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FITTING THE FORUM TO THE PERNICIOUS FUSS: A DISPUTE SYSTEM DESIGN TO ADDRESS IMPLICIT BIAS AND 'ISMS IN THE WORKPLACE

Elayne E. Greenberg*

“We can’t solve problems by using the same kind of thinking we used when we created them.”

Albert Einstein

I. INTRODUCTION

This paper proposes a dispute system design to address workplace discrimination caused by implicit biases so that employees and employers involved in such disputes can secure a more responsive justice than existing legal processes are able to provide. Workplace discrimination caused by implicit bias¹ continues to contaminate our work environment despite our focused legal ef-

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¹ The title of this Article is an extension of Professor Sander’s introduction of the dispute resolution concept of “fitting the forum to the fuss” when he addressed The Pound Conference and introduced the vision of the “multi-door courthouse” where disputants have a menu of appropriate dispute resolution process that is designed to address the presenting dispute. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976) (addressing The Pound Conference); see also Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 53 tbl.1 (1994).

Implicit bias may also be referred to as unconscious discrimination or unconscious bias. It refers to unconscious, biased thoughts that cause the actor to behave in a discriminatory way. The actor may be unaware that the behavior is discriminatory, and such discriminatory behavior may actually contradict the expressed values and feelings of the actor. For purposes of this paper, implicit bias denotes prejudice. Cf. SHANKAR VEDANTAM, *THE HIDDEN BRAIN: HOW OUR UNCONSCIOUS MINDS ELECT PRESIDENTS, CONTROL MARKETS, WAGE WARS, AND SAVE OUR LIVES* 4 (Spiegel & Grau eds., 2010) (defining unconscious bias as any situation where an individual’s actions “were at odds with [his or her] intentions”). See also Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1004 (2006) (defining unconscious bias as, not only

forts² to combat such overt “isms”³ as sexism,⁴ racism,⁵ ageism,⁶ and ableism.⁷ Although overt expressions of bias have significantly decreased in recent years, expressions of implicit bias, the primary cause of workplace discrimination, persist.⁸

This problem persists for three primary reasons. First, an expanding body of cross-disciplinary research clarifies that much of discriminatory behavior is not driven by explicit bias, as previously thought, but is driven by our implicit biases. Moreover, this research informs that our implicit biases are actually an unconscious mirror of our ubiquitous societal biases.⁹ Second, the law’s response to discrimination ineffectively targets the *explicit intent* of discriminatory behavior, ignoring the more pernicious *implicit in-*

prejudice, but any action where an individual’s unconscious behavior is incompatible with their intentions).

² Title VII, enacted in 1964, prohibits discrimination based on race, color, national origin, or religion. 42 U.S.C. § 2000e-1–2000e-17. It was amended and expanded by the Civil Rights Act of 1991, which prohibited discrimination if an individual’s race, color, sex, national origin, or religion was a “motivating factor” in the employment decision. Krieger & Fiske, *supra* note 1, at 1009. Specifically, Section 703(a)(1) of the Title VII of the Civil Rights Act of 1964 prohibits “unlawful employment practice[s.]” 42 U.S.C. § 2000e-2.

³ While the term “ism” is being used as a shorthand label to describe collectively different forms of discrimination, this labeling is not meant to diminish or devalue the distinct toxic, personal, and destructive effect of each type of discrimination on the individual and our society.

⁴ “Sexism has been defined as ‘the belief that sex differences produce the inherent superiority of a particular sex’” Jane Byeff Korn, *Institutional Sexism: Responsibility and Intent*, 4 TEX. J. WOMEN & L. 83, 88 (1995) (internal citations omitted).

⁵ Racism, when defined in broad terms for comparative purposes and narrow enough to include various forms of injustice, is “an ethnic group’s assertion or maintenance of a privileged and protected status vis a vis members of another group or groups who are thought . . . to possess a set of socially relevant characteristics that disqualify them from full membership in a community or citizenship in a nation-state.” Ariela J. Gross, *Race, Law, and Comparative History*, 29 LAW & HIST. REV. 549, 554 (2011) (internal citations omitted).

⁶ “Age discrimination involves treating someone (an applicant or employee) less favorable because of his [or her] age.” *Age Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/age.cfm> (last visited Feb. 10, 2015).

⁷ Ableism, also known as “disability phobia,” is defined as an attitude or practice towards “individuals with disabilities as being an abnormal presence, a constraint which devalues or silences their voice.” Alfreda A. Sellers Diamond, *L.D. Law: The Learning Disabled Law Student as a Part of a Diverse Law School Environment*, 22 S.U. L. REV. 69, 81 n.31 (1994) (internal citations omitted).

⁸ Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 791 (2005) (concluding that implicit bias is the most pervasive and persistent modern discrimination).

⁹ See Eric Mandelbaum, *Attitude, Inference, Association: On the Propositional Structure of Implicit Bias*, <http://people.fas.harvard.edu/~mandelbaum/Attitude%20Inference%20Association%20for%20dossier.pdf>.

tent of discrimination.¹⁰ Third, because our legal system is fundamentally a fault-based retributive system of justice that prioritizes punishment over rehabilitation, it fails to address the broader societal problems that cause implicit biases.¹¹

The existing legal system fails both employees and employers. Employees claiming discrimination often cannot prevail without a “smoking gun;” an evidentiary hurdle that is often insurmountable when the discrimination is the result of implicit bias. Employers, often believing that they have conducted their business in a non-discriminatory way, can feel victimized by defending against such claims. Yet, both the employee and employer may be right, and the failures of existing legal processes inflict a financial and psychological toll on both parties.¹² Compounding the problem, even the small percentage of employees and employers who seek an alternative justice in the EEOC mediation program, often find systemic inadequacies in response to their workplace discrimination allegations caused by implicit biases.

This paper extends the research on implicit bias to dispute system design and examines how a reconciliation-focused dispute system design might more effectively resolve workplace discrimination conflicts caused by implicit bias. Inspired by the fundamental values of peace reconciliation that are a part restorative justice principles,¹³ the proposed design abandons the status quo approach that mischaracterizes employees and employers as victims and offenders and replaces it with a more responsive dispute system design. This design promotes awareness, understand-

¹⁰ Krieger & Fiske, *supra* note 1, at 998–99 (noting judges are reluctant to change psychological models that would alter the legal doctrine and that the goal of the law is not to refine behavioral theories).

¹¹ See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063, 1080 (2006) (suggesting that we need a new model of discrimination to deal with implicit bias).

¹² See, e.g., Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003); Crosby Burn, *The Costly Business of Discrimination*, CENTER FOR AMERICAN PROGRESS (March 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf; Erin Carson, *How ‘unconscious bias training’ can fight hidden prejudices in the workplace*, <http://www.techrepublic.com/article/how-unconscious-bias-training-can-fight-hidden-prejudices-in-the-workplace/> (Jan. 29, 2015, 4:30 AM).

