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Discrimination Redefined

Ann C. McGinley*

I. INTRODUCTION

In *Pretext in Peril*,¹ Professor Natasha Martin argues convincingly that the United States Supreme Court and the lower federal courts have interpreted Title VII of the 1964 Civil Rights Act² to minimize a plaintiff's success in proving discrimination. She posits that the courts appear hostile to anti-discrimination cases because they believe that discrimination is a past evil that has been virtually eliminated.³ This mindset, combined with overcrowded dockets and a tendency to empathize with the employer's prerogatives, has led to judicial activism that has undermined Title VII's potential.⁴

Focusing on disparate treatment, which requires proof of discriminatory intent, Professor Martin notes accurately that employers' new sophistication about employment discrimination has virtually eliminated direct evidence of discrimination.⁵ But, unfortunately, as Professor Martin explains, discrimination continues to exist at perhaps a more subtle level, a fact that has led many courts to believe that "real" discrimination exists no more.⁶

I agree with Professor Martin's premise that it has become increasingly difficult to prove disparate treatment, especially in light of courts' aggressive use of summary judgment. I argue in this essay that the courts' retrenchment in Title VII cases results from a narrow definition of discrimination that focuses on conscious, intentional discrimination. Increasingly social science research demonstrates that much disparate treatment occurs as a result of

* William S. Boyd Professor of Law, William S. Boyd School of Law, UNLV; J.D. 1982, University of Pennsylvania Law School. Thanks to Bob Chang for inviting me to participate in this colloquium and to Natasha Martin for the opportunity to comment on her article. Also, thanks to Deans John White and Steve Johnson and to Jeff Stempel and Lety Saucedo for conversations about the substance of this Article. Finally, thanks to Jeanne Price, the Director of the Wiener-Rogers Law Library at the William S. Boyd School of Law, and to David McClure, a member of the library faculty, for their excellent support.

1. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313 (2010).

2. 42 U.S.C. §§ 2000e to e-17 (2006). Title VII forbids discrimination based on race, color, national origin, sex and religion.

3. Martin, *supra* note 1, at 317 n.11.

4. *Id.* at 315-17.

5. *Id.* at 397.

6. *Id.* at 398. See also Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 998 (1994) (concluding that the Supreme Court's basic assumption about the pervasiveness of discrimination has changed).

unconscious biases,⁷ but the courts' reluctance to consider this social science has led, in many cases, to a literal, narrow definition of "pretext." Moreover, I posit that the recent Supreme Court case of *Ricci v. DeStefano*⁸ redefines discrimination in an ahistorical and acontextual fashion by elevating color-blindness above all other values;⁹ it both limits and expands disparate treatment to conscious use of race in decisionmaking while simultaneously restricting the usefulness of disparate impact¹⁰ to attack policies and practices having a disparate effect on historically disadvantaged groups. This redefinition of discrimination tilts the law toward protecting the interests of white employees over those of their black and other minority colleagues because discrimination against minority employees has gone underground – both consciously and unconsciously – and, therefore, cannot be remedied. Additionally, any overt attempt to remedy discrimination against racial minorities is treated as discrimination against their white counterparts. While space does not permit me to flesh out a solution to this problem, I suggest that scholars work on a new proof construct that would accommodate what we currently know about discrimination: that much of it operates at the unconscious level.

II. PROFESSOR MARTIN'S CRITIQUE

The focus of Professor Martin's critique is the last stage of the indirect proof method first established in *McDonnell Douglas Corp. v. Green*.¹¹ Recognizing that it may be difficult to prove intentional discrimination in cases where the employer does not admit bias, the Supreme Court established the *McDonnell Douglas* proof mechanism, which allows the plaintiff to use a three-step method to prove discrimination indirectly.¹² The first stage estab-

7. See, e.g., David A. Wilder, *Role of Anxiety in Facilitation Stereotypic Judgments of Outgroup Behavior*, in AFFECT, COGNITION AND STEREOTYPING 87, 107 (Dianne M. Mackie & David L. Hamilton, eds., 1993) (finding that anxiety increases reliance on unconscious stereotypes of outgroups); see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895-96 (2009) (stating that social psychology research suggests that racial and gender bias is "invisible, deep and pervasive" and that it sometimes leads to discrimination); see Barlett, *supra*, at nn.2-3 (citing to research positing that implicit or unconscious bias exists and causes discrimination).

8. 129 S. Ct. 2658 (2009).

9. *Id.* at 2674-77.

