largely tended to be white as well.¹⁵ The court found that such word-of-mouth recruiting resulted in a relatively small number of minority applicants and was thus “circumstantial evidence which helps to establish a reasonable inference of an employer’s discriminatory treatment of blacks as a class.”¹⁶ However, other courts have concluded that referrals systems perpetuating a low percentage of minority employees are not illegal if such a system is not the primary means for recruiting applicants.¹⁷

11. *Id.*

12. *E.g., id.* at 104–05. Issues including the viability of suits alleging a social network check prehire violated plaintiff’s constitutional privacy, Fourth Amendment privacy, due process privacy, and state privacy are outside the scope of this Comment. For a discussion on these issues, see generally Daniel E. Mooney, Comment, *Employer On the Web Wire: Balancing the Legal Pros and Cons of Online Employee Screening*, 46 IDAHO L. REV. 733 (2010).

13. Mooney, *supra* note 12, at 738 (discussing negligent hire liability, in which an employer is found liable for failing to exercise reasonable care in hiring a person who was a foreseeable danger to third parties).

14. *See, e.g.,* EEOC v. Metal Serv. Co., 892 F.2d 341, 350–51 (3d Cir. 1990) (citing *Parham v. Sw. Bell Tel. Co.*, 433 F.2d 421, 426–27 (8th Cir. 1970)) (holding that word-of-mouth recruiting that resulted in a small number of minority applicants was circumstantial evidence helping to establish a reasonable inference of an employer’s discriminatory treatment of a minority class).

15. *Id.*

16. *Id.* (citing *United States v. Int’l Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1016 (3d Cir. 1976)).

17. *See, e.g.,* *Ross v. Jones & Laughlin Steel Corp.*, 468 F. Supp 715, 718–19 (W.D. Pa. 1979) (rejecting plaintiff’s argument that a coal preparation plant’s practice of hiring applicants recommended by the plant superintendent resulted in a disparate impact against females because the employment supervisor did not always follow the recommendations in making the ultimate hiring decisions, and there was no evidence that the referral practice was motivated by sexually discriminatory considerations).

B. Implicit Bias: Sociological and Psychological Underpinnings

The concept of implicit bias is rooted in sociological and psychological theory, and suggests that actors lack conscious, intentional control over the social perception processes, impression formation, and judgments that drive their actions.¹⁸ The following overview addresses the components of implicit bias and the empirical test used to analyze the presence of implicit bias.

1. The Components of Implicit Bias

Implicit bias contrasts with “naïve” psychological conception of social behavior, which characterizes actors as driven solely by explicit beliefs and conscious intentions.¹⁹ Implicit bias is discriminatory bias that “can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”²⁰ Implicit bias can be based on two subcomponents: implicit attitudes and implicit stereotypes.²¹

An attitude focuses on the positivity, rather than the content of a trait, and is characterized by social psychologists as an evaluative disposition—“the tendency to like or dislike, or to act favorably or unfavorably toward, someone or something.”²² This concept is illustrated through the scenario of a person forming an impression of a political candidate’s spouse, child, or sibling, knowing nothing about the political candidate’s relative other than the relation to the candidate.²³ This person is likely to form a positive or negative attitude toward the relative in correlation with the like or dislike he or she has for the candidate. The attitude toward the relative thus implicitly indicates the attitude toward the candidate.²⁴

A stereotype focuses on the content of a trait and is defined as a “mental association between a social group or category and a trait.”²⁵ For example, one experimental demonstration revealed a “false-fame” effect with respect to male versus female names.²⁶ The study concluded that because participants mistook male names as being famous, but did not mistake female names as being famous, such an effect reflected an implicit stereotype that associates males with fame-deserving achievement.²⁷ A stereotype thus connects a social group with a substantive trait. Implicit bias can therefore cause a decision maker to form a positive or negative attitude toward the member of a minority group and assume that this member possesses certain substantive traits.

18. Greenwald & Krieger, *supra* note 8, at 946.

19. *Id.*; see also FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* 79 (1958) (suggesting that “naïve” psychology refers to lay intuitions about determinants and consequences of human thought and behavior).

20. Greenwald & Krieger, *supra* note 8, at 951.

21. *Id.* at 948.

22. *Id.*

23. *Id.* at 948–49.

24. *Id.* at 949.

25. *Id.* at 946.

26. Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Gender Stereotyping in Judgments of Fame*, 68 *J. PERSONALITY & SOC. PSYCHOL.* 181, 183–84 (1995).

27. *Id.* at 182.

2. An Empirical Test for Implicit Bias: Implicit Association Test

Empirical tests reveal the pervasive presence of implicit bias across various social subgroups and indicate that people are largely unaware of the implicit biases they possess. The Implicit Association Test, known as the IAT, aims to empirically measure the degree of implicit bias exercised by a subject.²⁸ The most commonly used IAT measure, the Race IAT, assesses implicit attitudes toward African Americans as compared to European Americans.²⁹ IAT subjects undergo a series of tasks measuring their attitude toward each race. Subjects are shown pictures of African American (AA) faces and European American (EA) faces, each of which are paired with a word having either a pleasant or unpleasant connotation.³⁰ The subjects must then categorize the face-word combination as either “pleasant” or “unpleasant,” and the speed of this decision is recorded.³¹ Researchers are able to draw conclusions about implicit attitudinal preferences from the speed of each subject’s response.³²

The predictive validity of IAT measures, meaning the correlation of these predictive measures with measures of behavior, has been shown to be significantly greater than that of explicit (self-reported) measures in studies focusing on prejudicial attitudes and stereotypes.³³ Thus, people are more implicitly biased than they realize. Furthermore, in the context of socially sensitive scenarios, such as interactions amongst races, “impression-management processes might inhibit people from expressing negative attitudes or unattractive stereotypes” outright.³⁴ Consequently, implicit measures of bias in such situations have relatively greater predictive validity than do explicit measures.³⁵

IAT data amassed since 1998 reveals that bias found within social subgroups toward various disadvantaged groups is more pronounced in implicit measures than in explicit measures. The data depicted below in Table 1 compares the degree of favoritism test subjects held toward advantaged versus disadvantaged groups.³⁶ This table reports the results of the explicit measure, in which subjects self-reported a preference for or neutrality toward either the disadvantaged or advantaged group, as

28. Greenwald & Krieger, *supra* note 8, at 952.

29. *Id.*

30. *Id.* Researchers base these conclusions on the premise that it is easier to give a “pleasant” or “unpleasant” assessment when the face-word combination match up, and more difficult to give an assessment when the one of the face-word variables is “pleasant” and the other “unpleasant.” For example, American subjects taking the Race IAT responded faster when a European American face, rather than an African American face, was paired with a “pleasant” word, indicating that these subjects had a stronger “pleasant” association with European American faces than with African American faces. *Id.*

31. *Id.*

32. *Id.* at 953.

33. *Id.* at 954.

34. *Id.* at 954–55.

35. *Id.* at 954.

36. *Id.* Implicit Association Tests are made available to the public by Project Implicit, a multiuniversity research collaboration between Brian Nosek of University of Virginia, Mahzarin Banaji of Harvard University, and Anthony Greenwald of the University of Washington. See *Select a Test*, PROJECT IMPLICIT <https://implicit.harvard.edu/implicit/demo/selectatest.html> (last visited Oct. 28, 2012) (providing free online Implicit Association Tests to evaluate participant’s implicit biases toward traits such as weight, sexuality, gender, disability, religion, age, skin-tone, and race).

well as the IAT results in which implicit bias was analyzed. Table 1 offers an index column for both the explicit and implicit categories, which reports a bias index for each topic, “computed as the percentage of respondents showing favorability to the advantaged group minus the percentage showing favorability to the disadvantaged group.”³⁷ A higher index represents a more pervasive bias. Because this data was amassed from a voluntary sample of participants, the data does not represent an accurate attitude distribution of a given population, but it does indicate that implicit attitude measures reveal a greater degree of bias favoring advantaged groups than do explicit measures.³⁸

37. Greenwald & Krieger, *supra* note 8, at 955.

38. *Id.*

Table 1. Distributions of Responding on Self-report (Explicit) and IAT (Implicit) Measures ³⁹												
Disadvantaged group	Advantaged group	N	% biased toward disadvantaged (dis) and advantaged (adv) groups, and % neutral (neu)						IAT (Implicit)			
			dis	adv	neu	dis	adv	neu	dis	adv	neu	index
IAT Demonstration Web Site Tests												
Afr. American	Eur. American	22074	11.3%	54.6%	34.0%	23%	10.6%	24.1%	65.3%	55%		
Old	Young	11528	16.7%	36.8%	46.6%	30%	4.7%	14.3%	81.1%	76%		
IAT Research Web Site Tests												
Afr. American	Eur. American	211	11.8%	56.4%	31.9%	20%	12.3%	18.5%	69.2%	57%		
Asians	Whites	211	16.4%	56.9%	26.7%	10%	11.3%	25.9%	62.8%	51%		
Canadian	American	218	24.1%	39.5%	36.4%	12%	13.3%	21.7%	65.0%	52%		
Foreign places	American places	178	20.9%	36.6%	42.4%	22%	9.6%	14.0%	76.4%	67%		
Gay people	Straight people	217	14.3%	45.7%	40.0%	26%	8.3%	22.9%	68.8%	60%		
Muslims	Jews	144	10.4%	49.3%	40.3%	30%	11.1%	20.7%	68.2%	57%		
Old people	Young people	236	27.4%	39.2%	33.5%	6%	5.5%	15.6%	78.9%	73%		
Poor	Rich	211	36.7%	37.6%	25.7%	-11%	1.4%	4.3%	94.3%	93%		
Fat people	Thin people	239	13.4%	42.4%	44.2%	31%	13.1%	20.8%	66.1%	53%		
Japan	USA	263	19.9%	19.9%	60.2%	40%	6.2%	15.2%	78.7%	73%		
AVERAGES (12 data sets, unweighted)			19.5%	42.4%	38.1%	20%	9.2%	18.0%	72.8%	64%		

39. *Id.* at 957 (reporting data from Brian A. Nosek, *Moderators of the Relationship Between Implicit and Explicit Evaluation*, 134 J. EXPERIMENTAL PSYCHOL.: GEN. 565 (2005)).

Table 2, below, compares the presence of both explicit and implicit racial bias found in various subcategories of test participants. This table indicates that the percentage of respondents who display implicit bias remains relatively consistent across these subgroups.⁴⁰

Subcategories	N	Self-report (Explicit)			IAT (Implicit)			Index	
		AA	neither	EA	AA	neither	EA		
Education Level									
firm high school grad	3869	9.9%	57.9%	32.2%	22%	9.8%	26.2%	64.0%	54%
at least some college	13028	11.3%	54.1%	34.6%	23%	10.2%	23.2%	66.6%	56%
at least some grad school	3829	12.5%	53.5%	34.0%	21%	12.4%	24.8%	62.9%	50%
Race and Ethnicity									
Black (incl. multiracial)	2277	58.9%	36.2%	4.8%	-54%	34.1%	33.6%	32.4%	-2%
Hispanic (not Black)	1204	15.0%	59.7%	25.3%	10%	10.2%	29.2%	60.5%	50%
Asian & Pacific Islander	1080	9.6%	57.5%	32.9%	23%	7.7%	24.8%	67.5%	60%
White	14805	3.4%	56.0%	40.7%	37%	6.8%	21.7%	71.5%	65%
Age									
under 25	13823	9.7%	55.7%	34.5%	25%	9.4%	23.7%	66.9%	58%
25-44	5403	14.9%	53.9%	31.2%	16%	12.8%	24.4%	62.8%	50%
45 and older	1743	12.3%	47.1%	40.6%	28%	12.6%	25.6%	61.8%	49%
Sex									
Female	13060	12.3%	57.8%	29.8%	17%	11.4%	25.2%	63.4%	52%
Male	7971	9.6%	49.4%	41.0%	31%	9.2%	22.2%	68.6%	59%
Political Ideology									
Conservative	3053	4.8%	44.0%	51.2%	46%	6.5%	19.9%	73.6%	67%
Middle	10612	11.0%	54.0%	35.0%	24%	10.3%	23.8%	65.9%	56%
Liberal	6427	14.8%	59.9%	25.3%	11%	12.9%	26.0%	61.1%	48%

40. *Id.*

41. *Id.* at 958 (reporting data from Nosek, *supra* note 39, at 565).