¹³ Daniel Bar-Tal & Gemma H. Bennink, *The Nature of Reconciliation As An Outcome and as a Process*, in FROM CONFLICT RESOLUTION TO RECONCILIATION, 11 (Bar-Siman-Tov & Kelman eds., 2004); Herbert C. Kelman, *Reconciliation as Identity Change: A Social-Psychological Perspective*, in FROM CONFLICT RESOLUTION TO RECONCILIATION, 11 (Bar-Siman-Tov & Kelman eds., 2004); see generally Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANNU. REV. L. SOC. SCI. 161, 161–87 (2007) <http://ssrn.com/abstract=1005485>.

ing, and affirmative steps between employees and employers about the implicit biases that may unintentionally shape workplace discrimination. An essential purpose of such a design is to transform the conflict discourse surrounding employment discrimination from one of blame to one of awareness, understanding, and problem solving by beginning to address both the presenting employee/ employer conflict as well as the more deep-seated unconscious discrimination that is ingrained in the broader workplace culture. The goal is to create a dispute system design that encourages employees and employers to work together to create a discrimination-free work environment.¹⁴

Anchored in reconciliation-focused values, there are three components to this multi-intervention design: education about implicit bias; a transformative mediation process; and an assessment accountability that provides for public recognition for affirmative actions taken by employers and employees to address workplace discrimination caused by implicit bias. Each component is designed to allow employees and employers the opportunity to begin experiencing the cognitive and psychological shifts that are essential predicates for true reconciliation to take place.¹⁵ Further reinforcing the goal of reconciliation, the proposed design purposefully integrates priming opportunities into its structural design so that program participants have the opportunity to become more positively receptive to heretofore discriminated-against persons. Assessment loops are incorporated to measure the efficacy of the design and the individual components. Stakeholder participation ensures that the proposed design is synchronized with the needs and goals of the participants. Because the proposed design was formulated to be consistent with EEOC's core principals, the EEOC could easily incorporate the proposed design as an alternate dispute resolution track for their employment discrimination cases.

This discussion takes place in three parts. Part One describes implicit bias, providing an overview of the relevant research, explaining how it shapes our behavior, and identifying various methods to temper its influence. Part Two demonstrates the failure of our existing legal system and existing EEOC mediation program to address workplace discrimination allegations caused by implicit biases. Part Three prescribes a more realistic dispute system design

¹⁴ Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1971 (2009), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2734&context=faculty_scholarship.

¹⁵ *Id.*

that is better able to respond to discrimination caused by the unconscious biases of the actor.

II. UNDERSTANDING THE PERNICIOUS FUSS: IMPLICIT BIAS

The challenge with understanding and addressing implicit bias is akin to the philosophical dilemma posed by the question “if a tree falls in the forest, and no one is around to hear it, does it make a sound?” Like the debaters of the philosophical query about the falling tree, assessors of discrimination are challenged to believe that a person has committed a discriminatory act if that person’s discriminatory act was motivated by unconscious biases. According to their thinking, if you are not able to observe the unconscious workings of the brain at the time the brain activity shapes the discriminatory action, how could you possibly prove the link between implicit bias and the act of discrimination?

Yet, that is precisely what cognitive researchers who study discrimination etiology have been trying to prove, and this section will discuss the link between implicit bias and discrimination. Included in this section will be a definition of implicit bias, the theoretical models that explain implicit bias, a survey of representative research, and an understanding of why implicit biases are so pernicious. This understanding will inform and show how we might more effectively intervene to mediate implicit biases’ deleterious influences.

A. *Implicit Bias Defined*

Implicit bias refers to our unconscious, automatic responses that shape our conscious behavior.¹⁶ Even though implicit bias is an unconscious process, implicit bias predicts nonverbal behavior, social judgments, social actions, and psychological behavior.¹⁷ To the horror of many, we all have implicit biases. Our implicit biases toward others are pernicious and ubiquitous—they are evident in

¹⁶ Eric Kandel, who is a Nobel Prize winner in the biology of learning and memory, had said that “between 80 and 90 percent of our mental life is unconscious.” DAVID EDWARDS, *THE LAB: CREATIVITY AND CULTURE* 98 (2010). However, John Bargh, a psychologist at Yale University, estimates our mental unconscious life is closer to 100%. Bartlett, *supra* note 14, at 1902.

¹⁷ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 954–58 (2006).

our dealings with race, health care, gender, age and disabilities.¹⁸ Implicit biases are particularly difficult to identify, because an individual's unconscious bias is often at odds with that person's publicly stated beliefs and values.¹⁹ Moreover, these hidden biases are further reinforced and entrenched in our unconscious by both our neurological wiring²⁰ and our ongoing exposure to cultural stereotypes.²¹

B. *The Theoretical Models Explaining Implicit Bias*

There are two primary theoretical models for understanding implicit bias: the sociological model and the neurological model. Our understanding of implicit bias has evolved from a sociological

¹⁸ See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1080 (2006) (defining implicit bias as "pervasive but diffuse, consequential but unintended, ubiquitous but invisible").

¹⁹ Deana Pollard Sacks, *Implicit Bias-Inspired Torts*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 63 (Levinson & Smith eds. 2012); Krieger & Fiske, *supra* note 1, at 1003.

²⁰ Krieger & Fiske, *supra* note 1, at 1033 (noting neurological research where, in spite of low scores on explicit prejudice, individuals scored high on implicit biases when exposed to unfamiliar black faces).

²¹ Songs such as "You've Got To Be Carefully Taught" and "Everybody's A Little Bit Racist" contain explicit stereotyping. RODGERS & HAMMERSTEIN, *You've Got To Be Carefully Taught*, on SOUTH PACIFIC (1949), <http://www.metrolyrics.com/youve-got-to-be-carefully-taught-lyrics-south-pacific.html>; AVENUE Q, *Everybody's a Little Bit Racist*, <http://www.stlyrics.com/lyrics/avenueq/everyonesalittlebitracist.htm> (last visited Mar. 10, 2014). The lyrics for "You've Got To Be Carefully Taught" from Roger and Hammerstein's award winning play and movie is an example of how discrimination is embedded in our culture:

You've got to be taught
To hate and fear,
You've got to be taught
From year to year,
It's got to be drummed
In your dear little ear
You've got to be carefully taught.

You've got to be taught to be afraid
Of people whose eyes are oddly made,
And people whose skin is a different shade,
You've got to be carefully taught.

You've got to be taught before it's too late,
Before you are six or seven or eight,
To hate all the people your relatives hate,
You've got to be carefully taught!

RODGERS & HAMMERSTEIN, *You've Got To Be Carefully Taught*, on SOUTH PACIFIC (1949), <http://www.metrolyrics.com/youve-got-to-be-carefully-taught-lyrics-south-pacific.html>.

model that examines how our culture shapes implicit bias to a neurological model that explains how our brain's wiring reacts to implicit bias. Each model has expanded our knowledge from a different vantage point.²² And, as with any new theoretical model, each distinct conceptualization of bias has concomitantly referred to implicit bias with different nomenclature that more closely correlates with the theoretical postulate. Thus, implicit bias may also be referred to as the automatization of many stereotypes: predictably irrational,²³ blink,²⁴ thin slicing,²⁵ system "I" thinking,²⁶ and blind spots.²⁷

From a sociological perspective, implicit bias is actually the narrative of our larger culture²⁸ and our brains' recording of that story. Our life observations and media stories play a role in helping us absorb the broad cultural messages.²⁹ As our brain absorbs cultural influences, it then becomes hardwired to discern those who are part of the in-group and those who are relegated to the out-group. Thus, implicit bias results from our repeated vicarious experiences as observers of life that creates a linkage, not from direct experience.

Gordon W. Allport, a preeminent researcher who has studied prejudice and stigma from a sociological perspective, explained how both explicit and implicit biases provide a basis for the faulty generalizations that are used to categorize people.³⁰ Allport conceptualized what he referred to as ethnic prejudice as "an antipathy based upon a faulty and inflexible generalization [t]he

²² See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 20 (Addison-Wesley Publ'g Co. 1954); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (examining the psychology behind the seemingly rational way we think and make choices).

²³ See generally DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (Harper Collins 2008).

²⁴ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 72–98 (Back Bay Books 2005).

²⁵ *Id.* at 23. "Thin-slicing," also known as rapid cognition, is our unconscious' ability to make judgments about patterns and behavior based on limited experience. Thin-slicing is the basis of much prejudice and discrimination. *Id.* at 76.

²⁶ See generally KAHNEMAN, *supra* note 22.

²⁷ See MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (Delacorte 2013).