10. "Disparate impact" occurs when a neutral employment policy or practice has a disparate impact on a protected group and the employer fails to prove that the policy is job related or consistent with business necessity. Even if the employer makes this proof, the plaintiff can prevail by proving that there are less discriminatory alternatives.

11. 411 U.S. 792 (1973).

12. *Id.* at 802-05.

lishes the prima facie case; the second stage shifts the burden to the defendant to produce evidence that it had a legitimate, non-discriminatory reason for the adverse employment action.¹³ Finally, in the third stage, the plaintiff has the burden of demonstrating that the employer's legitimate, non-discriminatory reason is a pretext for discrimination.¹⁴ This burden of proving pretext merges with the plaintiff's ultimate burden of persuasion and, if proved, ordinarily is proof of discriminatory intent.¹⁵ The pretext stage, as Professor Martin points out, is the most important stage of the *McDonnell Douglas* proof method.¹⁶ It is also the most controversial and the stage that does all the work. In essence, most cases using the indirect proof method boil down to the question of whether the plaintiff has successfully proved pretext.

Professor Martin appropriately focuses on pretext because of its importance in proving discrimination. She notes that proving pretext, as a legitimate means of proving discrimination, is in peril for a number of reasons. First, she explains the convoluted history of the lower courts' view of pretext.¹⁷ Despite language in *Texas Department of Community Affairs v. Burdine*,¹⁸ which many interpreted to create a mandatory presumption of discrimination once pretext is established, some lower courts began to require plaintiffs to prove not only pretext but also additional evidence of discrimination in order to prevail.¹⁹ The Supreme Court analyzed this approach in *St. Mary's Honor Center v. Hicks*, where it held that a finding of pretext did not create a mandatory presumption of discrimination.²⁰ The Court ruled that a fact-finder is free to determine that proof of pretext is sufficient for a finding of discrimination, but the fact-finder is also permitted to conclude that pretext alone does not demonstrate that discrimination occurred.²¹ Soon thereafter, in *Reeves v. Sanderson Plumbing Products, Inc.*, an Age Discrimination in Employment Act (ADEA) case,²² the Supreme Court held that proof of a prima

13. *Id.* at 802-04.

14. *Id.* at 804-05.

15. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000).

16. Martin, *supra* note 1, at 323-26.

17. *Id.* at 325-43.

18. 450 U.S. 248, 254 (1981) ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.")

19. See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 59, 66 (1991).

20. 509 U.S. 502, 514-20 (1993).

21. *Id.*

22. 29 U.S.C. §§ 621-634 (2006).

facie case combined with proof of pretext is ordinarily sufficient to support a jury finding for the plaintiff.²³

Professor Martin makes a three-pronged argument. First, she argues that the Supreme Court in *Reeves* did not clarify the requirements sufficient to support a finding of discrimination.²⁴ Second, she posits that the lower courts have adopted a number of rigid “rules” or presumptions that undermine a plaintiff’s proof, including the “stray remarks doctrine,” the “honest belief” rule, a requirement that plaintiffs provide narrow and specific comparator evidence and the “same-actor doctrine.”²⁵ Third, Professor Martin observes, the lower courts have taken advantage of the ambiguities left by the Supreme Court cases.²⁶ The lower courts have applied these rigid and faulty rules while simultaneously aggressively using procedural mechanisms such as summary judgment and judgment as a matter of law.

Professor Martin’s arguments are well taken. While *Reeves* is a pro-plaintiff opinion, the Court leaves a gap because it does not hold conclusively that a finding of pretext will always support a jury verdict for the plaintiff. In her concurrence, Justice Ginsburg attempts to fill this gap, stating that only in uncommon circumstances should a plaintiff be required to submit evidence in addition to proof of a prima facie case and of pretext.²⁷ Nonetheless, lower courts have pushed the envelope after *Reeves*, granting summary judgment or judgment as a matter of law where there seems to be sufficient evidence that the employer’s alleged legitimate, non-discriminatory reason is a pretext for discrimination.²⁸ There is no question that the lower courts, prompted by a sophisticated defense bar, have embraced a number of rigid rules identified by Professor Martin – in combination with the aggressive use of summary judgment and judgment as a matter of law – to exonerate defendants from claims of discrimination even though there appear to be significant factual issues. This aggressive use of procedural devices has deprived many plaintiffs of the opportunity to have their cases heard before a jury of their peers.