Implicit bias influences nondeliberate or spontaneous discriminatory behaviors and can therefore affect employment-related interactions to the detriment of minority applicants.⁴² A study by Professors Allen R. McConnell and Jill M. Leibold showcased implicit bias' effect on behavior.⁴³ In this study, white subjects who had taken a race IAT were videotaped while being interviewed by black and white experimenters.⁴⁴ Subjects whose IAT results had indicated strong implicit preference for white over black people displayed a higher level of comfort with the white interviewer; they hesitated less, spoke more, smiled more, and made fewer speech errors.⁴⁵ A study by Professors Carl O. Word, Mark P. Zanna, and Joel Cooper, which predates the IAT, illustrated this correlation with respect to interviewers.⁴⁶ In this study, when white subjects interviewed black applicants, they spent less time speaking with these candidates and showed greater indications of nonverbal discomfort;⁴⁷ the McConnell and Leibold study found these factors to be predicted by the IAT.⁴⁸ Thus, implicit bias is more pervasive than people are consciously aware, is consistently present across a variety of social subgroups, and may affect behavior such as interview interactions in ways that can disadvantage minority job applicants.⁴⁹

C. *Implicit Bias and Title VII Employment Discrimination: An Emerging Issue*

Some scholars argue that implicit bias can be seamlessly integrated into the existing standards for Title VII claims,⁵⁰ provided courts adopt a behavioral-realist understanding of cognitive decision making,⁵¹ and courts have begun to recognize implicit bias as having a legitimate role in Title VII case law.⁵² Title VII of the Civil Rights Act of 1964 states: "It shall be an unlawful employment practice for an

42. See *id.* at 961 (finding substantial evidence to suggest implicit attitudes produce discriminatory behavior).

43. Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001).

44. *Id.* at 437; see also Greenwald & Krieger, *supra* note 8, at 961 (describing the McConnell and Leibold study and results).

45. *Id.* at 439.

46. Carl O. Word et al., *The Nonverbal Mediation of Self-Fulfilling Prophecies in Interracial Interaction*, 10 J. EXPERIMENTAL SOC. PSYCHOL. 109, 109 (1974).

47. *Id.* at 115.

48. Greenwald & Krieger, *supra* note 8, at 961.

49. See Word et al., *supra* note 46, at 119–20 (suggesting that different treatment of black and white applicants receive can influence the performance and attitudes of job candidates).

50. Title VII claims are statutory claims derived from 42 U.S.C. § 2000e (2006).

51. See Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1001, 1052–53 (2006) (explaining behavioral realism to stand for the proposition that "where the real world phenomena relevant to a particular area of law concern human social perception, motivation, and judgment, the relevant domains of empirical inquiry with which legal theories should remain consistent include cognitive social psychology and the related social sciences").

52. See *infra* Part II.C for a discussion of the ways in which courts have recognized implicit bias in employment discrimination case law.

employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin"⁵³ A plaintiff bringing a Title VII employment discrimination suit will present his or her claim using the evidentiary framework defined in *McDonnell Douglas Corp. v. Green*.⁵⁴ First, the plaintiff must establish a prima facie case that he was within a protected class, he was qualified for the position and met the employer's legitimate performance expectations, he was adversely affected, and that the evidence presented is sufficient to give rise to an inference of unlawful discrimination (i.e., similarly situated applicants or employees not of the plaintiff's protected class were treated more favorably).⁵⁵ Second, the burden of production shifts to the employer; he must rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for the action.⁵⁶ Finally, the burden shifts back to the plaintiff in order to show that the employer's stated reason for the action was only a pretext for illegal discrimination.⁵⁷ While this framework is firmly established, the following overview explores the lingering issues—courts and scholars have wrestled with the causation, pretext, and evidentiary questions that accompany the burden-shifting test, using contrasting approaches that have evolved throughout jurisprudential development. Specifically, scholarly and jurisprudential discord persists as to the application of the honest belief rule when evaluating an employer's proffered nondiscriminatory reason in a mixed-motive discrimination suit, the treatment of subjective evaluation methods offered as evidence to prove both intentional and unintentional discrimination, and practical problems with imposing liability for unconscious discrimination.

1. The Causation Requirement: Recognition of a Mixed-Motive Claim and Appropriate Evidentiary Standards

Title VII case law has evolved to recognize a "mixed-motive" claim for discrimination. In *Price Waterhouse v. Hopkins*,⁵⁸ the Supreme Court answered the question with which courts had been grappling: what is required for discrimination to be "because of" a person's protected trait?⁵⁹ The *Price Waterhouse* Court recognized a mixed-motive claim under Title VII, holding that

[w]hen . . . an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex and the other, legitimate considerations—even if we may say later, in the context of

53. 42 U.S.C. § 2000e-2(a)(1).

54. 411 U.S. 792 (1973).

55. *McDonnell Douglas*, 411 U.S. at 802–05.

56. *Id.* at 802.

57. *Id.*

58. 490 U.S. 228 (1989).

59. See 42 U.S.C. § 2000e-2(a)(1) (2006) (stating that it is unlawful for an employer to fail or refuse to hire *because of* an individual's race, color, religion, sex, or national origin); *Price Waterhouse*, 490 U.S. at 238 n.2 (stating that the standard for causation under Title VII has "left the Circuits in disarray" and discussing the various approaches of the circuits). Despite deciding *Price Waterhouse* in 1989, some level of disarray remains nearly twenty years later. See, e.g., *Rweyemamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (holding a Title VII claim unconstitutional as applied in the context of the ministerial exception).

litigation, that the decision would have been the same if gender had not been taken into account.⁶⁰

The Court also concluded that the employer had an affirmative defense if it could prove that it would have made the same decision had gender not played a part.⁶¹

The Supreme Court revisited the issue in *Desert Palace, Inc. v. Costa*⁶² and determined that a plaintiff does not have to provide direct evidence of discrimination order to gain a mixed-motive jury instruction.⁶³ Rather, based on the statutory language found in the Civil Rights Act of 1991, which provides that “an unlawful employment practice is established ‘when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice,’”⁶⁴ the Court held that circumstantial evidence can be used in order to obtain the mixed-motive instruction.⁶⁵

a. The Pretext Element: The Honest Belief Rule

Various circuits follow an “honest belief rule” when evaluating an employer’s proffered reason for taking adverse action.⁶⁶ Many *McDonnell Douglas* discrimination cases hinge on “whether an employer’s legitimate nondiscriminatory reason is pretext for discrimination.”⁶⁷ The pretext step, as outlined in the final burden-shift in the *McDonnell Douglas* framework, gives the plaintiff the chance to show that the employer’s legitimate reason was a “phony” rather than real reason for the adverse action.⁶⁸ Various circuits have adopted an “honest belief rule” that shields the employer from pretext-based liability when the employer’s legitimate reason is honestly held, but perhaps without basis in fact.⁶⁹ Thus, the honest belief rule, which has been adopted by every circuit but the Second and Third,⁷⁰ focuses on an employer’s subjective belief in its proffered legitimate nondiscriminatory reason.⁷¹ For example, in *Jackson v. E.J.*

60. *Price Waterhouse*, 490 U.S. at 241.

61. *Id.* at 246.

62. 539 U.S. 90 (2003).

63. *Desert Palace*, 539 U.S. at 101.

64. *Id.* at 94 (quoting 42 U.S.C. § 2000e-2(m)).

65. *Id.* at 99–100.

66. *E.g.*, *Kariotis v. Navistar Int’l Transp. Corp.*, 131 F.3d 672, 681 (7th Cir. 1997); *Fishbach v. D.C. Dep’t of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996); *see also* Rebecca Michaels, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?*, 71 *FORDHAM L. REV.* 2643, 2657 (2003).

67. Michaels, *supra* note 66, at 2656.

68. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1129 (7th Cir. 1997) (quoting *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996)).

69. Michaels, *supra* note 66, at 2657.

70. *E.g.*, *Cooper v. Southern Co.*, 390 F.3d 695, 729–30 (11th Cir. 2004), *overruled on other grounds by* *Ash v. Tyson Foods*, 546 U.S. 454 (2006); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002); *Braithewaite v. Timken Co.*, 258 F.3d 488, 496 (6th Cir. 2001); *Hawkins v. PepsiCo, Inc.* 203 F.3d 274, 279–80 (4th Cir. 2000); *Evans v. Dean Foods Co.*, No. 99-4148, 2000 WL 1260493, at *3 (10th Cir. Sept. 6, 2000); *Deines v. Tex. Dep’t of Protective & Regulatory Servs.*, 164 F.3d 277, 280–81 (5th Cir. 1999); *Euerle-Wehle v. United Parcel Serv., Inc.*, 181 F.3d 898, 900 (8th Cir. 1999); *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 248 (1st Cir. 1997); *Kariotis v. Navistar Int’l Transp. Corp.*, 131 F.3d 672, 681 (7th Cir. 1997); *Fishbach v. D.C. Dep’t of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

71. Michaels, *supra* note 66, at 2657.

Brach Corp.,⁷² the Seventh Circuit held that a plaintiff was unable to prevail if the decision maker “honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.”⁷³ Thus, the honest belief rule turns on the party’s conscious reasoning, rather than unconscious or implicit motivations.

b. The Behavioral Realism Approach to Pretext: Eradicating the Honest Belief Rule

Some scholars contend that the honest belief rule is inconsistent with empirical social psychologists’ understanding of decision making and reflects Title VII jurisprudence’s fundamental misconception of the behavioral reality of the human decision making process.⁷⁴ In *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, behavioral realist scholars Linda Hamilton Krieger and Susan T. Fiske argue that this misunderstanding lies in an unsubstantiated judicial assumption that when people discriminate, they are aware that they are doing so.⁷⁵ Thus, the honest belief rule assumes that the reason an employer offers to justify its action is “an ‘honest answer’ or a deliberate lie.”⁷⁶

This assumption is faulty because actors are cognizant of neither their implicit biases nor the reasons driving their actions. Because stereotypes function as implicit expectancies rather than consciously held beliefs, a decision maker may believe that his judgment and resulting decision was driven entirely by legitimate nondiscriminatory reasons, when in reality, his biased judgment of a negatively stereotyped target drove him to discriminate against that target.⁷⁷ Furthermore, the strong antidiscrimination norms of many modern societies create substantial motivation for people to consider themselves to be nonprejudiced and to portray themselves to others as such.⁷⁸ Thus, actors with implicit preferences may unconsciously search for independent decision criteria that align with these preferences, utilizing such criteria to justify their decisions.⁷⁹

A series of experiments performed by Massachusetts Institute of Technology Professor Michael Norton exemplified this unconscious effect in hiring scenarios.⁸⁰ In

72. 176 F.3d 971 (7th Cir. 1999).

73. *Jackson*, 176 F.3d at 984 (quoting *Debs v. Northeastern Ill. Univ.*, 153 F.3d 390, 396 (1998)). See also *Crim v. Bd. of Educ.*, 147 F.3d 535, 541 (7th Cir. 1998) (stating that even if an employer’s proffered reasons were “mistaken, ill-considered or foolish, if the [defendant] honestly believed in those reasons then pretext has not been proven”).

74. Krieger & Fiske, *supra* note 51, at 1035. See *supra* Part II.B for a discussion of empirical sociological studies regarding the prevalence of implicit bias versus explicit bias. See *supra* Part II.C.1.a for a discussion of Title VII jurisprudence.