²⁸ Comments made by Charles Laurence at IB Conference at Harvard (June 14, 2012). On another note, just listen to the lyrics of the songs "You've Got to Be Taught" from South Pacific and "Everybody's A Little Bit Racist" from the hit Broadway play Avenue Q, *supra* note 21.

²⁹ See BANAJI & GREENWALD, *supra* note 27, at 68; VEDANTAM, *supra* note 1, at 75. Our music also expresses societal biases. See *supra* note 21, for the songs from the plays South Pacific and Avenue Q that are examples of implicit bias within our culture.

³⁰ See ALLPORT, *supra* note 22, at 20.

prejudice may be felt or expressed, and the prejudice may be directed towards a group as a whole, or towards an individual because he is a member of that group.”³¹

Allport has shown that our own implicit biases have a greater likelihood of controlling our decision-making if the decision-making takes place in the physical absence of the person being discriminated against.³² Allport explains that in such a decision-making context, the decision maker’s own implicit biases are more influential than their own conscience or the law.³³ Thus, the mere physical presence or in-person contact at the time of decision-making with the person who might be discriminated against, minimizes the influence of the decision-maker’s implicit biases.³⁴

Unlike the sociological model, the neurological model focuses on how our brains process implicit bias and how we might moderate the expression of our implicit biases. Neuroscientists posit that at least eighty percent of our mental processes are unconscious.³⁵ Most of our thoughts, behavior and decisions are shaped by our unconscious. The amygdala is the sphere of the brain that controls our emotions, threatening stimuli, reflective thinking, our judgment, and decision-making.³⁶ When the amygdala is presented with images that the individual is unconsciously biased against, functional magnetic resonance imaging shows that the amygdala becomes activated.³⁷

This type of unconscious, reflexive thinking such as implicit bias (also known as Stage I thinking) can, however, be mitigated by making people consciously aware of their reflexive thinking. This more deliberative thought process, also known as Stage II thinking, allows people to consider the “reasonableness” of their reflective reactions.³⁸ Stage II thinking could be bolstered by heightening an individual’s awareness of his implicit biases and exposing the individual with positive experiences that are discordant with the implicit bias.³⁹ As will be expanded in Part III, a well-designed

³¹ *Id.* at 9.

³² *Id.*

³³ *Id.* at 57.

³⁴ *Id.*

³⁵ BANAJI & GREENWALD, *supra* note 27, at 61. Eric Kandel, a Nobel-prize winner for his work on memory, estimated that between 80% and 90% of our memory is unconscious, while Yale Psychologist John Bargh asserts that it is closer to 100%. See BARTLETT, *supra* note 14.

³⁶ See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1510–11 (2005).

³⁷ *Id.* at 1511.

³⁸ See KAHNEMAN, *supra* note 22.

³⁹ *Frequently Asked Questions*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/faqs.html> (last visited Feb. 24, 2015).

mediation program can allow for more deliberate thought processes and reasonable reflective reactions.

C. *A Measure of Implicit Bias: The Implicit Association Test and Studies*

Whether you believe in the sociological model or the neurological model, to the embarrassment of some and the illumination of others, our implicit biases are measurable.⁴⁰ The Implicit Association Test (“IAT”) measures our implicit biases in a variety of areas. The rationale underlying this test is that we make quicker connections to concepts that are more familiar to us than to ideas that are alien.⁴¹ In a series of questions, the test-taker is presented with two categories, an in-group and out-group, and asked to rate them as positive and negative. The test-taker is then tasked with assigning a series of adjectives to one of the two groups. The speed with which the test taker categorizes the positive words with the in-group and the negative words with the out-group is used to compute whether there is implicit bias. Interestingly, our cultural biases are so ingrained that even test takers who are members of “out-groups” have demonstrated a preference for “in-groups.”⁴²

As evidenced in some of the studies cited in the following segment, the IAT can be used to measure the implicit bias of decision makers in the employment context. Using this data, researchers are able to assess the correlation between an employer’s implicit bias and the employer’s adverse employment decisions. Measures of implicit biases also provide a welcomed baseline to help researchers and program developers evaluate what interventions might be effective to moderate our unconscious biases. Even though variations of the IAT have widespread use, there are still those who question the efficacy of the IAT and urge that its scores be interpreted tentatively rather than conclusively.⁴³

⁴⁰ See *id.*

⁴¹ GLADWELL, *supra* note 24, at 77.

⁴² *Id.* at 85 (noting that a half-black test-taker still showed “moderate automatic preference for whites”).

⁴³ Reshma M. Saujani, “*The Implicit Association Test*”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 412 (2003) (noting the disadvantages of the IAT test to be the murky definition of intent, that employment discrimination is a causation driven inquiry instead of an intent driven inquiry, and that the IAT is not a good evidentiary tool).

D. *Lessons From Representative Research About Implicit Bias*

The research on implicit bias provides evidence of its existence, its deleterious shaping on workplace decisions and clues about how to mitigate its influence on workplace discrimination. The following series of studies show how decision-makers have a greater likelihood being influenced by their unconscious biases, be it race, ethnicity or gender, if the decision is made in the physical absence of the discriminated against person. They also show the incongruence that exists between discriminating actors' stated beliefs and implicit biases.

In the first study, two sets of investigators showed up at fashionable restaurants asking for a table. One set consisted of two female Caucasian investigators; in the other set of investigators, there was one female Caucasian and one female African American. Neither of the two groups of investigators was refused a table and both groups were treated appropriately. Distinguishably, the results were different when each of the two groups wrote letters to the restaurant requesting a reservation.⁴⁴ In the written request, one group specifically mentioned African Americans would be attending and would the restaurant mind. None of the letters that mentioned the African Americans would be attending was answered.⁴⁵

This same research was then tested in the employment context. In an important study about discriminatory ethnic employment practices, the results explain how it is possible for employees with names linking them to Arab-Muslim heritage to feel they have been discriminated against, while the employers and recruiters who opted not to hire them, honestly believe they did nothing wrong.⁴⁶ A group of employers and recruiters in Sweden, who were seeking to hire males for a variety of both skilled and semi-skilled positions, were told to select applicants for call back interviews from a pool of equally skilled and qualified males.⁴⁷ The only difference between the two groups was that one group of applicants had Swedish names while the qualified counterparts had Arab-Muslim

⁴⁴ Notice should be given that this study occurred before the Open Table application replaced written request. See Randall Stross, *The Online Reservation That Restaurants Love to Hate*, N.Y. TIMES (Dec. 11, 2010), http://www.nytimes.com/2010/12/12/business/12digi.html?_r=0. Open Table began in 1998, while this study was conducted in the 1950s. See *id.*

⁴⁵ ALLPORT, *supra* note 22, at 57.

⁴⁶ See generally Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, in *LABOUR ECONOMICS* Vol. 17, No. 3, 523–34 (2010).

⁴⁷ See *id.*

names.⁴⁸ Employers and recruiters consistently preferred calling back those applicants with native Swedish names.⁴⁹

After the employment decision was made, a voluntary group of these employers and recruiters were then administered a measure of their implicit biases towards Arab-Muslims and Swedes. Yes, some employers and recruiters explicitly stated their biases against Arab-Muslims.⁵⁰ Of relevance to our discussion in this paper, a significant number of employers and recruiters who did not explicitly discriminate against the Arab-Muslim applicants were also still found to discriminate implicitly against them.⁵¹

A variation of this study has been replicated using the names “Lakisha” and “Jamal,” names regarded as African American names, and “Greg” and “Emily,” names regarded as Caucasian Americans. Job applications and resumes with identical qualifications were submitted to employers. The only difference was the name on the application. The job applications and résumés with the names associated with Caucasian American received fifty percent more callbacks.⁵²

Another study, seeking to evaluate whether pervasive gender disparities throughout the legal profession could be explained by unconscious gender biases, used the IAT to measure the gender biases of law students and assess how those biases influence their decision-making about gender roles in the legal profession.⁵³ The study assessed the links between the law students’ unconscious gender biases and three distinct areas: judicial appointments, firm hiring practices, and budgets slashes.⁵⁴ As measured by the IAT, all the law students had gender biases that associated men with careers and women with the home and family, prompting study

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* at 529.