23. 530 U.S. 133, 147-49 (2000). The Court noted that it has never “squarely addressed” whether the *McDonnell Douglas* method of proof applies to cases brought under the ADEA, but, because the parties did not dispute the issue, the Court assumed *arguendo* that *McDonnell Douglas* is fully applicable to an ADEA case. *Id.* at 142.

24. Martin, *supra* note 1, at 331-35.

25. *Id.* at 345-52, 357-65, 379-84.

26. *Id.* at 342-43.

27. *Reeves*, 530 U.S. at 154-55 (Ginsburg, J., concurring).

28. See Catherine A. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546 (2001) (describing the lower courts’ reaction to *Reeves*); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592-600 (2001) (discussing cases after *Reeves* that failed to follow *Reeves*). See also *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47-48 (1st Cir. 2002) (stating that, although the plaintiff had shown pretext, it was a weak issue of fact, and, therefore, the defendant was entitled to judgment as a matter of law).

III. TWO DEFINITIONS OF DISCRIMINATION

I agree with Professor Martin's view that the lower courts have interpreted employment discrimination law in a rigid, impractical manner and that there is significant discrimination occurring in the workplace that Title VII has not prevented or cured.²⁹ However, others with a different world view would disagree, concluding that Title VII has been used as a means of undermining the employment-at-will doctrine and intruding upon the reasonable prerogatives of employers.³⁰

Both sides of the debate are right. There is no question that there are employees who attempt to use the employment discrimination statutes to sue their employers even though they are not victims of illegal discrimination. By the same token, there are many employees whose meritorious lawsuits for illegal discrimination fail as a result of rigid, blind rules that ignore the discrimination that caused the plaintiff's adverse employment action. Both sides of the debate may even agree with both of these propositions. But we differ starkly as to our perception of the principal problem.

Our differences are about the very definition of discrimination. "Discrimination" means different things to different people. The narrowest view of illegal discrimination is defined as intentionally treating someone differently (and worse) because of the individual's race, color, national origin, gender, sex, religion or age. It sees discrimination as a wrong perpetrated by one individual against another individual. It results from conscious discriminatory animus toward the person because she or he is a member of a protected group. It eschews the concept of structural discrimination. Employers are responsible only because their employees, acting as agents, made a consciously discriminatory decision and carried it out.

IV. SCIENCE ON THE ORIGINS OF BIAS AND THE COURTS' REACTIONS

For one who advocates ascertaining the intent of the enacting Congress, or even one who permits "imaginative reconstruction" as explained by Judge Posner,³¹ it may be necessary to limit Title VII to this view. But one who

29. See Zimmer, *supra* note 28, at 592-600; Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623, 643-53 (2005) (demonstrating that discrimination occurs because of structures such as a workplace culture that create opportunities for discrimination).

30. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 3-4, 9 (1992) (arguing that anti-discrimination laws operate to restrict freedom of contract).

31. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286 (1985). A judge should attempt to determine the intent of the legislature by engaging in imaginative reconstruction, which requires the judge to consider how the enacting body would decide the issue. *Id.* at 286-88. This approach includes going beyond the text and the legislative history and even considering the values and attitudes of the

views statutes as dynamic and living documents, like Professor Eskridge, would likely encourage courts to consider the new information that social scientists have developed to explain the nature of prejudice and bias.³² It appears that legislators held a limited view of discrimination at the time they enacted Title VII,³³ consistent with the view held by social scientists in the early twentieth century regarding the nature and origins of prejudice.³⁴ At the time, psychologists believed that stereotyping and discrimination resulted from the affect (or emotion) of the person holding the stereotype toward members of a particular out-group.³⁵ Discriminatory behavior, according to this view, resulted from conscious negative attitudes or emotions held by the discriminator.³⁶

Soon thereafter, in the 1970s, psychologists began to focus on cognition rather than affect as the cause of attitudes held by members of one group toward another.³⁷ Cognitive theory posits that human beings create categories to process information efficiently. The cognitive processing causes stereotyping of individuals who are members of out-groups. Once formed, the stereotypes are entrenched and cause individuals to filter information through the given stereotype. Thus, stereotypes, acquired in unconscious or subliminal fashion, account for processing of information in inaccurate or biased ways.³⁸

legislature that passed the statute. *Id.* Judge Posner states that judges should put themselves into the position of the drafters and try to imagine how they would have decided the case. *Id.*

32. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

33. The passage of the Civil Rights Act of 1964 occurred in response to segregated facilities that caused racial unrest in the South and other parts of the country. Pub. L. 88-352, 78 Stat. 241. For a brief history of the Civil Rights Act of 1964, see CongressLink, Major Features of the Civil Rights Act of 1964, http://congresslink.org/print_basics_histmats_civilrights64text.htm (last visited Feb. 10, 2010). The history demonstrates that Congress was concerned primarily with overt racial discrimination as a result of the history of race relations in the country at the time. *Id.*

34. See Galen V. Bodenhausen, *Emotions, Arousal, and Stereotypic Judgments: A Heuristic Model of Affect and Stereotyping*, in *AFFECT, COGNITION, AND STEREOTYPING* 13, 14 (Diane M. Mackie & David L. Hamilton eds., 1993); Steven J. Stroessner & Diane M. Mackie, *Affect and Perceived Group Variability: Implications for Stereotyping and Prejudice*, in *AFFECT, COGNITION, AND STEREOTYPING* 63 (Diane M. Mackie & David L. Hamilton eds., 1993).

35. See Bodenhausen, *supra* note 34, at 14. An "out-group" is a "group of people excluded from or not belonging to one's own group, especially when viewed as subordinate or contemptibly different." See *Amer. Heritage Dictionary of the English Language*, <http://thefreedictionary.com/out-groups> (4th ed. 2000).

36. See Bodenhausen, *supra* note 34; Stroessner & Mackie, *supra* note 34.

37. See David L. Hamilton & Diane M. Mackie, *Cognitive and Affective Processes in Intergroup Perception: The Developing Interface*, in *AFFECT, COGNITION, AND STEREOTYPING* 1 (Diane M. Mackie & David L. Hamilton eds., 1993).

38. See *id.* at 63.

Psychologists recognize today, however, that prejudice and the resulting discrimination do not result from either affect or cognitive processing alone.³⁹ Instead, they result from a complex interaction of motivational, cognitive and cultural factors.⁴⁰ Social scientists are confident about one conclusion: stereotypes often result from unconscious or subliminal processes.

These studies have been supported by the use of technology to study brain activity to determine unconscious responses based on race or outsider status. Cognitive psychologists use functional magnetic resource imaging (fMRI) as well as electroencephalography (EEG) and magnetoencephalography (MEG) to measure neural activity in different parts of the brain.⁴¹ In conjunction with this technology, they administer tests that determine whether subjects believe that they have racial prejudices.⁴² The tests measuring explicit (conscious) bias generally demonstrate that white subjects have little or no prejudice, while at the same time the tests measuring implicit (unconscious) bias demonstrate that they do harbor negative attitudes toward blacks.⁴³

fMRI has permitted social scientists to view these unconscious reactions and to measure them in human brain activity.⁴⁴ Over the past decade, Alan Hart, Elizabeth Phelps and their colleagues have conducted experiments in which white subjects view pictures of black persons while the fMRI maps changes in the oxygenation of the blood in the amygdala.⁴⁵ The amygdala is a small structure in the medial temporal lobe that is known for measuring emotional learning and memory.⁴⁶ Results from these studies demonstrate that white subjects' brain activity is activated differently in the amygdala

39. See David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION, AND RACISM 127, 153 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

40. *Id.*

41. See Stacey A. Tovino, *Functional Neuroimaging Information: A Case for Neuro Exceptionalism?*, 34 FLA. ST. U. L. REV. 415, 416, 422 (2007); Lasana T. Harris & Susan T. Fiske, *Social Neuroscience Evidence for Dehumanised Perception*, 20 EURO. REV. SOC. PSYCH. 192, 194 (2009).

42. See Jennifer L. Eberhardt, *Imaging Race*, 60 AM. PSYCHOLOGIST 181, 182-84 (2005); William A. Cunningham et al., *Separable Neural Components in the Processing of Black and White Faces*, 15 PSYCH. SCI. 806, 808-09 (2004).

43. See sources cited *supra* note 42.

44. See, e.g., Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729 (2000) [hereinafter *Performance*]; Elizabeth A. Phelps & Laura A. Thomas, *Race, Behavior, and the Brain: The Role of Neuroimaging in Understanding Complex Social Behaviors*, 24 POL. PSYCHOL. 747, 751 (2003) [hereinafter *Race, Behavior, and the Brain*].

45. See Alan J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs. Ingroup Face Stimuli*, 11 NEUROREPORT 2351 (2000); *Performance*, *supra* note 44; *Race, Behavior, and the Brain*, *supra* note 44.