75. Krieger & Fiske, *supra* note 51, at 1035 (characterizing judicial treatment of the honest belief rule as “the operation of an unstated and unexamined judicial theory about the nature of discriminatory motivation itself—that when people discriminate they know that they are doing so”).

76. *Id.* at 1038.

77. *Id.*

78. *Id.* at 1037.

79. *Id.*

80. Michael I. Norton et al., *Casuality and Social Category Bias*, 8 J. PERSONALITY & SOC. PSYCHOL. 817, 829 (2004).

this experiment, subjects altered the hiring criteria they found most important to candidate selection for a stereotypically male construction job when considering both male and female applicants.⁸¹ When the male candidate had more education and less job experience, subjects who preferred the male candidate stated that they found education to be more important than job experience.⁸² When the male candidate had more job experience and less education than the female candidate, these subjects stated that job experience was more important than education.⁸³ However, when participants ranked the selection criteria before finding out the candidate's gender, gender bias in selection largely disappeared.⁸⁴ Thus, the weight a decision maker affords certain selection criteria unconsciously shifts in order to justify the implicit biases the decision maker possesses.⁸⁵ The behavioral realism approach imposes liability on these actors—who would otherwise have a defense under the honest belief rule—because a protected characteristic in part motivated their decision making process, regardless of their own beliefs about their decisional motivations.

Scholars argue that the behavioral realist approach harmonizes with the language of Title VII. Krieger and Fiske contend that because the word “intentional” is absent from Title VII's Section 703(a)(1), the intent requirement is born of unsubstantiated judicial construction⁸⁶ and that a textualist reading of Title VII does not necessitate that “motivation” be construed as synonymous with “intent.”⁸⁷ Thus, if a Title VII plaintiff can prove that the application of race, gender, ethnic, or similar protected trait stereotypes motivated an actor and therefore robbed her of an employment opportunity, although this application was inadvertent, such motivation would be covered by Title VII; this broad construction would conform with the statute's normative goals and remedial nature.⁸⁸

2. Proving Implicit Bias in an Employment Discrimination Claim: Types of Circumstantial Evidence

Proof of application of implicit stereotypes “can be proven or disproven through the same types [of] evidence long recognized as relevant on the question of intent in disparate treatment adjudication.”⁸⁹ In most cases, the fact that a protected-group status

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 821–22.

85. Krieger & Fiske, *supra* note 51, at 1037.

86. *Id.* at 1053.

87. Krieger & Fiske analyze the distinct definitions of “motive” versus “intent,” and state that, “motivating factor” is an internal mental state, a category that includes cognitive structures like implicit stereotypes or other social schema that influence social perception, judgment, and action. For race, color, sex, national origin, or other protected characteristics to “motivate” an employment decision means that the characteristic served as a stimulus which, interacting with the decision maker's internal biased mental state, led the decision maker to behave toward the person differently than he otherwise would.

Id. at 1056.

88. *Id.* at 1058.

89. *Id.* at 1059.

was a “motivating factor” in the employment action is proved or disproved by circumstantial evidence, comprised of numerous evidentiary facts and reasonable inferences that, as a whole, establish the existence of the element by a preponderance of the evidence.⁹⁰

The Supreme Court has outlined the types of evidentiary facts a fact finder may consider in a disparate treatment case in deciding whether protected group status was a motivating factor.⁹¹ These facts include: evidence indicating similarly situated persons outside the plaintiff’s protected group were treated more favorably than the plaintiff or other members of the plaintiff’s group;⁹² decision makers’ statements or expressive conduct revealing stereotypes or negative attitudes toward the plaintiff or others in the plaintiff’s protected group;⁹³ the general pattern of the employer’s treatment of members of the plaintiff’s group, including statistical data;⁹⁴ the particular decision maker’s treatment of the plaintiff and other members of the plaintiff’s protected group;⁹⁵ the defendant’s presentation of evidence of a legitimate, nondiscriminatory reason for its action;⁹⁶ whether the nondiscriminatory reasons fail to explain the employer’s decision or otherwise warrant credence;⁹⁷ whether the nature of operation of the employer’s decision-making process left room for the operation of bias;⁹⁸ and whether the employer implemented and applied effective mechanisms for detecting the possible influence of bias and for preventing such biases from influencing the ultimate decision.⁹⁹ Scholars contend these same pieces of evidence could be offered to prove that implicit stereotypes drove the decision maker’s action.¹⁰⁰

3. The Circuits’ Treatment of Implicit Bias and Subjective Evaluation Methods in Employment Discrimination Case Law

Various courts have integrated the concept of implicit bias into decisions regarding employment discrimination cases. Some have also recognized that subjective

90. *Id.*

91. *See id.* at 1060.

92. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 151–52 (2000).

93. *Id.* at 151.

94. *Patterson v. McClean Credit Union*, 491 U.S. 164, 188 (1989).

95. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–05 (1970).

96. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

97. *Reeves*, 530 U.S. at 147.

98. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

99. *Id.*

100. Krieger & Fiske explain:

Under the behaviorally realistic approach to defining discriminatory motivation . . . these species of evidence are as probative as they have always been. What changes under a behavioral realist interpretation of Section 703(m) is that the set of inferences that can reasonably be drawn from these species of evidence and what exactly ‘discriminatory motivation’ means, as an essential element of the plaintiff’s disparate treatment claim. For example, comparative evidence showing that an African-American plaintiff was treated more harshly than a similarly situated White employee in a disciplinary situation could be offered to show that implicit stereotypes had caused the decision-maker to perceive the plaintiff’s misconduct to have been more serious, reprehensible, or likely to recur, than the similar misconduct of the White comparator.

Krieger & Fiske, *supra* note 51, at 1060.

evaluation methods may fail to provide safeguards from unconscious discrimination.

a. The Circuits' Treatment of Implicit Bias

Various circuits have addressed the issue of implicit bias. The First Circuit recognized the concept of implicit bias, stating that in the case of an African American plaintiff asserting discrimination on the part of her manager, the question of whether she had been treated disparately because of race is valid “regardless of whether the employer consciously intended to base the evaluation on race, or simply did so because of unthinking stereotypes or bias.”¹⁰¹ Similarly, a court in the Eastern District of Wisconsin addressed the presence of implicit bias in a discrimination suit in which the plaintiff alleged various race-driven actions on the part of his employer.¹⁰² The court suggested that implicit bias was at play and focused on the subjective criteria utilized by the employer, stating that “when the evaluation of employees is highly subjective, there is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware,” and that “stereotyping can constitute evidence of discrimination.”¹⁰³ A court in the Middle District of Alabama echoed this reasoning, concluding that a plaintiff’s inability to show that the employer’s decision was “impermissibly motivated by discriminatory animus does not necessarily mean that no discrimination occurred in the selection process.”¹⁰⁴ The court found that it would be possible for the school board to choose the individual it perceived to be the “best” candidate, yet still subject the plaintiff to discrimination.¹⁰⁵ The court concluded that by “insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended.”¹⁰⁶

b. The Circuits' Treatment of Subjective Evaluation Methods in the Context of an Employment Discrimination Claim

Numerous other courts have examined employers’ subjective evaluation methods with suspicion in light of the possibility that subjective methods may be used to mask

101. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999); *see also Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984) (noting that plaintiffs in a disparate treatment case can challenge “subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white managers”); *Sweeney v. Bd. of Trs. of Keene State Coll.*, 569 F.2d 169, 179 (1st Cir. 1978) (permitting a challenge to a decision process in which “bias may often be unconscious and unexpressed”), *vacated on other grounds*, 439 U.S. 24 (1978).

102. *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F.Supp.2d 765, 770, 776–77 (E.D. Wis. 2010) (addressing the case in which plaintiff alleged that his employer did not give him a raise because he was black, did not acknowledge plaintiff’s achievements, was quick to blame plaintiff, and overlooked the faults of non-black employees).

103. *Id.* at 775–76 (citing *United States v. Stephens*, 421 F.2d 503, 515 (7th Cir. 2005)) (stating that “[u]nfortunately, racial stereotyping and unconscious bias is not limited to one particular area of society . . . the evidence of continued racial stereotyping in employment, housing, insurance and many other areas makes that apparent”).

104. *Thomas v. Troy City Bd. of Educ.*, 302 F.Supp. 2d 1303, 1309 (M.D. Ala. 2004).

105. *Id.*

106. *Id.* (quoting Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987)).

intentional discrimination. As a court in the District of Maryland reasoned, “[p]laintiffs do not and cannot allege that subjective decision making itself is a practice that discriminates. Rather, they can only allege that it allows a situation to exist in which several different managers are able to discriminate intentionally.”¹⁰⁷ The Third Circuit likewise held that subjective evaluations “are more susceptible of abuse and more likely to mask pretext.”¹⁰⁸ Similarly, the Tenth Circuit concluded that “[c]ourts view with skepticism subjective evaluation methods.”¹⁰⁹ The Second Circuit correspondingly held that “greater possibilities for abuse are inherent in the utilization of such subjective values.”¹¹⁰ The Seventh Circuit asserted that “[i]t is true that an employer’s use of subjective criteria may leave it more vulnerable to a finding of discrimination, when a plaintiff can point to some objective evidence indicating that the subjective evaluation is a mask for discrimination.”¹¹¹

However, courts have declined to establish subjective decision making as “discrimination per se.”¹¹² As one approach, the Tenth Circuit held that certain parameters for subjective criteria in employment decision making would be appropriate, focusing on the consistency of the hiring process from candidate to candidate, the relevance of the evaluation criteria to the job in question, and the adherence of the interviewers to guidelines provided by the company.¹¹³ The court reviewed the testing and interview procedures for potential hires to determine whether the procedure created a discriminatory mechanism that excluded female applicants.¹¹⁴ While the plaintiff succeeded in establishing a prima facie case pursuant to the *McDonnell Douglas* framework,¹¹⁵ the court held that the employer proffered a legitimate, nondiscriminatory reason for choosing not to hire her when the employer stated that she performed poorly in her interview.¹¹⁶ The plaintiff argued that the interview process was a sham aimed at concealing the company’s discriminatory hiring process, but the court disagreed.¹¹⁷ It stated that “although ‘the presence of subjective decision-making can create a strong inference of discrimination,’ the use of subjective considerations by employers is ‘not unlawful per se.’”¹¹⁸

The court held that the interview process used a system to rate interviewees that

107. *Brooks v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1996 WL 406684, at *4 (D. Md. June 17, 1996), *order vacated*, 148 F.3d 373 (4th Cir. 1998).

108. *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) (quoting *Fowle v. C & C Cola*, 868 F.2d 59, 64–65 (3d Cir. 1989)).

109. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002).

110. *Walker v. N.Y. State Office of Mental Health*, No. 977367, 1998 WL 639392, at *2 (2d Cir. Apr. 6, 1998).

111. *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998).

112. *See, e.g., Turner v. Public Serv. Co. of Colo.*, 563 F.3d 1136, 1145 (10th Cir. 2009) (declining to establish the use of subjective criteria in employment decisions as discrimination per se).

113. *Id.* at 1145–46.

114. *Id.* at 1145.

115. *See supra* Part II.C for a discussion of the *McDonnell Douglas* framework used in establishing a Title VII discrimination claim.

116. *Turner*, 563 F.3d at 1143–50.