⁵² Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* (2012).

⁵³ Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 *DUKE J. GENDER L. & POL'Y* 1, 3, 5 (2010). The study provoked a desire to understand the reason for the stark absence of women in the top tiers of the legal profession even though approximately 50% of law school graduates have been graduating women. *Id.* at 2–6. The data is chilling: 80% of deans in law schools are men; more than 70% of men in academia hold tenured track and tenured faculty positions; 94% of men are managing partners in the top 200 of American’s largest law firm; men are the highest paid partners in 99% of the top law firms; and more than 70% of men are judges in federal and state courts. *Id.*

⁵⁴ *Id.* at 24.

participants to favor men over women as judges.⁵⁵ However, the participants made more egalitarian choices when it came to making decisions about law firm hiring and budgets cuts.⁵⁶ Of significance, participants were able to moderate and overcome their biases if they were motivated to do so.⁵⁷ The researchers of this study underscored the role that the priming of the study participants likely played as a motivator, by the introducing before the test stimuli that signaled it was a test about gender bias.⁵⁸

Awareness of our implicit biases is not enough to mitigate their influence. In fact, an awareness of one's implicit biases may increase its influence by normalizing it.⁵⁹ Therefore multiple studies reinforce that awareness needs to be coupled with a statement that such bias is not acceptable and needs to be overcome.⁶⁰

E. *Understanding Why Implicit Bias Is So Pernicious*

Three primary reasons explain why implicit bias remains so pernicious and challenging to remediate. First, people are unaware that the problem exists.⁶¹ Second, there is a discomfort about inquiring into the workings of the unconscious mind.⁶² Third, even if we make people aware of their biases, nobody wants to be labeled a discriminator.⁶³ All of these issues must be addressed in the design formulation of a dispute resolution process to address implicit bias in the workplace and other contexts.

First, because implicit bias is an unconscious process; people are unaware that a problem exists.⁶⁴ One wrinkle that explains why implicit bias is so impervious and difficult to discern is that the

⁵⁵ See *id.* at 28–29.

⁵⁶ See *id.* at 31.

⁵⁷ See *id.* at 33.

⁵⁸ See Levinson & Young, *supra* note 53, at 35. The researchers noted that the priming had an impact on the results. Where the priming was implicit, the white judges sentencing decisions were predictable, but where the priming was explicit, their IAT scores no longer predicted their decisions.

⁵⁹ Adam Grant & Sheryl Sandberg, *When Talking About Bias Backfires*, N.Y. TIMES, Dec. 6, 2014, at SR4, <http://www.nytimes.com/2014/12/07/opinion/sunday/adam-grant-and-sheryl-sandberg-on-discrimination-at-work.html>.

⁶⁰ *Id.*

⁶¹ See generally Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006).

⁶² See Krieger & Fiske, *supra* note 1, at 998.

⁶³ See BANAJI & GREENWALD, *supra* note 27, at 69.

⁶⁴ See Jolls & Sunstein, *supra* note 61.

individual whose decision-making is influenced by their implicit bias may have a public persona in which their expressed actions and values are contrary to the person's implicit bias.⁶⁵ For example, a CEO who has been a staunch advocate for affirmative action, may be still have unconscious biases against people of color or women.

Another wrinkle that makes it hard to ferret out is that implicit bias is more likely to appear in ambiguous, undefined situations that allow for judgment, choice, and interpretation of policies. In the employment arena, hiring and promotion decisions are ripe for being influenced by implicit bias. Thus, even though the CEO leads a company with a publicly recognized affirmative action program that brings a diverse pool of employees into the company, the CEO's implicit biases emerge when workplace decisions are made. When the CEO is choosing from among five division leaders to head an initiative, all performance skills being equal, the CEO will avoid selecting division leaders (s)he is implicitly biased against. However, the CEO may deny having a bias in the decision-making, because the CEO is totally unaware of his/her implicit biases.

Second, there is a general societal discomfort with treading into the unconscious workings of the minds of others. This is especially evident in the legal treatment of discrimination. The judiciary is similarly unwilling to inquire into the unconscious minds of parties and to investigate unconscious bias.⁶⁶ For the most part, our discrimination laws are framed to address explicit acts of discrimination.⁶⁷ Judges loathe inquiries into the unconscious and prefer to interpret the laws when there are intentional, conscious acts, and a direct causal link between the discriminatory thought and the discriminatory.⁶⁸ Ironically, a judge's own implicit biases may influence the way the judge interprets the law.⁶⁹ In cases of implicit discrimination, there may be no observable facts, no smoking gun.⁷⁰ Instead, there may be an ambiguous situation that

⁶⁵ See, e.g., Kang, *supra* note 36, at 1508 (explaining how people with racist attitudes may be completely unaware of these biases).

⁶⁶ See Krieger & Fiske, *supra* note 1, at 998–99.

⁶⁷ The exceptions are “mens rea” and “disproportionate impact.”

⁶⁸ See generally Krieger & Fiske, *supra* note 1, at 1027–52.

⁶⁹ See *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579–80 (1979) (“[I]t is simply proof of actions taken by the employer from which we *infer discriminatory animus* because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.”) (emphasis added).

⁷⁰ For examples of a judge's bias, see the cases interpreting the ADA; see also Melanie D. Winegar, *Big Talk, Broken Promises: How Title I of the American's with Disabilities Act Failed*, 34 HOFSTRA L. REV. 1267, 1303 (2006) (noting that judges' biases may be triggered as certain

doesn't rise to the legal standards of discrimination. This judicial reluctance to investigate unconscious bias⁷¹ tells us that implicit bias has a greater likelihood of being addressed in a non-judicial setting, such as the proposed dispute resolution design presented in Part III.

A third explanation why implicit bias remains so pernicious is that even when people are made aware of their implicit biases, nobody wants to be labeled as a discriminator.⁷² Though the research demonstrates that implicit bias is *not* about a person's goodness or badness but about a person's practice, nobody wants to be labeled a discriminator. Especially if an individual has made conscious efforts to engage with others in a non-discriminatory way, the realization that we have implicit biases is a shocking one that flies in the face of how we prefer to think of ourselves.⁷³ We want to avoid the stigma of being labeled a discriminator.⁷⁴ Psychologically, we may indulge in a range of defenses to help manage the discomfort or cognitive dissonance that emerges when we are confronted with the inconsistency between our unconscious and publically expressed values.⁷⁵ One option is to repress or deny that the bias exists.⁷⁶ Another defensive strategy is defensive rationalization in which the person fortifies his bias by example of supportive evidence for the biased reaction.⁷⁷ A third psychological defense is compromise or alteration in which the person alternates his actions based on the situation.⁷⁸ Finally, there are those who feel so uncomfortable with the dissonance between their overt and unconscious that they will strive to develop a consistency between their conscious and unconscious.⁷⁹ Thus, an essential paradigm shift in re-designing a dispute resolution program to address implicit bias is

"invisible disabilities" become known to the judges); Judge Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 94 (Levinson & Smith eds. 2012).

⁷¹ See generally Krieger & Fiske, *supra* note 1, at 1027–52.

⁷² See BANAJI & GREENWALD, *supra* note 30, at 69; see also Hayley Roberts, *Implicit Bias and Social Justice*, OPEN SOCIETY FOUNDATIONS (Dec. 18, 2011), <http://www.opensocietyfoundations.org/voices/implicit-bias-and-social-justice> (last visited Feb. 18, 2014) (labeling someone as a discriminator may actually make it harder to eradicate discrimination).