46. See Tovino, *supra* note 41, at 424.

depending on whether the photograph is of a white or black object. Thus, Dr. Phelps concludes that the photographs of different social groups evoke different reactions in the amygdala and that these different reactions occur as a result of unconscious processes.⁴⁷ Moreover, another study by Elizabeth Phelps demonstrates that where whites view the photograph of a black object who is unknown to the viewer, the variation in the amygdala occurs. Where they view the photograph of a well-known and respected black object like Michael Jordan or Martin Luther King, the white subjects do not have the same amygdala variation as they do when they view the unknown blacks.⁴⁸ Other experiments demonstrate that other parts of the brain tend to moderate the response of the amygdala.⁴⁹

These experiments make it fairly clear that at least some prejudice or bias is experienced in the unconscious and caused by social factors. Despite this work by psychologists, sociologists and neuroscientists, and despite articles by a number of legal scholars who have introduced the courts to the social science data,⁵⁰ the idea of unconscious motive, per se, has not gained traction with the courts. Nor have the courts embraced the concept of structural discrimination proposed by Susan Sturm⁵¹ and Tristin Green,⁵² who rely on organizational behavioral experts to explain how structures at work can allow unconscious processes to combine to produce discriminatory results.

In fact, many courts seem to be moving in the opposite direction of the scientific evidence. Many have embraced a very literal, individual and color-blind view of the behavior that constitutes discrimination. Examples of this narrow acontextual approach can be seen in some courts' definition of "pretext," which sees pretext as a phony excuse, a lie or a cover-up for discrimination, all of which seem to foreclose the possibility of unconscious motive

47. See *Performance*, *supra* note 44, at 734.

48. *Id.*

49. See Cunningham et al., *supra* note 42, at 811.

50. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Ann C. McGinley, *!Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005).

51. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (concluding that much discrimination occurs as a result of cognitive or unconscious bias, results from interaction among groups in the workplace and is exacerbated by governance structures that require workers to participate more actively in decisionmaking).

52. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (arguing that subtle forms of discrimination common in today's workplace are influenced "by the structures, practices and dynamics of the organizations and groups within which individuals work").

or bias as an explanation for the employer's pretextual, non-discriminatory reason for taking the adverse employment action. Another example of an acontextual analysis is the Supreme Court's decision in *Ricci v. DeStefano*,⁵³ a case that both limits and expands the definition of discrimination in an ahistorical way. I will deal with these two examples in the next subsections of this essay.

A. Pretext as Lie

In *!Viva la Evolución!: Recognizing Unconscious Motive in Title VII*,⁵⁴ I demonstrated that the *McDonnell Douglas* methodology can capture discrimination resulting from an unconsciously discriminatory motive.⁵⁵ While proof of pretext may raise an inference of conscious discrimination, a finding of pretext may also substitute for a showing of causation: that is, it may demonstrate that the protected characteristic was a motivating factor in the employment decision, whether consciously discriminatory or not.⁵⁶ I concluded, based on research in psychology, that not all racially based decisionmaking occurs at the conscious level and that the *McDonnell Douglas* methodology, when interpreted to give a broad definition to the pretext requirement, captures decisions caused by conscious and unconscious discriminatory motives.⁵⁷ And, I noted, while the authors of Title VII likely envisioned conscious discrimination because discrimination was overt at the time of the passage of the bill, a change in the predominant forms of discrimination and in our understanding of the nature of prejudice should not deter us from interpreting the statute to accomplish its goals of eliminating discrimination in the workplace and providing economic opportunities to all workers based on their ability to do the job.⁵⁸ The *McDonnell Douglas* methodology accomplished this goal of holding employers liable for discrimination resulting from unconscious prejudices in many instances, even if courts were unaware of this solution.⁵⁹

Through the use of hypotheticals, I demonstrated that an employer may decide to promote a white man over an older black man because he is more comfortable with the white man.⁶⁰ Or perhaps the employer promotes a white employee over a Hispanic woman based on an honest, mistaken belief that

53. 129 S. Ct. 2658 (2009).

54. See McGinley, *supra* note 50, at 454.

55. This article was published before the new results with the fMRI brain activity research, but the fMRI work is consistent with and supportive of the research by social scientists, concluding that prejudice often originates in the unconscious.

56. See McGinley, *supra* note 50, at 454-55.

57. *Id.* at 421-46, 455, 481.

58. *Id.* at 416-20.

59. *Id.* at 455.