117. *Id.*

118. *Id.* at 1144 (citing *Bauer v. Bailar*, 647 F.2d 1037, 1045–46 (10th Cir. 1981)).

was not excessively subjective because each applicant answered the same questions, and the interviewers ranked the applicants' responses using predetermined criteria from the company's interview guide.¹¹⁹ These questions inquired into job-related competencies, such as technical orientation and communication skills, and such competencies were mandatory considerations for interviewers (as opposed to discretionary considerations the interviewers could choose to evaluate for one candidate but not for another).¹²⁰ Finally, although the interview questions did not result in "measurable data," the interview process required interviewees to "think on their feet and thereby supply insight as to adaptability and trainability."¹²¹ Because of the nature of the job for which candidates were interviewing, the agility in each candidate's response to identical questions was relevant to the applicants' qualifications.¹²² Thus, "the evaluations made by the interview panels were not based on whims or unguided opinions."¹²³ The court concluded that the interview process was thus not "wholly subjective," and therefore was not pretextual.¹²⁴

4. Recognizing Liability for Unconscious Discrimination: Practical Considerations

Many scholars maintain that Title VII does not rule out the imposition of liability for unconscious discrimination,¹²⁵ and courts have begun to recognize unconscious discrimination.¹²⁶ However, imposing liability on employers for such discrimination may prove ineffective as a deterrent measure because of the difficulty in controlling discrimination driven by implicit biases in real-life employment settings. Because unconscious discrimination can be largely inadvertent in nature,¹²⁷ an attempt to utilize unconscious discrimination liability as prophylactic mechanism may overstate "the degree to which automatically activated stereotypes can be controlled through good intentions and effortful thought."¹²⁸ In order for judgments to be made without implicit bias, four conditions must be met: (1) the decision maker must be aware of the

119. *Id.* at 1145–46.

120. *Id.*

121. *Id.* at 1146.

122. *Id.*

123. *Id.*

124. *Id.*

125. Amy L. Wax, *Discrimination As Accident*, 74 *IND. L.J.* 1129, 1146 (1999); see e.g. David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. CHI. L. REV.* 935, 937–39 (1989) (questioning the usefulness of a discriminatory intent standard); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 *S. CAL. L. REV.* 733, 734–36 (1987) (suggesting that Title VII cases need not require proof of intent). See *supra* notes 86–88 and accompanying text for a discussion of the argument that Title VII prohibits unconscious discrimination.

126. See *supra* Part II.C.3.a for a discussion of various circuits' recognition of unconscious discrimination.

127. *Cf.* Wax, *supra* note 125, at 1196 (stating that "the discriminatory 'accidents' represented by contaminated assessments of employees in the workplace may be unavoidable, in the sense that there are no known effective precautions that can be taken against them").

128. *Id.* at 1158–59 (quoting John A. Bargh, *The Cognitive Monster: The Case Against the Controllability of Automatic Stereotype Effect*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY* 361, 362 (Shelly Chaiken & Yaacov Trope eds., 1999)).

“unwanted mental process” by either a “direct introspective access to the process” or “external evidence indicating that the bias is operating,” (2) the individual must be motivated to amend his ways, (3) if motivated, the decision maker “must be aware of the direction and magnitude of the bias,” and (4) the individual must have “sufficient control over [the responses] to be able to correct the unwanted mental processing.”¹²⁹

In most cases of implicit bias, especially when people engage in the subjective assessments common to a real-life employment setting, these conditions cannot be achieved.¹³⁰ For example, a person working on a group project with a member of a protected class would be influenced by implicit bias when considering the suggestions and contributions of that coworker. Because people cannot detect unconscious mental contamination at work due to a lack of introspective access to their unconscious processes, any attempt to detect unconscious bias from the “outside” by looking at the results of a handful of workplace decisions is thus unlikely to yield reliable evidence of mental contamination—people are unable to recognize the exact contribution of all outside influences to a judgment.¹³¹ Thus, no known interventions can reduce or eliminate implicit bias in real-life social encounters.¹³²

5. Methods for Eliminating Implicit Bias: Exposure Control and Evaluative Objectivity

In social and occupational evaluation settings, however, there exist two reliable methods for eliminating race- or sex-based biases: exposure control and exclusively objective evaluation.¹³³ Exposure control consists of “depriving the discretionary decision maker of any information or knowledge about the target’s protected characteristic,” and in turn eliminating the presence of implicit bias.¹³⁴ For example, the rules of evidence dictate that juries may not receive certain information that may lead to bias and similarly, scholarly journals utilize exposure control in masking the author’s identity from the reviewer.¹³⁵ A symphony orchestra’s implementation of a blind audition system illustrates exposure control’s effectiveness in eliminating implicit bias in a prehire setting.¹³⁶ Blind auditions, meaning auditions performed behind a screen so that the gender of the musician was shielded, accounted for a twenty-five

129. *Id.* (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117–20 (1994)).

130. *Id.*

131. *Id.* at 1159–60.

132. *Id.* at 1161.

133. *Id.* at 1161 n.96.

134. Wilson & Brekke, *supra* note 129, at 134–35.

135. See FED. R. EVID. 412 advisory committee’s note (stating that in order to safeguard an alleged victim against “sexual stereotyping,” evidence regarding a victim’s sexual behavior or predisposition is inadmissible in a civil or criminal proceeding involving alleged sexual misconduct); see also Jonathan Gingerich, *A Call For Blind Review: Student Edited Law Reviews and Bias*, 59 J. LEGAL EDUC. 269, 272 (2009) (advocating for a blind review policy in student-run law review submissions, and recounting a scholarly ecology journal’s institution of a double-blind review policy that accounted for a 7.9% increase in acceptances of female-authored papers).

136. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 727 (2000).

percent increase in the hiring of orchestra musicians who were female.¹³⁷

As an alternative technique, the use of solely objective evaluations, rather than subjective, precludes the use of a decision maker's individual discretion¹³⁸ and thus prevents the implicit bias from influencing the evaluation in any way. For example, when comparing the objective standardized test scores of two applicants, the reviewer has no opportunity to exercise personal judgment and thus the evaluation is uninfluenced by unconscious biases; a score in the ninety-eighth percentile is objectively higher and more desirable than a score in the sixty-eighth percentile. In contrast, a reviewer's subjective written review as to the quality of a candidate's interpersonal skills mandates the use of individual discretion; because this written review is based on the reviewer's personal opinion of the applicant's interpersonal skills, the reviewer's unconscious biases can color the evaluation.

D. Social Science Expert Testimony and the Supreme Court: Rejection of "Social Framework" Evidence

While the issue of implicit bias has not been squarely addressed by the Supreme Court, the Court has articulated reticence to recognize a claim built upon similar social science theory. In considering whether a plaintiff class certification in *Wal-Mart Stores, Inc. v. Dukes*¹³⁹ was consistent with Federal Rules of Civil Procedure 23(a) and (b), the Court considered "social framework" analysis presented by respondents' sociological expert, Dr. William Bielby.¹⁴⁰ Bielby, relying on social science research, testified that "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision-maker [*sic*] discretion tends to allow people to 'seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes.'"¹⁴¹ He continued that with respect to Wal-Mart specifically, managers make decisions with a great deal of discretion and minimal oversight, and that subjective decisions such as these, in addition to discretionary wage decisions, are likely "to be biased 'unless they are assessed in a systematic and valid manner, with clear criteria and careful attention to the integrity of the decision-making process.'"¹⁴² Bielby concluded that these systematic elements were missing from Wal-Mart's decision making process, and that the company's practice of requiring relocation across stores for salaried managers, which generally creates a greater burden for women, makes the promotion process "especially

137. *Id.*

138. Wax, *supra* note 125, at 1161 n.96 (citing Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157, 1158 (1991)).

139. 131 S.Ct. 2541 (2011).

140. *Wal-Mart*, 131 S.Ct. at 2553.

141. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 153 (N.D. Cal. 2004) (holding that plaintiffs satisfied the numerosity, commonality, typicality, and adequacy requirements needed for class certification, and concluding that, while the ultimate evaluation of Bielby's testimony is reserved for a jury, "[f]or present purposes, Dr. Bielby's testimony raises an inference of corporate uniformity and gender stereotyping that is common to all class members"), *aff'd and remanded in part*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S.Ct. 2541 (2011).

142. *Id.* at 153.

vulnerable to gender stereotyping.”¹⁴³ Bielby additionally reviewed Wal-Mart’s diversity and equal opportunity policies and concluded that they have recognizable weaknesses that limit their effectiveness for identifying and eliminating discriminatory barriers; as a whole, Bielby stated that while the company increased its emphasis on diversity issues, the company had not translated that emphasis into practice and effective measures.¹⁴⁴

The Supreme Court rejected Bielby’s testimony because of its lack of specificity. Emphasizing the respondents’ need to prove commonality in order to satisfy Rule 23(a)’s requirements and gain class certification, the Court stated that Bielby could not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”¹⁴⁵ Because the Supreme Court felt that Bielby “admittedly has no answer to that question,” the Court “disregarded” his social framework testimony.¹⁴⁶

Prehire social networking checks have become a commonplace employment practice, with employers utilizing these checks to subjectively evaluate job applicants. Title VII employment discrimination jurisprudence has begun to integrate implicit bias into its unsettled landscape, recognizing that subjective evaluation methods can facilitate unconscious discrimination.

III. DISCUSSION

While the routine prehire social networking check may appear to be harmless at first blush, this practice may have a number of legal ramifications for an employer defending against a Title VII employment discrimination suit in light of certain jurisprudence leaving the matter unsettled.

This Section first explores the implications of such checks in the context of intentional discrimination suits, suggesting that a prehire social networking check may afford an employer greater opportunity to mask pretext at the third phase of the *McDonnell Douglas* framework. This Section then predicts that an employer engaging in these checks may be unable to invoke the ignorance defense when faced with an allegation of intentional discrimination and may be subject to expanded liability, and that courts may view the act of checking an applicant’s social networking profile as indicative of a discriminatory motive.

This Section next analyzes the role that prehire social networking checks may play in implicit bias discrimination cases, suggesting that by removing exposure control and imputing subjectivity into the earliest phase of the hiring process, these checks may leave hiring processes vulnerable to implicit bias. It explains how a plaintiff alleging that an employer’s implicit bias caused mixed-motive discrimination in violation of Title VII may use prehire social networking checks and supporting

143. *Id.*

144. *Id.*

145. *Wal-Mart*, 131 S.Ct. at 2553 (omission in original) (quoting *Wal-Mart*, 222 F.R.D. at 192).

146. *Id.* at 2554.

social science testimony as circumstantial evidence. This Section then contends that a plaintiff could offer evidence that an employer performed a prehire social networking check in order to establish an employer's knowledge of the applicant's protected trait, and in turn argue that implicit bias influenced the hiring decision.

This Section then offers employers a guide for navigating the problematic waters of prehire social networking checks. It outlines the proactive ways in which employers can prevent implicit bias from influencing their hiring decisions and avoid litigation. Lastly, this Section suggests that the practice of prehire social networking checks may be ripe for legislative regulation and explains the practical reasons why such regulation may be necessary.

A. *Prehire Social Networking Checks and Intentional Discrimination: Masking Pretext*

The highly subjective nature of prehire social networking checks represents a problem for employers. Because its subjectivity provides employers with a heightened opportunity to mask pretext at the third step of the *McDonnell Douglas* framework,¹⁴⁷ courts may view the practice with suspicion.¹⁴⁸ Moreover, these checks increase level of subjectivity in the otherwise objective resume-review stage of applicant evaluation, thereby allowing employers to mask pretext earlier in the hiring process than at the interview stage where some, presumably objective, selection process has occurred.

Social networking checks impute a degree of subjectivity into the earliest, otherwise objective stages of a hiring process. The eighteen percent of employers who reported that a candidate's social networking profile convinced them to hire the candidate cited nebulous and intangible reasoning for this decision—a “good feel for the candidate's personality and fit,”¹⁴⁹ the fact that the candidate was “creative,”¹⁵⁰ had “solid communication skills,”¹⁵¹ or was “well-rounded.”¹⁵² Those employers who based a candidate's rejection on a social networking evaluation stated that similarly subjective criteria drove this decision—“provocative or inappropriate”¹⁵³ photos of or information about a candidate, and “poor communication skills.”¹⁵⁴

147. See *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1218 (10th Cir. 2002) (“Courts view with skepticism subjective evaluation methods.”); see also *Walker v. N.Y. State Office of Mental Health*, No. 977367, 1998 WL 639392, at *2 (2d Cir. Apr. 6, 1998) (“Greater possibilities for abuse are inherent in the utilization of subjective values.”); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) (“It is true that an employer's use of subjective criteria may leave it more vulnerable to a finding of discrimination, when a plaintiff can point to some objective evidence indicating that the subjective evaluation is a mask for discrimination.”).