⁷³ See *id.*; see also ALLPORT, *supra* note 22, at 334; GLADWELL, *supra* note 27, at 85 (discussing his personal upset to find that even though he self-identifies as "half-black," his own IAT on race indicated that he has a pro-white preference).

⁷⁴ *Id.*

⁷⁵ ALLPORT, *supra* note 22, at 344.

⁷⁶ *Id.*

⁷⁷ *Id.* at 335.

⁷⁸ *Id.* at 337.

⁷⁹ *Id.* at 338.

to eliminate discussions of blame and disparaging labels and replace it with a forum that supports the development of heightened awareness for the participants.

The good news in all this is that, as will be explained in Part III, if we view implicit bias as learned sociological and neurological habit caused by a saturation of stereotypes, it is a habit, like any habit, that can be broken with awareness and specific strategic interventions.⁸⁰ The predicates for such changes requires that the individual be motivated to break the habit, be willing to develop an awareness of both their personal and societal level of implicit bias, and uses multi-disciplinary interventions to reduce their implicit biases.⁸¹ For those who are laden with guilt, take solace in knowing that those that feel the guiltiest are also the most motivated to change.⁸² Priming, or using positive stimulus prior to the interactions with the person discriminated against, can help alter negative, and unconscious reactions. Thus, our awareness of implicit bias begins a constructive inquiry about how we might more effectively intervene to address workplace discrimination.

III. ACKNOWLEDGING WHY THE EXISTING LEGAL SYSTEM AND EEOC MEDIATION PROGRAMS ARE FORUMS THAT DON'T FIT THE PERNICIOUS FUSS OF IMPLICIT BIAS

Our systemic failure to stop discriminatory acts in the workplace that are caused by unconscious biases, combined with the current scientific research on implicit biases, compels us to confront that the current dispute resolution processes, which are grounded in retributive justice principles and are both inadequate and inappropriate processes to redress such discrimination. Although the research shows that most workplace discrimination is caused by implicit bias, the existing legal and dispute resolution processes have been unable to address effectively claims of implicit bias. Whether decided by a court or through alternative dispute resolution, employees are unlikely to prevail in their discrimination claims. The reasons are two-fold. First, courts narrowly interpret

⁸⁰ Bridget Murray-Law, *Retraining the biased brain*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Oct. 2011) <http://www.apa.org/monitor/2011/10/biased-brain.aspx> (noting research that to break the implicit bias habit one must be aware of, concerned with and replace the biased information).

⁸¹ *Id.*

⁸² Implicit Racial Bias Across the Law: A Book Conference, at Harvard University (Jun. 14, 2012).

the legal definition of discrimination. Second, the triers of fact have demonstrated an evolving bias against employees. Compounding this injustice, employers are also victimized. Even though employers prevail more often than not, they still have to expend monetary and psychological resources to defend claims that they perceive as meritless. Third, the broader social problems from which implicit biases emanate are never addressed.

This section discusses how implicit biases contaminate all aspects of employer-employee dispute resolution: beginning in the workplace and continuing within our legal system and such dispute resolution adjuncts as the EEOC mediation program.⁸³ Even though many these discrimination claims may have been animated by implicit biases, none of these fora address implicit biases. Thus, employers and employees have no responsive forum to address their disputes. Section A discusses the many instances where implicit biases are likely to shape an employer's decisions. Next, Section B raises the economic toll on business. Then, Section C illustrates how Title VII's federal jurisprudence is unable to adequately address implicit biases. Finally, the discussion shifts to how even alternatives to litigation, such as the EEOC's mediation program, focus only on explicit biases.

A. *How Implicit Biases Arise in the Workplace*

As was introduced in the previous section, implicit biases are more likely to shape decision-making in ambiguous situations where the decision-maker exercises his discretion. Many significant employment decisions from hiring selection, working advancement and termination allow the decision-maker to exercise some degree of discretion and be influenced by his implicit biases. For example, an interviewing employer's gestures may be less welcoming to candidates against whom the interviewer has an implicit bias.⁸⁴ Similarly, during an interview, an employer may sit farther back or smile less than usual. These actions will affect the candidate's response and ultimately change the tone of the interview and the interviewer's impression of the candidate. Even if the candidate is hired, these biases may arise anew in future employment decisions that allow for employer discretion, such as merit-based

⁸³ See, e.g., Krieger & Fiske, *supra* note 1, at 997.

⁸⁴ GLADWELL, *supra* note 24, at 86.

monetary awards or promotions.⁸⁵ These implicit biases are especially likely to flourish in workplaces with less formal decision-making processes, which increase the likelihood of subjective employment decisions.⁸⁶

B. *The Economic Toll of Discrimination on Businesses*

It is not only a moral imperative for businesses to address responsibly workplace discrimination allegations, but a business necessity. The economic costs of workplace discrimination are staggering. It is estimated that businesses have lost \$64 billion to replace the two million workers who have left their jobs because of discrimination.⁸⁷ The cost of employee turnover is approximately twenty percent of an employee's salary.⁸⁸ A December 2005 Gallup poll of those who had experienced discrimination in the workplace confirms that employees who suffer discrimination are less likely to be loyal to their firms and remain in their jobs.⁸⁹ Those employees who are discriminated against but opt to remain in their jobs also cost their employers money because of their lack of productivity, increased worker's compensation claims, and lost time.⁹⁰

Although the cost of discrimination in general has been reported, the data cited above does not distinguish between discrimination caused by implicit versus explicit bias. However, given the lack of public awareness about implicit bias, the prevalence of our implicit biases and the lack of legal recognition that implicit bias is a cognizable legal claim, I believe the above numbers are an underrepresentation of the true economic costs to businesses for workplace discrimination caused by implicit bias. Thus, businesses have an economic motivation to address allegation of implicit bias.

⁸⁵ *Id.* at 87.

⁸⁶ Gertner & Hart, *supra* note 70, at 84.

⁸⁷ Crosby Burns, *The Costly Business of Discrimination The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. AM. PROGRESS (Mar. 2012), https://cdn.americanprogress.org/wpcontent/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf.

⁸⁸ Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees*, in CENTER FOR AMERICAN PROGRESS (Nov. 16, 2012), <https://cdn.americanprogress.org/wpcontent/uploads/2012/11/CostofTurnover.pdf> (analyzing patterns revealed about the cost of employee turnover: 21% of salary for highly skilled positions, 20% of salary for positions paying \$75,000 or less, and 16% of salary for positions earning less than \$30,000).

⁸⁹ David C. Wilson, *When Equal Opportunity Knocks*, GALLUP BUS. J. (Apr. 13, 2006), <http://www.gallup.com/businessjournal/22378/when-equal-opportunity-knocks.aspx>.

⁹⁰ *Id.*

C. *Implicit Bias Contaminates our Legal System: Beyond The Reach of Anti-Discrimination Laws Such As Title VII*

Anti-discrimination laws such as Title VII, as currently interpreted by federal courts, are insufficiently flexible to address adverse employment actions motivated by implicit biases.⁹¹ When originally enacted in 1964, Title VII comported with research showing that employment discrimination could be evidenced in an overt act.⁹² Consistent with that understanding, courts have held that to prevail in a Title VII § 703 action, plaintiffs must prove the employer explicitly discriminated against the employee.⁹³

Section 703(a) specifically provides that:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁹⁴

Although Title VII allows limited inquiry into an employer's motives, the focus is far too restrictive to reveal the employer's im-

⁹¹ The legislature, however, intended a broad application of Title VII and the Supreme Court in *United Steelworks of America, AFL-CIO-CLC v. Weber* has evaluated that, "Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of [discrimination] for which Title VII provides no remedy. Such a construction, as the Court points out, [] would be 'ironic,' given the broad remedial purposes of Title VII." *United Steelworks of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 215 (1979). See also Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁹² Title VII Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261 (codified as amended at 42 U.S.C. § 2000e).