60. *Id.* at 465.

she is more disorganized than the white employee.⁶¹ In these cases, the employer's attitude toward the minority employee is likely shaped in his or her unconscious. Nonetheless, under the *McDonnell Douglas* framework as interpreted in *Reeves*, a jury may find discrimination if it finds that the reason the employer articulates for the adverse employment action either is not true or is not the real reason for the adverse employment action.⁶² The finding of pretext may flag both unconscious and conscious motives for the employer's behavior.

Perhaps understanding that a broad definition of pretext may capture discrimination that goes beyond conscious discriminatory intent, a number of courts, and in particular the Seventh Circuit, define pretext narrowly, thereby eliminating the conclusion that an adverse employment action motivated by unconscious biases violates the statute.⁶³ These courts emphasize that pretext is a lie for the employer's action, not merely a finding that the employer's articulated reason for the adverse action is untrue.⁶⁴ If the employee proves that the articulation is untrue but the employer was mistaken in its belief that the employee deserved to be disciplined or fired, such mistaken belief is not sufficient to prove pretext.⁶⁵ In other words, even if the defendant's mistake results from unconscious bias or stereotyping, there is no showing of pretext according to these courts. For example, in *McGowan v. Deere & Co.*, the United States Court of Appeals for the Seventh Circuit held that the plaintiff, an African American male who was not permitted to return to work after an injury, had to show more than that the employer's stated reason for the firing was wrong.⁶⁶ The court stated,

[J]ust because the analysis of the second prong of the prima facie case merges with the pretext analysis does not mean that a plaintiff does not have to present some circumstances from which inten-

61. *Id.* at 464-65.

62. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-47 (2000).

63. *See, e.g., McGowan v. Deere & Co.*, 581 F.3d 575, 581 (7th Cir. 2009) (holding that, after *Reeves*, a plaintiff, in order to show pretext, must still demonstrate "that the employer's stated reason for an employment action is dishonest and that the true reason was based on discriminatory intent"); *Kouvchinov v. Parametric Tech. Corp.*, 537 F.3d 62, 67 (1st Cir. 2008) (concluding that a mistaken belief is not enough to prove pretext); *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47-48 (1st Cir. 2002) (holding that, even though there was some evidence of pretext from which a jury could infer discrimination, summary judgment should be affirmed because the pretext evidence was weak at best); *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68-69 (7th Cir. 1995) (holding that pretext is "a phony reason" for the adverse action and that, even if the employee can demonstrate that one of the two reasons given by the employer is wrong, the court can still grant summary judgment if the other is correct).

64. *See supra* note 63.

65. *See Kouvchinov*, 537 F.3d at 67.

66. 581 F.3d at 577-78, 581-82.

tional discrimination can be inferred. Otherwise, an honest but mistaken belief would subject an employer to liability. Thus, in order to show pretext, a plaintiff is still required to show that the employer's stated reason for an employment action is dishonest and that the true reason was based on discriminatory intent.⁶⁷

This case seems to contradict *Reeves*, which holds that in most cases a showing of pretext is sufficient for the jury to hear the case and to decide whether the employer's decision was motivated by discrimination.⁶⁸ In essence, it appears to make "pretext-plus"⁶⁹ the rule in the ordinary case even though the Supreme Court rejected the "pretext-plus" rule in *Reeves*.⁷⁰ Requiring "pretext-plus" is a means of limiting the definition of discrimination to conscious discrimination.

B. Ricci v. DeStefano's Ahistorical View of Discrimination

A recent Supreme Court case demonstrates a narrow definition of discrimination that focuses on conscious, overt reliance on race. In the now-famous firefighter case, *Ricci v. DeStefano*, the City of New Haven gave written and oral examinations for promotions to vacant lieutenant and captain positions.⁷¹ While the City hired a consultant to create examinations to measure job-related knowledge,⁷² the consultant was not permitted to alter the 60/40% weighting of the written and oral components that the union had negotiated almost two decades earlier.⁷³ The exam results had a disparate impact on black and Hispanic firefighters.⁷⁴ Even though a sizable number of blacks and Hispanics sat for the examinations, no black or Hispanic firefighters qualified for promotion to the lieutenant positions, and no black and only two Hispanic firefighters qualified for promotion to the captain positions.⁷⁵

Concerned about this result, City officials convened meetings with the consultant and sent a letter to the Civil Service Board (CSB) suggesting that

67. *Id.* at 581 (emphasis omitted).

68. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

69. "Pretext-plus" is used to describe a requirement that the plaintiff not only prove that the employer's legitimate, non-discriminatory reason is pretextual in order to get to the jury but also show additional evidence of discrimination. This term was coined by Catherine Lanctot. *See Lanctot, supra* note 19, at 66.