148. See *supra* Part II.C.3.b for a discussion of the circuits' treatment of subjective evaluation methods in the context of an employment discrimination claim.

149. Curley & Morway, *supra* note 1, at 104.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 102; see also Hill, *supra* note 7 (stating that employers also rejected candidates because they posted content about them drinking, posted inappropriate comments, posted content about them using drugs, or posted negative comments about a previous employer).

154. Curley & Morway, *supra* note 1, at 102.

A subjective evaluation of a candidate's communication style, personality, and fit within the organization may be inevitable in the context of a job interview. However, without a social networking check, a certain level of objectivity is preserved in the early steps of hiring, namely, the stage in which an employer reviews and compares job candidates' objective qualifications in deciding whom to interview. In this resume-review stage, an employer may critique objective criteria such as an applicant's level of education, academic record, and previous employment experience. The decision made in this stage is thus justifiable solely on the candidate's objective qualifications, and leaves the employer with little opportunity to mask intentional discrimination.

To illustrate, consider the hypothetical employment discrimination case in which a plaintiff was rejected without being interviewed, solely on the basis of his resume. After the plaintiff has established a prima facie case through the first step in the *McDonnell Douglas* framework, the burden then shifts to the employer to rebut the presumption of discrimination by producing a legitimate, nondiscriminatory reason for the action.¹⁵⁵ Had a social networking check not taken place, an employer at this stage can point only to the applicant's objective criteria in producing the nondiscriminatory reason. For example, another applicant may have attained a higher level of education than the plaintiff or may have past work experience that is particularly relevant to the job sought to be filled, or the plaintiff's academic grades may have been undesirable. The employer will be therefore forced to justify its decision with a concrete reason that a court can verify in reviewing the plaintiff's qualifications. Thus, in this scenario, the employer has minimal opportunity to mask pretext in its reasoning; the employer will find it more difficult to conceal the fact that discrimination drove the decision if its proffered reasons are limited to objective, readily verifiable criteria.¹⁵⁶

In contrast, by engaging in the subjective evaluation inherent to social networking checks prior to rejecting a candidate, an employer avails itself of a broader, more fungible basis of criteria with which to justify its decision not to interview; it is thus easier for the employer to mask pretext.¹⁵⁷ For example, the rejected plaintiff may have had identical, if not superior, objective qualifications than the hired candidate. The subjective evaluation that occurred through the social networking check provides the employer with greater latitude in formulating a legitimate, nondiscriminatory reason for rejecting the plaintiff's candidacy. While intentionally discriminatory motives may have actually driven the decision, the employer can state that after critiquing the candidate's social networking profile, he or she did not seem to "fit" the organization, while another candidate did. Such an intangible, largely subjective judgment call is less verifiable than an objective comparison of education levels or grade point averages, perhaps providing a shelter for employers who intentionally discriminate in choosing not to interview applicants with protected Title VII traits. Because of this risk, courts are likely to examine with close scrutiny the subjective evaluations an employer performs during a prehire social networking check.

155. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1970). For a further discussion of the *McDonnell Douglas* evidentiary framework see *supra* Part II.C.

156. See *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) (stating that subjective evaluations "are more susceptible to abuse and more likely to mask pretext").

157. *Id.*

As with other subjective decision making procedures, courts would most likely decline to establish social networking checks as “discrimination per se,”¹⁵⁸ but would instead conduct a holistic, case-by-case inquiry in order to determine whether the employer’s procedures masked pretext. After the plaintiff has pointed to objective evidence indicating that the subjective evaluation was a mask for discrimination¹⁵⁹ the courts would, perhaps, apply parameters such as those outlined by the Tenth Circuit when determining whether the social networking check was not pretextual in that it was not “wholly subjective”¹⁶⁰—the consistency of the hiring process from candidate to candidate, the relevance of the evaluation criteria to the job in question, and the adherence of the evaluators to company-mandated guidelines.¹⁶¹ Thus, a finding of liability may rest on the degree of consistency, relevance, and adherence to company-issued guidelines with which an employer evaluates a social networking profile.

B. Losing the Ignorance Defense in an Intentional Discrimination Suit

A prehire social networking check robs the employer of a powerful defense in a case alleging intentional discrimination—ignorance of the plaintiff’s protected trait at the time of the adverse decision. The legal implications of inquiring about protected traits in collecting an applicant’s hiring criteria deters employers from doing so; job application or interview questions regarding nationality, religion, age, marital and family status, gender, and health and physical abilities on job applications or in interviews can be used as evidence of discrimination because these inquiries are suggestive of discriminatory intent.¹⁶² For example, the fact that an employer asked the following questions could be used as evidence of discrimination, provided the employer did not do so for a legitimate purpose such as affirmative action¹⁶³: Are you a U.S. citizen? What is your native tongue? What religion do you practice? Do you belong to a club or social organization? Do you have children or plan to have children?¹⁶⁴

The common fields of many social networking sites provide the answer to these questions,¹⁶⁵ and therefore a prehire social networking check allows an employer to

158. See *Turner v. Public Serv. Co. of Colo.*, 563 F.3d 1136, 1145 (10th Cir. 2009) (declining to establish the use of subjective criteria in employment decisions as discrimination per se).

159. See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170 (7th Cir. 1998) (suggesting the need for some additional objective evidence in conjunction with evidence of subjective criteria).

160. *Turner*, 563 F.3d at 1145–46.

161. *Id.*

162. See *Questions and Answers About Race and Color Discrimination in Employment*, US EQUAL EMP. OPPORTUNITY COMM’N, http://www.eeoc.gov/policy/docs/qanda_race_color.html (last updated May 16, 2006) [hereinafter US Equal Emp’t Opportunity Comm’n] (discussing the legal ramifications an employers will face if it asks about protected traits on a job application); HR World Editors, *30 Interview Questions You Can’t Ask and 30 Sneaky, Legal Alternatives to Get the Same Info*, FOCUS, <http://www.focus.com/fyi/30-interview-questions-you-cant-ask-and-30-sneaky-legal-get/> (discussing job interview and job application questions that may be used as evidence of discrimination).

163. See US Equal Emp’t Opportunity Comm’n, *supra* note 162 (discussing the legal ramifications of asking about protected traits on a job application).

164. HR World Editors, *supra* note 162.

165. See *supra* Section I for a discussion of the fact that the fields of common social networking sites allows users to provide information regarding education, employment, date of birth, religious affiliation,

obviate the aforementioned legal safeguards and gain knowledge of the protected trait. For example, a Facebook user may include the following fields in his or her profile page: religious affiliation, hometown, and activities and interests.¹⁶⁶ An employer can therefore learn the answers to questions that are per se unlawful under Title VII. Additionally, Facebook users can include pictures and videos of themselves, and can allow other users to post comments on their profile pages.¹⁶⁷ Furthermore, employers can draw inferences from these photographs regarding protected Title VII traits. For example, a picture can reveal the applicant's race. Should a plaintiff allege that intentional discrimination occurred at the resume-review stage of the hiring process, the employer who has engaged in a prehire social networking check can therefore no longer claim ignorance of the applicant's protected trait.

In losing the ignorance defense at the resume-review stage, the employer exposes itself to expanded mixed-motive liability at an earlier phase of the hiring process.¹⁶⁸ In the context of an intentional discrimination claim, it is surely not uncommon for an employer to have unintentionally learned the answers to prohibited questions in the natural course of the hiring process. An applicant may offer this information during an interview, and traits such as race may be apparent from the applicant's physical appearance. However, at the preliminary stages of hiring, prior to an interview, an employer can generally claim ignorance of the applicant's protected trait, as long as it refrained from asking about the trait on the job application in compliance with de facto legal mandates.¹⁶⁹ Additionally, even postinterview, an employer can claim ignorance of traits, such as religion, which are not disclosed by a candidate appearance. This ignorance provides a safe harbor for employers at the resume-review stage of hiring—if an employer was unaware of a protected trait at the time it declined to interview the candidate, the protected trait could not have motivated the adverse decision.¹⁷⁰ When an employer checks an applicant's social networking profile and therefore learns of the protected trait, it departs from the safe harbor—because the employer was aware of a protected trait, the trait could have motivated the adverse decision. In relinquishing the ignorance defense, the employer risks incurring mixed-motive liability from which it would have otherwise been protected at this phase of the hiring process.¹⁷¹

Should an applicant's name suggest race membership, a prehire social networking check may strengthen a plaintiff's otherwise futile proxy discrimination claim.

political affiliation, sexual orientation, marital status, family status; join groups and indicate personal interests; post pictures and videos.

166. See FACEBOOK, <http://www.facebook.com> (last visited Oct. 28, 2012) (viewing individual profile which displays these fields).

167. *Id.* (viewing individual profile which displays these fields and options).

168. See *supra* Part II.C.1 for a discussion of a mixed-motive claim, which renders an employer liable if it considers both discriminatory and legitimate factors at the time of making a decision.

169. See US Equal Emp't Opportunity Comm'n, *supra* note 162 (discussing the legal ramifications of asking about protected traits on a job application); HR World Editors, *supra* note 162 (discussing the nationality, religion, age, marital and family status, gender, and health and physical abilities questions that employers are de facto prohibited from asking on job applications and in job interviews).

170. See *supra* Part II.C for a discussion of the *McDonnell Douglas* causation requirements and mixed-motive instruction which render an employer liable for considering both discriminatory and legitimate factors at the time of making a decision.

171. See *supra* Part II.C.1 for a discussion of a mixed-motive claim.

Discriminating against an applicant because his name sounds African American constitutes proxy discrimination. Proxy discrimination contrasts from traditional, intentional discrimination in that the latter involves face-to-face encounters which, through physical appearance, confirm the applicant's membership in a protected class,¹⁷² while the former involves the use of a separate indicator of group membership, such as a name.¹⁷³ Because proxy discrimination relies on a trait that highly correlates with, but does not necessarily implicate, protected group memberships, federal courts may be reluctant to recognize this discrimination as cognizable under Title VII.¹⁷⁴

A prehire social networking check closes the gap between traditional, intentional discrimination and proxy discrimination at the resume-review phase of the hiring process. Consider hypothetical applicant Lakisha, whose name is displayed on her resume or job application; her name suggests to the employer that she may possess a protected trait. The employer accesses her Facebook profile, and after viewing her photos, confirms that Lakisha is African American, and thus a member of a protected class. Should the employer discriminate, the discrimination may now rely on Lakisha's protected trait (her race is African American) rather than simply her proxy (her name is African American sounding). Thus, while Lakisha's claim of proxy discrimination based on name association may have been weak because of the courts' reticence to recognize this claim, she may now mount a sound intentional discrimination claim by offering evidence that the employer checked her social networking profile, learned that she was African American, and discriminated against her because of her race. The employer is exposed to expanded liability.

C. *Trait Disclosure Through Social Networking Checks Versus Direct Applicant Disclosure: Indicative of Discriminatory Intent?*

In addition to the loss of the ignorance defense, an employer runs the risk that a court may find the act of checking an applicant's social network to indicate the employer's discriminatory intent. In spite of that risk, the courts' trend toward viewing social networking information as intended public communication suggests that a prehire social networking check will not be considered indicative of discriminatory intent.¹⁷⁵

172. Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1326 (2005).