⁹³ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169 (1995); see also *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("[Under Section 703(a)(1),] [a] disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action" (internal citations and quotation marks omitted)); *Amer. Tobacco Inc. v. Patterson*, 456 U.S. 63, 89 (1982) (finding that under Section 703(h) actual intent must be proven); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) (stating that the core of every disparate treatment claim is showing whether the victim was subject to intentional discrimination).

⁹⁴ Title VII Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e).

licit biases.⁹⁵ This narrow interpretation of what constitutes discrimination coupled with the possibility that a judge's own implicit biases may shape judicial decision making may help explain why employers prevail in approximately ninety percent of the cases.⁹⁶ Despite assurances from courts that plaintiffs need not provide evidence of a "smoking gun" to prevail in an employment discrimination action,⁹⁷ "today's plaintiff stands to lose unless he or she can prove that the defendant had explicitly discriminatory policies in place or that the relevant actors were overtly biased."⁹⁸

Consequently, it is no surprise that employers often prevail during key phases of litigation.⁹⁹ For example, when defendant's counsel makes a motion for summary judgment, judges grant

⁹⁵ "The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact." *Ricci*, 557 U.S. at 577. The Supreme Court of the United States, however, has recognized that an employer's facially neutral policy can still be found to be "discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The Civil Rights Act of 1991 provided a provision prohibiting disparate impact discrimination. 105 Stat. 1071.

⁹⁶ Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2009) <http://yalelawjournal.org/the-yale-law-journal-pocket-part/procedure/losers%E2%80%99-rules/> [hereinafter Gertner, *Losers' Rules*]; Remarks of Honorable Bennett, Northern District of Iowa, Implicit Racial Bias Across the Law: A Book Conference, at Harvard University (Jun. 14, 2012).

⁹⁷ See, e.g., *United States v. City of New York*, 713 F. Supp. 2d 300, 322 (S.D.N.Y. 2010) ("Showing an employer's motivation to discriminate is 'usually' accomplished through the 'cumulative weight of circumstantial evidence.'"); *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991). In determining whether defendants were motivated by discrimination, "[c]ourts recognize that 'direct evidence of intentional discrimination is hard to come by' and that plaintiffs will rarely be able to produce eyewitness testimony as to the employer's mental processes. *United States v. City of New York*, 683 F. Supp. 2d 225, 246–47 (E.D.N.Y. 2010). Smoking gun proof is required for intentional discrimination claims. See *City of New York*, 713 F. Supp.2d at 322 (quoting *City of New York*, 683 F. Supp. 2d at 25).

⁹⁸ Gertner, *Losers' Rules*, *supra* note 96 at 110. The Supreme Court of Washington, sitting *en banc* and deciding on the racial implications within preemptive challenges, stated, "it remains unclear whether unconscious racial discrimination is prohibited under *Batson v. Kentucky*, 476 U.S. 79 (1986).]" *State v. Saintcalle*, 309 P.3d 361, 98 (Wash. 2013) (*en banc*). *Batson* was a case that prohibited the use of preemptory challenges solely on the basis of race. See generally *Batson*, 476 U.S. 79. The Supreme Court of Washington, however, went further in stating, "Unconscious racial discrimination is extremely inequitable, harmful, and unjust—but also fairly ubiquitous and relatively blameless at an individual level. Unconscious bias is not easily deterred, because the biased individual is not aware of its presence. Further, it is nearly impossible for any observer to identify the presence of unconscious bias . . ." *Saintcalle*, 309 P.3d at 98.

⁹⁹ After the recent Supreme Court decision of *Univ. Tx. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013), however, employers will prevail more often than they do now. Generally, a plaintiff in an employment discrimination suit need only show that their protected class was the motivating factor for the discriminatory action; this was a test of mixed motive. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Nassar*, the Supreme Court heightened the standard and plaintiffs must now prove that the employer would not have taken the adverse action *but for* the desire to retaliate. See 133 S. Ct. at 2532–33.

greater than seventy percent of summary judgment motions to employers in employment discrimination cases, effectively ending those cases.¹⁰⁰ A predominant reason that such a high percentage of summary judgments exist is because a plaintiff's submissions rarely include evidence of the "smoking gun."¹⁰¹ This constricted inquiry into the employer's motives allows for no consideration of the employer's implicit biases.

Of course, some readers may argue that there is no "smoking gun," because an employee was just fishing in the employer's deep pockets, and the case actually had no merit. However, this does not comport with the reality of many employment discrimination scenarios. Employment discrimination is contextual and that rarely shows in the papers employees submitted to the court.¹⁰²

Judge Nancy Gertner has suggested that the resulting narrow interpretation of Title VII has led to a self-reinforcing pro-defendant heuristic.¹⁰³ This process has resulted in a phenomenon Gertner calls "Losers' Rules," a term to describe how the growing compilation of summary judgments reinforce pro-employer decisions.¹⁰⁴ As required by the Federal Rules of Civil Procedure,¹⁰⁵ judges must provide an explanation of why a defendant's motion for summary judgment should be granted. These decisions then become part of a growing body of asymmetrical law favoring employers, reinforced by other judges in their own decision making of

¹⁰⁰ Mem. from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson, 1–2 (June 15, 2007), <https://bulk.resource.org/courts.gov/fjc/sujufy06.pdf> (finding that, "[o]ver 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part").

¹⁰¹ *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 300 (4th Cir. 2010) ("[P]laintiff does not need a 'smoking gun' to prove invidious intent, and few plaintiffs will have one."); *Williams v. URS Corp.*, 124 F.App'x. 97, 101 (3d Cir. 2005) ("violators have learned not to leave the proverbial 'smoking gun' behind."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 n. 12 (1st Cir. 1999) (stating that the sophisticated employment world to allow for smoking gun evidence); *E.E.O.C. v. Bloomberg L.P.*, 2013 WL 4799161 at *5 (S.D.N.Y. 2013) ("an employer who discriminates is unlikely to leave a 'smoking gun,' such as a notation in an employee's personnel file, attesting to a discriminatory intent.") (internal quotation and citation marks omitted). *But see* *Beauchat v. Mineta*, 257 F.App'x. 463, 466 (2d Cir. 2007) (indicating that two statements did not rise to the level of direct evidence or the "smoking gun" necessary to show discriminatory treatment).

¹⁰² See generally Elizabeth Hirsh & Christopher Lyons, *Perceiving Discrimination on the Job: Legal Consciousness, Workplace Context, and the Construction of Race Discrimination*, 44 L. & Soc'y REV. 269 (2010).

¹⁰³ See generally Gertner & Hart, *supra* note 70; see also Gertner, *Losers' Rules*, *supra* note 96.

¹⁰⁴ See Gertner, *Losers' Rules*, *supra* note 96.

¹⁰⁵ Federal Rule of Civil Procedure 56 states, "The court should state on the record the reasons for granting or denying the motion." FED. R. CIV. P. 56.

employment discrimination cases. Thus, an employment discrimination policy favoring employers is formed. The discrimination continues.