70. 530 U.S. at 147-48.

71. 129 S. Ct. 2658, 2665 (2009).

72. *Id.* at 2665-66. The consultant used interviews, ride-alongs and job-analysis questionnaires given both to racial minorities and non-minorities to create the examinations. *Id.*

73. *Id.* at 2691 (Ginsburg, J., dissenting).

74. *Id.* at 2666-67.

75. *Id.* at 2666.

the CSB not certify the exam results.⁷⁶ The CSB held a hearing, taking testimony from an industrial/organizational psychologist and consultant, Christopher Hornick. Hornick expressed surprise at the disparity in the scores between the whites and the minority candidates and stated that the statistical disparity might have resulted from the collective bargaining agreement's 60/40% weighting of written and oral examinations.⁷⁷ He also posited that the differential may have resulted from the City's failure to review the test for relevancy before it was administered⁷⁸ and testified that there were "more appropriate ways to assess [a person's] ability to serve as a captain or lieutenant."⁷⁹ A second witness, "Vincent Lewis, a fire program specialist from the Department of Homeland Security," testified that he believed that the candidates should know the materials and that "the questions were relevant."⁸⁰ Finally, Janet Helms, an expert in how race and culture influence test performance, testified that, regardless of the type of written test administered, members of underrepresented groups will fare worse than whites.⁸¹

When the CSB refused to certify the results of the promotion process, white firefighters and one Hispanic firefighter who passed the exam filed a lawsuit alleging disparate treatment racial discrimination.⁸² The defendants argued that they had a good faith belief that certifying the results would have violated the disparate impact provisions of Title VII.⁸³

The federal district court granted summary judgment to the defendants,⁸⁴ which a panel of the Court of Appeals for the Second Circuit upheld.⁸⁵ In a 5-4 decision, the United States Supreme Court reversed, holding that a good faith belief that the testing created an illegal disparate impact on racial minorities is insufficient as a defense to a disparate treatment claim that arose as a result of the City's overt use of race to throw out the results.⁸⁶ Instead, over a strong dissent, the Court concluded that the City must have "a strong basis in evidence that, had it" certified the results, "it would have been liable under [Title VII] disparate-impact" theory; the Court concluded as a matter of law that the defendants did not meet the necessary threshold standard.⁸⁷

76. *Id.* at 2666-67.

77. *Id.* at 2669.

78. *Id.* at 2668-69.

79. *Id.* at 2670 (internal quotation marks omitted).

80. *Id.* at 2669 (internal quotation marks omitted).

81. *Id.* at 2669.

82. *Id.* at 2671.

83. *Id.*

84. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006).

85. *Ricci v. DeStefano*, 530 F.3d 87, 87 (2d Cir. 2008).

86. *Ricci*, 129 S. Ct. at 2663-64.

87. *Id.* at 2664. The Court did not reach the question of whether the disparate impact provision violates the Equal Protection Clause of the Fourteenth Amendment. For an interesting discussion of this issue, see generally, Richard Primus, *The Future*

In concluding that the defendants violated the statute's ban on disparate treatment, *Ricci* emphasizes an ahistorical, acontextual view of discrimination. It views the only wrong as the defendants' overt and conscious use of race to overturn the test results. It ignores, however, the defendants' reason for doing so and the history of racial discrimination in the country and in the unions that negotiated the 60/40% weighting – discrimination that may have led to the disparate impact. At the same time, the Court narrowed the definition of disparate impact. It concluded that as a matter of law the examinations were job related and that there was insufficient evidence of a less-discriminatory alternative, despite evidence that a different weighting of the oral and written examinations would have allowed the City to consider three black candidates for the open positions and testimony by a consultant that an assessment center process of evaluating candidates in performance of job tasks would likely have had a less adverse impact.⁸⁸ Finally, the Court ignored testimony that Bridgeport, Connecticut, a city nearby, had better results when it used a selection process that placed primary emphasis on an oral examination.⁸⁹ All of this evidence, at a minimum, seems to point to questions of fact for jury determination.⁹⁰

The Court's emphasis on overt discrimination in disparate treatment cases and its failure to take seriously the disparate impact of the test and the possibility of less discriminatory alternatives make it significantly easier for whites than racial minorities to bring race discrimination cases.⁹¹ This is because racial minorities have historically been harmed by structural discrimination that is better addressed by disparate impact cases. Because many of the structures challenged were designed with white men in mind, they tend to favor whites, even if the benefit may not be intentional. Thus, white men have not brought disparate impact causes of action. Where, however, a race-conscious remedy is considered intentional discrimination as it was in *Ricci*, white men are benefitted, and persons of color lose. A limitation on disparate impact cases that permits a finding of discrimination based on unconscious processes will, therefore, harm persons of color. Perhaps this result is one

of *Disparate Impact*, 108 MICH. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1495870>.