173. *Id.*

174. *Id.* The Supreme Court has rejected age discrimination based on proxies under the ADEA, and this reasoning has extended to Title VII race and national origin suits. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993) (holding that terminating an older employee to prevent his pension from vesting did not violate the ADEA because the factor used was years of service, a factor that correlated with age, but was logically distinct from age); *Fragante v. City & Cnty. of Honolulu*, 888 F.2d 591, 599 (9th Cir. 1989) (holding that an adverse employment decision may be predicated upon an individual's accent when it materially interferes with job performance, even though accent is correlated with national origin); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1326, 1350 (1991) ("The problem is that in every accent case the employer will raise the 'can't understand' defense, and in almost every reported case, the courts have accepted it.").

175. See *infra* note 182 and accompanying text for a discussion of the reasonable expectation of privacy in Internet postings on social networking sites. For a discussion of the current debate as to the privacy issues

An employer can learn of an applicant's protected trait in the preliminary stages of hiring in ways other than a prehire social networking check. An applicant's resume may inadvertently suggest the presence of a protected trait. In these cases, the employer does not enjoy the safe harbor of ignorance at the resume-review stage, although it may have complied with the de facto legal mandates. For example, an applicant may indicate membership in a religiously or racially affiliated association on her resume, suggesting that the applicant possesses the corresponding protected trait, or an applicant's name may be obviously female. An employer's attempt to claim ignorance in this scenario is therefore less effective—because it arguably could have inferred that the protected trait was present, discriminatory motives could have driven the adverse decision.¹⁷⁶ The employer could thus be liable under a mixed-motive theory.

However, the two scenarios in which an employer gains knowledge of the protected trait prior to interviewing—through a prehire social networking check versus disclosure on a resume—differ in a key respect. When a protected trait is disclosed on a resume, the employer assumes a passive role in gaining knowledge of that trait. It could not have reviewed the applicant's credentials without stumbling across the applicant's disclosure of the trait. This scenario bears close resemblance to a candidate's voluntary and unprompted disclosure during an interview. When a protected trait is disclosed in a prehire social networking check, however, the employer assumes a more active role in gaining knowledge of that trait. Assuming the employer's awareness of the common presence of legally protected fields on social networking profiles, which is likely considering the widespread use of such profiles,¹⁷⁷ an employer visits these sites with the knowledge that it may gain awareness of the applicant's protected trait.

This passive role versus active role nuance bears arguable significance in suggesting the presence of an employer's discriminatory intent. It is debatable whether a social networking check resembles an applicant's unprompted disclosure in an interview or, conversely, an employer's direct inquiry to an applicant regarding a protected trait. Recent decisions suggest that courts find no expectation of privacy to exist in regard to information posted on public social networking sites.¹⁷⁸ Therefore, courts may view an employer's visit to a social networking site prehire as akin to an applicant's voluntary disclosure of a protected trait during an interview; because the applicant broadcasted this information over the Internet, an employer's visit to the applicant's profile is merely the delivery of the applicant's intended communication. Moreover, on LinkedIn, users create profiles primarily employment and professional networking purposes; arguably the information that an applicant posts on his LinkedIn profile is aimed to reach a specific audience—potential employers. In that instance, an

implicated when an employer asks for an applicant's Facebook username and password, see *supra* note 6.

176. See *supra* Part II.C.1 for a discussion of a mixed-motive claim.

177. See Curley & Morway, *supra* note 1, at 98 (discussing the widespread use of social networking sites, with two-thirds of the world's population belonging to such sites); Hill, *supra* note 7 (discussing the high percentage of employers that making hiring decisions on the basis of information found on an applicant's social networking profile).

178. See Mooney, *supra* note 12, at 743–48 (stating that “courts have almost unanimously held that individuals do not possess a reasonable expectation of privacy in Internet postings on social networking sites” and discussing specific instances in which courts have declined to recognize Fourth Amendment privacy expectations on Facebook and MySpace posts).

employer's access of an applicant's LinkedIn profile is quite similar to the applicant's voluntary disclosure during an interview, and is hardly indicative of discriminatory intent.

The argument that a prehire social networking check does not indicate discriminatory intent is bolstered by the negligent hire liability an employer faces in opting not to check applicants' social networking profiles.¹⁷⁹ The duty to take reasonable care in hiring may evolve to encompass prehire social networking checks. For example, an applicant may have posted violent threats on his or her profile. If this applicant's social networking profile could have put an employer on notice as to that applicant's violent propensities, an employer is justified in visiting the site in order to protect itself from liability; discriminatory intent is not necessarily at play.¹⁸⁰ An employer's receipt of the applicant's communication regarding a Title VII protected trait, in whatever form that may take on the social networking profile, is therefore a necessary evil. In sum, courts may find that an employer's decision to visit a social networking profile, even with full knowledge that Title VII traits could be disclosed on this profile, does not indicate the presence of discriminatory intent. Rather, to the extent that a prehire social networking check informs an employer as to an applicant's protected trait, this represents the unavoidable byproduct of warding off negligent hire liability.

Courts could, alternatively, address this passive role versus active role nuance using a policy-driven approach in furtherance of Title VII's goals. Because employers are de facto prohibited from asking about protected traits explicitly on an application and from considering such traits in employment decisions,¹⁸¹ it is arguably desirable for employers to refrain from taking active steps to gain knowledge of these protected traits. Therefore, although an applicant may have voluntarily communicated the presence of a trait on a social networking site, the goals of Title VII may call for an employer to refrain from taking active steps to learn of this trait. Under this view, a visit to a social networking profile, with knowledge that this profile will inform the employer of the trait or in order to gain knowledge of this trait, suggests a discriminatory intent on the part of the employer in abrogation of Title VII's goals. In other words, just as it may suggest the presence of a discriminatory intent to inquire about a Title VII trait in an interview, so does it suggest a discriminatory intent to take the extra step of visiting a social networking profile.

This approach, however, conflicts with courts' trend toward viewing social networking information as public, intended communication;¹⁸² it is improbable that

179. See Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW 19, 22–27 (2007) (discussing the expanding scope of an employer's liability for negligence in hiring); see also Favate, *supra* note 6 (explaining that some employers say they are checking an applicant's social networking profile to look for illegal behavior).

180. See Mooney, *supra* note 12, at 738 (discussing negligent hire liability, in which an employer is found liable for failing to exercise reasonable care in hiring a person who was a foreseeable danger to third parties).

181. See US Equal Emp't Opportunity Comm'n, *supra* note 162 (discussing the legal ramifications of an employer's asking about protected traits on a job application, and stating that an employer's doing so may be used as evidence of discriminatory intent).

182. See Mooney, *supra* note 12, at 743–48 (discussing the uniform trend in which courts have declined

courts will go so far as to cast an employer's availing itself of public information as suggestive of discriminatory intent. Furthermore, the threat of negligent hire liability may impose upon the employer a duty to search these sites; courts will not likely penalize employers for exercising reasonable care.¹⁸³ Therefore, while the result of an employer's check—knowledge of the applicant's protected trait—may negate the defense of ignorance in the larger allegation that intentional discrimination drove an adverse decision, the act of checking the social networking profile is unlikely to itself be deemed indicative of discriminatory intent.

D. Prehire Social Networking Checks and Implicit Bias

Because prehire social networking checks may allow implicit bias to influence the early stages of hiring decisions, these checks may detrimentally affect minority applicants and subject employers to increased liability. Empirical evidence indicates that implicit bias is widespread across social subgroups and that implicit bias can drive decisions even when actors believe they are exercising nondiscriminatory judgment.¹⁸⁴ At the preliminary, resume-review stage of hiring, two methods exist to avoid the effect of such bias: exposure control and exclusively objective evaluation.¹⁸⁵ Prehire social networking checks eliminate both methods and may therefore allow implicit bias to color decisions made at the earliest stage of candidate selection.

1. The Removal of Exposure Control

A prehire social networking check can inform an employer as to an applicant's protected trait and thereby defeats exposure control. Exposure control eliminates the presence of implicit bias by depriving the decision maker of information regarding the applicant's protected trait and therefore precluding implicit bias from driving the decision.¹⁸⁶ De facto legal safeguards provide exposure control throughout the interview process by prohibiting an employer from inquiring about protected traits.¹⁸⁷ While exposure control can be defeated during a job interview by either an applicant's voluntary disclosure or physical appearance, exposure control is generally preserved in

to recognize Fourth Amendment privacy expectations on Facebook and MySpace posts). However, employers who request an applicant's username and password may be viewed differently, as recently proposed legislation may outlaw this practice on privacy grounds in multiple states. *See* White, *supra* note 6 (describing Maryland, Illinois, and California state bills). This legislation may bolster the argument that an applicant's password-protected information is not public communication. Should this argument succeed, an employer's request for an applicant's password and subsequent access of that applicant's password-protected information would not represent the access of public communication, and the contention that such access indicates discriminatory intent (akin to an employer asking about a protected trait on a job application) may be more successful.

183. *See supra* note 13 and accompanying text for a discussion of the negligent hire liability an employer may face by failing to perform a social networking check.

184. *See supra* Part II.B.2 for a discussion of the Implicit Association Test and the fact that implicit bias measures have higher predictive validity than explicit (self-reported) measures.

185. *See supra* Part II.C.5 for a discussion of exposure control and exclusively objective evaluation as methods for eliminating implicit bias.

186. *Id.*

187. *See supra* notes 162–67 and accompanying text for a discussion of the nationality, religion, age, marital and family status, gender, and health and physical abilities questions employers are prohibited from asking.

the earliest, resume-review phase of the hiring process because at this phase protected traits will generally remain undisclosed on a job application or a resume, and an employer is prohibited from inquiring about these traits.¹⁸⁸ Thus, an employer at this phase evaluates an applicant's candidacy without knowledge of that applicant's protected Title VII trait, and the decision to interview is consequently devoid of any implicitly biased motivations. This guarantees that the pool of candidates chosen to interview is uninfluenced by the decision maker's unconscious attitudes and stereotypes.

When a prehire social networking check informs an employer of an applicant's protected trait, exposure control is defeated at the initial stage of the process. Once a decision maker is aware of the applicant's trait, his action may be driven by the unconscious attitudes and stereotypes he holds toward that protected group.¹⁸⁹ Societal norms and legal mandates discourage the exercise of biases and may cause the actor to unconsciously seek independent, justifiable criteria for what is in actuality a discriminator decision; decision makers may thus remain unaware that implicit bias is influencing the way that they evaluate candidates.¹⁹⁰ The social networking check allows the actor's implicit bias to unwittingly affect the earliest stage of the hiring process—a phase that would otherwise be shielded from such bias through the exposure control that de facto legal safeguards facilitate.

Consider a hiring scenario in which a prehire social networking check has not been performed—the employer receives an applicant's resume, evaluates the resume, and invites him for an in-person interview. In this example, exposure control is retained until the employer meets the applicant at the in-person interview. The employer's evaluation of the applicant after the interview may be driven by implicit bias because exposure control is likely to be defeated by this point—once an interviewer meets an applicant in person, the applicant's physical characteristics may allow the interviewer to draw inferences about a protected trait such as race. However, the employer selected the applicant for an interview while exposure control was still in effect. Thus, the interview pool was selected without the influence of implicit bias.

Social networking checks are effectively eliminating the one phase of the hiring process that is protected from implicit bias, allowing implicit bias to, in turn, govern not only which candidates are ultimately hired, but also which candidates are selected to interview. Because the initial applicant pool is, by nature, larger than the interview pool, the earlier a social networking check introduces implicit bias into the hiring process, the greater the number of minority candidates (and potential plaintiffs) subjected to implicit bias's potentially detrimental influence. In effect, a greater number of minority candidates may be eliminated at the initial phase of hiring, and fewer minority candidates may be invited to interview.

188. See US Equal Emp't Opportunity Comm'n, *supra* note 162 (discussing the legal ramifications of asking about protected traits on a job application).