Even in the unlikely event that the employment discrimination case is among the fewer than thirty percent of cases that survive a summary judgment motion and proceeds to litigation, there is still likely to be a pro-employer judgment.¹⁰⁶ As has been discussed, Title VII jurisprudence has been repeatedly interpreted to require the employee to demonstrate that the employer had a discriminatory intent or motive at the time of the adverse employment decision in order to find workplace discrimination.¹⁰⁷ Moreover, such legal constructs as disparate treatment and mixed-motives require a showing that the employer manifested discriminatory motive or intent at the time the alleged discriminatory action was made.¹⁰⁸ Even if the employee is able to demonstrate that the employer has discriminated against the employee, the burden then shifts to the employer to defend the adverse employment decision was in fact made for a legally permissible reason.¹⁰⁹ As the courts have interpreted these legal constructs, the courts have failed to consider whether unconscious influences shaped the employer's decision.¹¹⁰ Confounding the issue and adding irony to the existing legal quag-

¹⁰⁶ In addition to the requirements put on employees to survive summary judgment motions, there have also been requirements placed for them to bring class actions. The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* made it more difficult for employees to bring class actions, making it more difficult for employees to bring class actions, requiring that employees show a common policy of discrimination. See generally *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

¹⁰⁷ Krieger, *supra* note 93, at 1169.

¹⁰⁸ *Id.* at 1227.

¹⁰⁹ "If there is only indirect evidence of discrimination, courts must utilize the 'burden shifting' analysis set forth in *McDonald Douglas v. Green*["] Boback v. Gen. Motors Corp., No. 95-3836, 107 F.3d 870, at *2 n. 2 (6th Cir. 1997) (citing *McDonald Douglas v. Green*, 411 U.S. 792 (1973)). In *McDonald Douglas*, the Supreme Court established that a plaintiff must first establish his or her *prima facie* case of discrimination by a preponderance of the evidence. *McDonald Douglas*, 411 U.S. at 802-03. The burden then turns to the employer to show that there is "some legitimate, nondiscriminatory reason for the employee's rejection." See *id.* at 802.

¹¹⁰ Krieger, *supra* note 93, at 1211. The reader should, however, keep in mind disparate impact claims. For a discussion of the legislative history of disparate impact, see *supra* note 95. In *Griggs v. Duke Power Co.*, the Supreme Court interpreted "[t]he Act [as] proscrib[ing] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). This case and its progenies appear to offer some protection for employees against an employer's implicit biases. Nevertheless, disparate impact claims to point to more than just generalized proof of a policy; it requires employees to "isolat[e] and identify[] the *specific* employment practices" that lead to the disparate impact. *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005). It does not address individual instances of discrimination where there is only a single employment decision that is implicitly bias.

mire, judges have ample opportunity to inject their own implicit biases when evaluating the merits of employment discrimination cases. In various situations, employment law even encourages judges to rely on their common sense and, therefore, inject their own implicit biases.¹¹¹

By ignoring the research on implicit bias, jurisprudence does not comport with the reality of many employers' decision making, which is, in fact, more nuanced and influenced by a compilation of unconscious and cognitively learned categories. The research has continually shown how an employer's choice of managers among several candidates might be shaped by a composite of unconscious learned assumptions and social schemas about gender, ethnicity, intelligence, leadership, physical abilities, and personality that then provide a filter through which the employer will evaluate each candidate's qualifications.¹¹² So workplace discrimination continues with the countenance of the court.¹¹³

Legal scholars of implicit bias posit that if we wish to truly de-bias our laws and to make more effective our societal efforts to combat discrimination, we need to expand our legal conceptualizations of discrimination to include not only explicit behavior, but also implicit behavior.¹¹⁴ Unfortunately, our legal system as it exists today has neither the framework nor the flexibility to incorporate this important research on discrimination in a timely fashion.¹¹⁵

D. *The EEOC Mediation Program Does Not Address Implicit Bias*

Originally structured as an alternative to litigation in the federal courts, the EEOC's mediation program, while successful on a number of fronts, has yet to address the implicit biases inherent in many discrimination complaints. Yet, the EEOC's mediation program could be re-structured to address those cases with implicit

¹¹¹ Krieger, *supra* note 93, at 1206–07.

¹¹² Gertner & Hart, *supra* note 70, at 80.

¹¹³ Krieger, *supra* note 93, at 1239.

¹¹⁴ See Krieger & Fiske, *supra* note 1, at 1061. The authors, Krieger and Fiske propose that the Supreme Court of the United States will inevitably be faced with a situation where it will have to find that implicit biases are the reason for the disparate treatment and create a new solution. *Id.*

¹¹⁵ See *id.*; see also Jolls & Sunstein, *supra* note 61, at 996.

biases in a way that remains consistent with the program's purpose and values.

The EEOC mediation program, which began in 1991,¹¹⁶ is an alternative option to help employees and employers embroiled in workplace discrimination cases try to resolve their complaints.¹¹⁷ Following four successful years of pilot mediation programs, the EEOC determined that mediation offered a "viable alternative to the traditional investigatory methods used by the EEOC to resolve charges of employment discrimination, and that an ADR program should be implemented."¹¹⁸ The EEOC mediation program is guided by four core principles. First, the mediation program is required to reinforce EEOC's dual purpose of upholding federal employment discrimination laws and resolving employment disputes.¹¹⁹ Second, the mediation programs must be developed and implemented to be fair.¹²⁰ Fairness is further explained to include providing representation to the unrepresented party, voluntariness, neutrality, confidentiality and enforceability.¹²¹ Third, the mediation programs need to be flexible to respond to the cultural and other programmatic variants.¹²² Finally, each Commission-sponsored mediation program should be required to have requisite training and evaluation components to enhance the program's efficacy.¹²³

Although the EEOC mediation program has been largely successful in mediating explicit bias disputes, the program would be significantly more effective if there was a strategic re-design also to address implicit bias.¹²⁴ The data indicate that from 1999 through

¹¹⁶ Paula Choate, Remarks at the Meeting of the U.S. Equal Employment Opportunity Commission discussing EEOC's Mediation Program and Workplace Benefits of Mediation (Dec. 2, 2003), <http://www.eeoc.gov/eeoc/meetings/archive/12-2-03/choate.html>.

¹¹⁷ An investigation of EEOC disputes pending before the Illinois Human Rights Commission, comparing fact-finding, mediation, and binding arbitration, suggests "litigants are more interested in mediation than binding arbitration." Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal procedures Ex Ante*, 99 IOWA L. REV. 637, 651 (2014).

¹¹⁸ *History of the EEOC Mediation Program*, E.E.O.C., <http://www.eeoc.gov/eeoc/mediation/history.cfm> (last visited Feb. 27, 2015).

¹¹⁹ *ADR Policy Statement*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (July 17, 1995), <http://www.eeoc.gov/policy/docs/adrstatement.html> (last visited Feb. 27, 2015).

¹²⁰ *Id.*

¹²¹ *Id.* The ADR Policy Statement indicates that fairness should be manifested across the EEOC by incorporating these core principles as soon as possible.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ After 2010, 200 of the Fortune 500 companies had signed national mediation agreements with the EEOC. See Press Release, EEOC Signs Mediation Agreement with National Retail

2010, approximately seventy percent of the 136,000 mediations held have been successful.¹²⁵ However, upon closer scrutiny, we learn that more than seventy-five percent of employers offered mediation refuse mediation; the data on EEOC Mediation Acceptance Rates between 2006 and 2012 show that there is significant disparity between the number of charging parties who accept offers to mediation (approximately 84.5%) and the number of respondents who accepted the offer to mediate (approximately 26.3%).¹²⁶ Why?

The research indicates that a significant reason that employers charged with discrimination opt not to participate in EEOC mediation is the employer's believes that an employee's charges have no merit.¹²⁷ After all, why should an employer even consider mediation if an employee's claim is baseless, and the employer has done nothing wrong?¹²⁸ In fact, the employer's perception that there is no merit to the employee's charge is consistent with the research on implicit bias indicating that there is no conscious awareness of discriminatory intent even though there may be discriminatory behavior. A natural corollary is to assume if some employers were aware that they might have committed some discriminatory action towards their employees, some employers might have a greater interest in participating in mediation and trying to resolve the matter. In the meantime, the unconscious discriminatory behavior is likely to continue.