88. *Id.* at 2662, 2679-80.

89. *Id.* at 2705 (Ginsburg, J., dissenting).

90. Justice Alito, joined by Justices Scalia and Thomas, gives a different reading to the facts in the record. He cites to evidence that the City's motivation was not to avoid disparate impact litigation but merely to discriminate on the basis of race. *See id.* at 2683-89 (Alito, J., concurring). This evidence, however, appears to point to the necessity of a trial because there appear to be genuine issues of material fact concerning the motivation of the City.

91. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness* 10-11 (UCLA Sch. of Law Research Paper No. 09-30, Loyola-LA Legal Studies Paper No. 2009-49, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507344#.

that the Court favors because it believes in a narrow definition of discrimination that embodies overt conscious acts. If so, this is a myopic view that ignores the most recent social science research demonstrating the prevalence of subconsciously held negative attitudes by whites towards members of racial minorities. Our society has reacted strongly to the issue of race, making the overt racial reference unacceptable and the term "racist" one of the worst insults in the language. This result has caused racial discrimination against racial minorities to go underground – whether conscious or unconscious – while remedial efforts and affirmative action become the targets of lawsuits alleging reverse discrimination because they are necessarily overt.

V. A POSSIBLE SOLUTION?

The problem, therefore, is that the definition of "discrimination" has been narrowed and broadened to denote the intentional use of race no matter the context. This means that neutral policies and practices having a disparate impact on women and persons of color will be ignored as unimportant and that affirmative remedial measures based on historical context will be labeled "discrimination" and banned. "Discrimination" must be redefined to combat this tendency. The definition of "discrimination" must include neutral structures and processes that create a disparate impact on persons who have suffered discrimination historically; it should also include behaviors that harm protected groups as a result of unconscious discrimination.

How, then, do we arrive at a more robust, meaningful definition of "discrimination"? Some have advocated increased resort to disparate impact law to overcome the problems presented by the disparate treatment method of proof.⁹² This is certainly an avenue that merits exploration, but, unfortunately, *Ricci* makes proof of disparate impact more difficult in the future. For discrimination based on unconscious bias, however, there is some hope that disparate impact theory may be the appropriate solution. The Court has mentioned that one use of disparate impact is to remedy unconscious bias.⁹³ Yet Congress focused more on the traditional types of disparate impact cases when it drafted the disparate impact provisions of the 1991 Civil Rights Act.⁹⁴ Thus, the law requires that in most cases the plaintiff prove that a specific employment practice caused a disparate impact. This proof is difficult to establish, especially when the practices are subjective and promote the use of unconscious biases.

92. See generally Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911 (2005); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597 (2004).

93. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (subjective criteria are subject to the disparate impact cause of action).

94. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., 42 U.S.C.).

Moreover, Justice Scalia's concurrence in *DeStefano*, joined by Justice Alito, raises a red flag for all who recognize that disparate impact is a vital tool in combating employment discrimination. The concurrence goes beyond the majority opinion in enforcing colorblind decisionmaking. It argues that "disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."⁹⁵ Scalia therefore concludes that disparate impact violates the equal protection clause, and he ends with a warning: "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how — and on what terms — to make peace between them."⁹⁶

Despite the possibility of this "war," scholars should work on developing alternative theories under disparate impact law that would make it easier to prove discrimination resulting from unconscious bias. They should also consider new approaches to proving discrimination that permit a finding of discrimination based on structures that cause unconscious racial decisionmaking while still supporting theories that permit exceptions to *Ricci*'s narrow, colorblind, ahistorical approach to defining discrimination.

95. 129 S. Ct. at 2682 (Scalia, J., dissenting).

96. *Id.* at 2683. Professor Charles Sullivan concludes that limiting disparate impact claims to women and racial minorities would not survive constitutional scrutiny under the Equal Protection Clause. See Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1565 (2004). Implicit in his argument, however, is that if disparate impact applies to whites and to men as well as to women and racial minorities, the theory will survive constitutional scrutiny.