189. See *supra* notes 42–49 and accompanying text for a discussion of the unconscious effect of implicit bias in hiring decisions and the way in which this effect works to the detriment of minority candidates.

190. *Id.* See *supra* notes 77–85 and accompanying text for a discussion of the ways in which antidiscrimination norms cause people to seek independent, seemingly nonprejudiced criteria to justify decisions that are actually driven by implicit bias.

This effect obviously injures the individual applicants who, because the prehire social networking check introduced implicit bias into the mind of the employer, find themselves rejected prior to an interview. Additionally, such effect may result in the hiring of fewer minority candidates. The frequency with which implicit bias influences decisions may be statistically unpredictable at this point—the candidacy of some minority applicants may survive notwithstanding the presence of implicit bias, while others simply may not. Implicit bias often enters the hiring process by the interview phase, as exposure control can be naturally defeated at that point. However, if fewer minority applicants have the *opportunity* to interview because of the introduction of implicit bias at the resume-review phase, a still smaller number of minority applicants stand a chance of gaining ultimate employment in spite of the unpredictable influences of implicit bias.¹⁹¹ Thus, perhaps the introduction of implicit bias early in the hiring process will diminish the number of minority candidates ultimately hired.

2. The Removal of Exclusively Objective Evaluation

In addition to defeating exposure control, the prehire critique of an applicant's social networking profile imputes subjectivity into a hiring stage that would otherwise utilize objective evaluation, leaving the employment decision with no protection from implicit bias. At the resume-review phase of the hiring process, an employer evaluates primarily objective criteria—for example, an applicant's education level, grade point average, years of experience. This objective evaluation represents the second method through which implicit bias is eliminated.¹⁹² Because the decision maker is precluded from exercising a high degree of personal discretion in evaluating the candidate, and is instead limited to concrete, objective criteria, there is little opportunity for implicit bias to influence the decision.

Prehire social networking checks allow subjective evaluation to occur at the resume-review phase and thus open the door to the influence of implicit bias at an early stage of hiring. The employers that engage in social networking checks state that largely subjective criteria govern their evaluation of an applicant's social networking profile, such as the applicant's "fit" within the organization and the applicant's creative abilities.¹⁹³ Such subjectivity requires a decision maker to exercise a higher degree of personal discretion and thus allows implicit bias to influence the decision. While

191. The Supreme Court has emphasized that Title VII protects the individual, and therefore even if a prehire social networking check taking place at the resume-review stage has a disparate impact on a protected class, and the employer then ameliorates this statistical impact when hiring the final pool of candidates post interview, the employer can still be held liable to the plaintiffs rejected at the resume-review stage under a disparate impact theory. See *Connecticut v. Teal*, 457 U.S. 440, 442 (1982) (rejecting the "bottom line defense" in the context of a disparate impact case in which plaintiffs alleged that a written examination taken for promotion consideration created a disparate impact on black applicants, and holding that despite the defendant's nondiscriminatory "bottom line," meaning that the ultimate pool of candidates promoted contained more blacks than whites, plaintiff succeeded in establishing a prima facie case of employment discrimination).

192. See Wax, *supra* note 125, at 1161 n.96 (citing Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158, 1158 (1991)) (discussing exclusively objective evaluations as a method for eliminating implicit bias).

193. See *supra* Part II.A.1 for a discussion of the subjective criteria employers utilize when evaluating an applicant's social networking profile and the way in which such criteria influences their decision to hire or not to hire.

subjectivity is inevitable in the interview evaluation phase, the objectivity of the resume-review phase guarantees that the applicants selected to interview are chosen without the influence of implicit bias. Prehire social networking checks therefore remove this initial protection and allow implicit bias to influence the earliest stage of candidate selection.

E. Implicit Bias, Prehire Social Networking Checks, and Group Status as a “Motivating Factor”: How Will the Courts React?

Because prehire social networking checks expose an employment decision to the influence of implicit bias, employers could face litigation for engaging in this practice. A plaintiff could offer evidence that an employer engaged in a prehire social networking check as circumstantial evidence, tending to prove that the employer’s implicit bias toward a Title VII trait was a motivating factor in the employer’s decision. Courts recognize the concept of implicit bias and articulate that employers can in fact unintentionally discriminate against Title VII groups based on unconscious attitudes and stereotypes.¹⁹⁴ Scholars contend that the same circumstantial evidence used to prove that protected group status was a “motivating factor” in the employment decision can be used to prove that implicit stereotypes drove the decision maker’s action.¹⁹⁵

The subjective nature of a prehire social networking check and its removal of exposure control makes it likely that such a check will fall into two of these enumerated circumstantial evidence categories: (1) whether the nature of the operation of the employer’s decision making process left room for the operation of bias, and (2) whether the employer had in place and applied effective mechanisms for detecting the possible influence of bias and for preventing such biases from influencing the ultimate decision made.¹⁹⁶ Courts exercise heightened scrutiny when an employer’s evaluation method is highly subjective in nature, recognizing that such evaluations allow employers more latitude than do objective evaluations, thereby increasing the risk that implicit bias may influence the decision.¹⁹⁷ Courts have moreover recognized that prescreening hiring procedures, such as word-of-mouth recruiting, can be discriminatory.¹⁹⁸

194. See *supra* Part II.C.3.a for a discussion of employment discrimination cases in which courts have recognized that employers discriminated on the basis of implicit bias.

195. See *supra* Part II.C.2 for a discussion of the types of circumstantial evidence that scholars contend can be used to prove that implicit bias drove the decision-maker’s action.

196. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); see also *Krieger & Fiske, supra* note 51, at 1060 (stating that the same pieces of evidence that have been long recognized as relevant to the question of intent in disparate treatment adjudication can be used to prove that implicit stereotypes have driven the decision-maker’s action).

197. See, e.g., *Kimble v. Wis. Dept. of Workforce Dev.*, 690 F.Supp.2d 765, 775–76 (E.D. Wis. 2010) (stating that “when the evaluation of employees is highly subjective, there is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware,” and that “stereotyping can constitute evidence of discrimination”).

198. See *supra* notes 15–17 for a discussion of courts’ treatment of word-of-mouth recruitment procedures and finding that if a procedure results in a low percentage of minority applicants, however inadvertent, this can be used as a piece of circumstantial evidence which helps to establish a reasonable inference of an employer’s discriminatory treatment of minority classes.

Courts may view the subjective nature of prehire social networking checks with the same concerns. Because these checks utilize highly subjective criteria and remove exposure control, courts may examine these checks as vehicles through which implicit bias can be unconsciously exercised to the detriment of protected groups. In relying on highly subjective criteria and in removing exposure control, these prehire checks may thus be deemed to (1) “leave room” for the operation of bias, or (2) fail to provide effective mechanisms for detecting the possible influence of bias and for preventing such biases from influencing the ultimate decision made.¹⁹⁹ Therefore, proof that a prehire social networking profile evaluation occurred could be used as a piece of circumstantial evidence, offered to prove that protected group status was a motivating factor in the adverse employment decision.

A plaintiff’s success in offering prehire social networking checks as such circumstantial evidence may depend on his or her ability to offer supporting statistical evidence.²⁰⁰ To bolster the claim that a prehire social networking check’s subjective nature and lack of exposure control leaves room for the operation of bias or fails to provide effective mechanisms for detecting bias and preventing such bias from influencing the ultimate decision, a plaintiff may need to offer empirical social science evidence to illustrate the precise way in which a check does so. This social science evidence may be required to indicate, with specificity, how regularly unconscious attitudes and stereotypes play a meaningful role when employers evaluate an applicant’s social networking profile in deciding on his or her candidacy.²⁰¹

The Supreme Court has not yet been presented with social science evidence offered to prove that prehire social networking checks left room for the operation of bias or fail to provide effective mechanisms for eliminating such bias. However, the Court’s dismissal of social framework evidence may be a harbinger of the fate of similar evidence. In *Wal-Mart Stores, Inc. v. Dukes*,²⁰² the Court rejected Dr. Bielby’s social framework testimony because it was not sufficiently specific and because commonality was key to the respondents’ case.²⁰³ The Court pinpointed a fatal flaw in the testimony—Bielby had conceded that he could not calculate “whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.”²⁰⁴ Rather, he could provide only the vague assertion that Wal-Mart’s employment policies were “especially vulnerable to gender stereotypes.”²⁰⁵ This general testimony did not pass muster with the Court.²⁰⁶

199. *Price Waterhouse*, 490 U.S. at 251.

200. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2552 (2011) (evaluating social framework evidence and rejecting expert testimony because it lacked specificity). See also *supra* Part II.D for a discussion of the Supreme Court’s view on social framework evidence.

201. See *Wal-Mart*, 131 S.Ct. at 2553 (rejecting social science testimony because the testifying expert could not “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions”).

202. 131 S.Ct. 2541 (2011).

203. See *supra* Part II.D for a discussion of the Supreme Court’s rejection of social science testimony). See also *Wal-Mart*, 131 S.Ct at 2552.

204. *Wal-Mart*, 131 S.Ct at 2552.

205. *Id.*

206. *Id.*

A plaintiff offering social science evidence regarding prehire social networking checks may encounter the same dilemma. This social science evidence may need to establish how regularly a decision maker's implicit bias against a group protected by Title VII motivated his decision to reject candidates based on their social networking profile traits with the degree of specificity mandated by the Supreme Court. Absent such specificity, this evidence is subject to rejection for the same reasons as Bielby's social framework testimony. A plaintiff thus faces a harrowing challenge—will an expert ever be able to state, with statistical specificity, in what manner and how regularly a person's unconscious biases shape and drive a decision? And if an expert does in fact claim to formulate this evidence with the requisite statistical specificity, what is the likelihood that a court will view such conclusion as persuasive and credible, given the seemingly speculative nature of getting inside someone's head? A plaintiff may therefore fight an uphill battle when seeking to establish that group status was a motivating factor in the adverse employment decision through proof that the employer engaged in a prehire social networking evaluation.

However, if the evidence is not offered in order to establish commonality in the context of a class action certification, the specificity requirements outlined by the *Dukes* Court may be relaxed. The Court indicated that of the two strategies²⁰⁷ a plaintiff may utilize to prove commonality, the relevant approach in *Dukes* required “significant proof” that Wal-Mart “operated under a general policy of discrimination,” and that Bielby's testimony was the only evidence the plaintiffs had offered to prove that a general policy existed.²⁰⁸ The Court emphasized that with regard to this general policy, statistical specificity was the “essential question *on which respondents' theory of commonality depends*,”²⁰⁹ and that Bielby's testimony failed to offer such specificity. In other words, the court rejected the evidence because it did not serve the purpose for which it was offered—it could not establish a general policy of discrimination if it could not indicate how *often* such discrimination occurred.²¹⁰

207. See *Gen. Tel. Co of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (stating that “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking [*sic*] processes”).

208. *Wal-Mart*, 131 S.Ct. at 2553.

209. *Id.* at 2553 (emphasis added).

210. In contrast, some scholars argue that Bielby's testimony may have been *too specific* for the purpose for which it was offered. *E.g.*, Gregory Mitchell et al., *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109, 1117–18 (2011). Monahan, Walker and Mitchell contend that Bielby's testimony conflated two distinct types of evidence—social fact evidence and social framework evidence. *Id.*

[S]ocial facts evidence involve case-specific descriptive or causal claims, whereas social authority and social frameworks involve general propositions about causation or about the prevalence of certain behaviors, characteristics, or outcomes in the aggregate . . . and because social facts involve case-specific claims, social facts require the application of sound methods and principles to case-specific data to reach descriptive and causal conclusions about the case at hand.

Id. Bielby's testimony was thus problematic because he formulated *specific* conclusions about Wal-Mart based on *general* social science research. Such case-specific claims required case-specific research. *Id.* at 1118. A plaintiff offering evidence that implicit bias colored an employer's evaluation of a candidate would therefore need to separate the evidence into two distinct utilities: (1) offer social framework evidence as to the *general* way in which implicit bias operates in order to assist the jury in evaluating the case or (2) conduct case-specific research as to how implicit bias operated in this *specific* case in order to apply the social science

If a single plaintiff offers social science evidence to establish that a decision maker's implicit bias against a protected Title VII trait motivated his decision to reject candidates based on their social networking profile, the purpose of this evidence may differ from that of the social framework evidence in *Dukes*. This social science evidence could simply be offered circumstantially to illustrate how implicit bias operates and the ways in which it may have motivated the decision maker's choice to reject a candidate based on his social networking profile.²¹¹ Because this plaintiff is not attempting to prove commonality, the testifying expert may not need to indicate, with statistical specificity, how regularly such motivation occurs. Thus, while an inability to offer statistical specificity in this situation may detract from the persuasiveness of the plaintiff's evidence, it may not necessarily constitute a basis for rejecting the evidence altogether.

A plaintiff may enlist such evidence in an alternate strategy. This plaintiff could utilize proof that a social networking check occurred in order to establish that the employer had knowledge of the protected trait, and that implicit bias toward the protected trait contributed to the ultimate adverse decision. Thus, in the same way that a social networking check robs the employer of the ignorance defense in intentional discrimination suits,²¹² the employer correspondingly loses the ignorance defense in implicit bias discrimination suits. This allows a plaintiff to claim that unconscious discrimination was at play beginning in the earliest stages of the hiring process. Without a social networking check, a plaintiff would be unable to prove that the unconscious stereotype was triggered until after the employer learned of the protected trait. In establishing that the employer engaged in a social networking check and therefore learned of the trait at the resume-review stage, a plaintiff has the opportunity to claim that implicit bias toward that trait colored the employer's decisions throughout any subsequent phase of the hiring process. For example, a plaintiff could allege that because an employer checked her social networking profile and learned of her protected trait, implicit bias caused the employer to reject her candidacy or the basis of her resume. If she was interviewed before the rejection, she could also claim that implicit bias influenced the way in which the employer evaluated her interview skills.²¹³

F. Better Safe Than Subjective: The Bottom Line for Employers

The subjective nature of a prehire social networking check is the root of many legal ramifications for employers. A finding of excessive subjectivity may indicate pretext in the context of an intentional discrimination claim. The removal of exposure control and imputation of subjectivity into the resume-review phase of the hiring

conclusions to the case's facts. *See id.* ("If general social science principles are to be linked to a specific case by a social science expert, then those linkage opinions need to be based on a social fact study . . .").

211. *See id.* (explaining the difference between social fact evidence and social framework evidence).

212. *See supra* Part III.B for a discussion of the way in which a prehire social networking check robs the employer of the ignorance defense in an intentional discrimination suit.

213. Such evidence would be particularly useful if the plaintiff's protected trait is one not physically apparent, such as religion. In this situation, a plaintiff would be unable to argue that the in-person interview revealed the trait. Therefore, proof that an employer accessed this plaintiff's social networking profile, which listed his religion, may be the only way to establish the employer's knowledge of this trait.

process may leave an employer open to a finding of implicitly biased motivations in the context of an unintentional discrimination claim. To avoid these legal pitfalls, employers may consider implementing evaluation guidelines and instituting company policies regarding the use of these guidelines.

In order to preclude a finding of excessive subjectivity and thus discriminatory pretext in the context of an intentional discrimination claim, employers may consider adopting written guidelines regarding social networking checks. These guidelines should ensure consistency of the hiring process from candidate to candidate, the relevance of the evaluation criteria to the job in question, and the adherence of the interviewers to these guidelines, in conformity with the factors outlined by the Tenth Circuit.²¹⁴

Employers who wish to formulate guidelines should adhere to the following steps. First, the employer must identify the competencies required for the specific position the applicant is seeking. Of these competencies, the employer should determine which skills can be assessed through the evaluation of an applicant's social networking profile. Second, the employer should draft the directive guidelines. These guidelines must indicate the position sought to be filled, list the set of skills to be evaluated, and delineate a series of specific questions for the person viewing the applicant's social networking profile to answer. These questions must directly relate to the relevant job competencies for that specific position.²¹⁵ Third, the employer must implement a policy regarding the use of these guidelines. This policy should mandate the use of these uniform guidelines during the evaluation of the social networking profile for each and every candidate applying to a specific position.²¹⁶ It should also require that the person evaluating the social networking profiles respond to each field on the guidelines, for every candidate. Such a policy may function to satisfy the consistency, relevance, and adherence concerns articulated by the Tenth Circuit and in turn, shield the employer from liability.²¹⁷

214. See *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1145–46 (10th Cir. 2009) (delineating parameters for subjective criteria in employment decision making, particularly the consistency of the hiring process from candidate to candidate, the relevance of the evaluation criteria to the job in question, and the adherence of the interviewers to guidelines provided by the company). See *supra* Part II.C.3.b for a discussion of the factors that the Tenth Circuit considered in determining whether a subjective evaluation process was wholly subjective and therefore pretextual, particularly the consistency of the hiring process between candidates, the relevance of the evaluation criteria to the job sought, and the adherence of the interviewers to the company-provided guidelines.

215. For example, an employer seeking to fill an administrative assistant position may want a candidate with excellent grammar skills. This employer could determine that an applicant's written postings on a social networking site could provide insight as to that applicant's grammar skills in everyday communication. This employer would indicate on the guidelines that "Grammar proficiency in everyday communication" is the skill to be evaluated by the social networking check. This employer could require the person assigned to evaluate the applicant's social networking profile to answer the following question: "How many grammar mistakes are found in the applicant's written postings on his or her social networking profile? Please list the specific grammar mistakes."

216. In the interest of consistency, the policy should also require the evaluator to make a record of the instance in which the evaluator performed an Internet search, but concluded that a candidate does *not* have a social networking profile.

217. *Turner*, 563 F.3d at 1145–46 (delineating parameters for subjective criteria in employment decision making, particularly the consistency of the hiring process from candidate to candidate, the relevance of the

The use of such guidelines may moreover curb the influence of implicit bias by tempering the level of subjectivity used in this stage of the evaluation, and, in turn, lessening the degree to which the decision maker exercises his own judgment. Although this may not constitute an exclusively objective evaluation, heightening the degree of objectivity is likely the best tactic an employer can utilize in mitigating the influence of implicit bias. In doing so, an employer may ease the suspicion with which a court may view this practice and may block social networking checks from falling into the two relevant categories of circumstantial evidence: a practice that (1) “[leaves] room for the operation of bias,”²¹⁸ or (2) fails to implement “mechanisms for detecting the possible influence of bias and for preventing such biases from influencing the ultimate decision made.”²¹⁹

However, even with the guidelines in tow, an employer will lose the advantage of the ignorance defense in both cases of intentional discrimination as well as unintentional discrimination. While subjectivity can be lessened through the adoption of guidelines, exposure control cannot be regained once an employer has decided to visit an applicant’s social networking profile. To rectify this predicament in the context of an unintentional discrimination claim, an employer may consider isolating the task of checking an applicant’s social networking profile from the rest of the hiring process. For example, one person could be assigned to check the applicant’s social networking profile and perform the relevant evaluation pursuant to the guidelines, and an entirely separate decision maker could be made responsible for subsequent hiring evaluations. The employer in this scenario would need to ensure that the first evaluator does not communicate the applicant’s protected trait to the subsequent evaluator. In doing so, the employer may reclaim the ignorance defense to a degree; while implicit bias may have been at play at the resume-review phase of the hiring process, implicit bias could not have influenced the subsequent hiring stages because the decision makers at those stages were unaware of the applicant’s protected trait. While a plaintiff would be able to claim that implicit bias colored the adverse preliminary hiring decision at the resume-review stage, such a policy may make it more difficult for another plaintiff to prove that implicit bias toward a protected Title VII trait was a motivating factor in the adverse employment decision post interview. In sum, this policy would advance a number of the employer’s goals—it would enable the employer to eliminate negligent hire liability by performing a social networking check, while simultaneously mitigating the influence of implicit bias and decreasing the employer’s legal risk.²²⁰

evaluation criteria to the job in question, and the adherence of the interviewers to guidelines provided by the company).

218. Krieger & Fiske, *supra* note 51, at 1060 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

219. *Id.* (citing *Price Waterhouse*, 490 U.S. at 251); *see also id.* (stating that the same pieces of evidence that have been long recognized as relevant to the question of intent in disparate treatment adjudication can be used to prove that implicit stereotypes have driven the decisionmaker’s action).

220. *See supra* note 13 and accompanying text for a discussion of negligent hire liability and prehire social networking checks; *see also* Sprague, *supra* note 180 at 22–27 (discussing the expanding scope of an employer’s liability for negligence in hiring); Favate, *supra* note 6 (explaining that some employers say they are checking an applicant’s social networking profile to look for illegal behavior).

G. *The Need for Legislative Action*

The intersection of implicit bias and prehire social networking checks may represent a problem that calls for legislative action. Due to the high specificity threshold social science evidence may be required to meet,²²¹ it may be very difficult for a plaintiff to prove that a prehire social networking check caused implicit bias to influence an employer's adverse decision. Because a plaintiff has a low prospect of success, an employer may feel less compelled to implement the aforementioned guidelines,²²² as there may be virtually no legal consequence for failing to do so. Should the legislature find the threat of implicit bias from prehire social networking checks to be of great enough social consequence, and therefore, a worthy and actionable problem,²²³ the only solution may be to mandate an employer's use of such guidelines in order to mitigate the level of subjectivity exercised in a prehire social networking check.²²⁴ A legislative determination in this regard will depend on the progression of case law in this area, as well as the development of empirical research indicating the statistical effect social networking checks have on the candidacy of minority applicants.

IV. CONCLUSION

By engaging in the seemingly routine practice of prehire social networking checks, an employer may face more legal ramifications than appear at first blush. In the context of an intentional discrimination claim, a plaintiff may use evidence that a check was performed in order to defeat a defendant's ignorance defense, and courts may fear that a defendant may use the subjective nature of these checks in order to mask pretext. In the context of an unintentional discrimination claim, a plaintiff may present evidence that a check was performed in order to prove that implicit bias contributed to the employer's adverse hiring decision. An employer can take prophylactic steps in order to prevent implicit bias from influencing its hiring decision and, in turn, avoid litigation—it can draft written guidelines to govern prehire social networking checks, implement a policy mandating the use of such guidelines, and separate the resume-review task from the interviewing tasks in order to regain ignorance of the applicant's

221. See *supra* notes 201–12 and accompanying text for a discussion of the specificity requirements for social science evidence.

222. See *supra* Part III.F for a discussion of the guidelines an employer could use to mitigate the influence of implicit bias in prehire social networking checks.

223. Considering the recently proposed legislation in California, Maryland, and Illinois aimed at prohibiting employers from asking applicants to supply their Facebook usernames and passwords and both the ACLU's and Facebook's condemnation of this practice from a privacy standpoint, the employment discrimination implications that prehire social networking checks is likely to be a point of social concern. See Gross, *supra* note 6 (describing Facebook's stance that an employer that asks for an applicant's Facebook password undermines the privacy of the site); see also Favate, *supra* note 6 (describing the ACLU's stance that the practice of prospective employers asking applicants for their Facebook usernames and passwords is an "invasion of privacy"); see also White, *supra* note 6 (describing Maryland, Illinois, and California state bills that would, if passed, prohibit employers from requiring job applicants to disclose user names, passwords or other login credentials to a "personal account or service").

224. See *supra* Part III.F for a discussion of the guidelines an employer could implement in order to mitigate the influence of implicit bias in prehire social networking checks.

protected trait. Given the difficulty of establishing a successful unintentional discrimination claim using prehire social networking checks as evidence, this practice may be ripe for legislative regulation.