Thus, because our legal system and the EEOC Mediation Program are unable to address implicit bias in employment discrimination claims, mediation programs such as the one at the EEOC have an opportunity to restructure the existing mediation program to

Pharmacy and Health-Care Corporation, U.S.E.E.O.C., (Jun. 6, 2010) <http://www.eeoc.gov/eeoc/newsroom/release/6-29-10b.cfm>. In 2010, CVS Caremark, which employees over 200,000 employees, signed an agreement with the EEOC. *Id.* The director of the EEOC's Office of Field Programs, Nicholas Inzeo, noted, "[M]ediation encourages employees and employers to craft the resolution to their conflict that best meets their mutual needs, bringing closure in a satisfactory manner to both parties." *Id.*

¹²⁵ EEOC Mediation Acceptance Rates, *compiled by* Office of Research and Planning (Aug. 23, 2012) (last updated Sept. 5, 2013).

¹²⁶ *Id.*

¹²⁷ Patrick McDermott, Anita Jose, & Ruth Obar, *An Investigation of the Reasons for the Lack of Employer Participation in the EEOC Mediation Program*, E.E.O.C. (Dec. 10, 2003), <http://eeoc.gov/eeoc/mediation/report/study3/index.html> (last visited Feb. 27, 2015). 590 employers out of 629 cited "[m]erits of the case do not warrant mediation" as their reasoning for not pursuing mediation; this is 93.8% of the questioned employers. *See id.* at Results.

¹²⁸ *See id.*

better address problems of implicit bias.¹²⁹ Implicit bias has not yet been addressed adequately in any existing dispute resolution process.¹³⁰ In their pursuit of justice and vindication, both employees and employers are repeatedly victimized by these systematic inadequacies. The implicit biases that are likely to shape an employer's adverse employment decisions, the implicit biases that are likely to shape a judge's own evaluation of whether those employment decisions are discriminatory,¹³¹ and the legal system's narrow interpretation of employment discrimination law as a consciously biased decision,¹³² help us understand why employees have a low chance of prevailing in court.

Moreover, even though employers achieve greater success in court, they also feel like victims for having to defend themselves, believing they have done nothing wrong. Unfortunately, mediation programs, such as the one implemented by the EEOC, have yet to live up to their true potentials, because their narrow focus on explicit biases has discouraged participation from employers who believe they did nothing wrong. How might a mediation program such as the one at the EEOC be strategically re-designed to better respond to the implicit biases inherent in workplace discrimination?¹³³

¹²⁹ Alexander Colvin, a renowned scholar on arbitration and a professor at Cornell University, has recently measured the employee win rates and has found that where the employee is the plaintiff employees won only 24.7% of the time. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 74 (2014).

¹³⁰ BANAJI & GREENWALD, *supra* note 27, at 69.

¹³¹ See, e.g., Krieger & Fiske, *supra* note 1.

¹³² Jolls & Sunstein, *supra* note 61, at 985.

¹³³ In 2007, the EEOC has proposed a new area for improvement: unconscious bias. Maureen Minehan, *EEOC Targets Unconscious Bias*, 24 No. 13 Emp. Alert 1 (June 21, 2007). It proposed modifying hiring processes with more structured interviews and blind applications and noted that such actions are a "good start" to combatting unconscious racial discrimination. See *id.*

IV. FITTING THE FORUM TO THE PERNICIOUS FUSS: A DISPUTE SYSTEM DESIGN PROPOSAL TO ADDRESS IMPLICIT BIAS IN THE WORKPLACE¹³⁴

A. *Overview*

I suggest a different, more responsive paradigm to address implicit bias in the workplace and propose a multi-intervention reconciliation-focused dispute resolution system design as a more effective alternative to the status quo. Grounded in the fundamental values of peace reconciliation that are a part of restorative justice principles¹³⁵ and extrapolating from the research on implicit bias, the proposed design abandons the status quo approach of blame that mischaracterizes employees and employers as victims and offenders and replaces it with a more responsive dispute system design that invites employee/employer awareness, understanding, learning, and change. Moreover, the proposed design expands the conceptualization of implicit bias discrimination from a conflict between an employer and an employee to a symptom of a broader societal problem. This dispute system design incentivizes employees and employers to work together not only to address the presenting implicit bias in their workplace, but also to help transform the work environment in the broader culture to become discrimination free.¹³⁶

There are three components to this multi-intervention design: education about implicit bias; a transformative mediation process; and an assessment accountability that provides for public recognition for affirmative actions taken by employers and employees to address workplace discrimination caused by implicit bias. Each component of the design invites employees and employers to experience the cognitive and psychological shifts that are predicates for

¹³⁴ See generally Cathy A. Costantino & Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (Jossey-Bass, 1995); see Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 *NEGOT. J.* 49 (1994). The term “fits the forum to the fuss” has become shorthand in the dispute resolution field to promote a more customized approach to dispute resolution. According to this concept, our evolved dispute resolution system, should offer a menu of dispute resolution processes. See *id.* People in conflict may choose the most appropriate process from this menu to resolve their particular conflict. See *id.*

¹³⁵ See Bar-Tal & Bennick, *supra* note 13; see also Kelman, *supra* note 13; see generally Menkel-Meadow, *supra* note 13.

¹³⁶ Bartlett, *supra* note 14.

true reconciliation to take place.¹³⁷ Incorporating the research on implicit bias, the proposed design structure incorporates priming opportunities so that program participants may become more positively receptive to heretofore discriminated against persons. The efficacy of the design and the individual components are regularly assessed to ensure that the program design is aligned with the program goals. Stakeholder participation ensures that the proposed design is synchronized with the needs and goals of the participants.

The goal of the proposed a reconciliation-focused design is to promote awareness of implicit biases; incentivize acknowledgment, understanding and change; foster compliance with the spirit, as well as intent, of anti-discrimination laws, and create a societal shift of inclusion. This reconciliation-focused design incorporates the scientific research on implicit bias and compensates for the limitations of our current dispute resolution regime.¹³⁸ The expectation is that the proposed reconciliation-focused design will help create a more problem-solving milieu in which employees and employers work together to confront their own implicit biases without fear of retribution. In this environment, employers and employees will then have the opportunity to collaborate to ensure that individuals in the workplace will be accountable for unconscious biases, that discriminatory acts in the workplace will not be tolerated and that affirmative steps will be taken to minimize the likelihood of its reoccurrence.

This prototype also builds in large part on the articulated core values of the EEOC mediation program¹³⁹ and could easily be integrated as another dispute resolution track as part of the EEOC program. Such an inclusion in a respected governmental dispute resolution system with the stature of the EEOC would be an overdue governmental recognition that all workplace discrimination is not alike, and that workplace discrimination caused by implicit bias requires a different type of intervention. Furthermore, such inclusion of this suggested dispute system design would demonstrate the agency's internal flexibility to respond to the compelling research on implicit biases. Finally the adoption of this proposed program

¹³⁷ *Id.*

¹³⁸ See generally Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures, and Consumer Lemon Laws*, 46 L. & Soc'y REV. 463 (2012).

¹³⁹ See *supra* notes 116–26. Specifically, the EEOC's core mediation principles, resolving discrimination and fairness, are supported and furthered by the adoption of the proposed de-biased mediation prototype.

would reinforce the agency's commitment to eradicate discrimination in all its variants.¹⁴⁰

Three components of the proposed focus are discussed in greater detail below: the reconciliation foundation, the mediation component, and the education component.

B. *The Foundation: Peace Reconciliation-focus Culled From Restorative Justice Principles*

This reconciliation-focused proposal gleans some of the central underpinnings of peace reconciliation and restorative justice principles, such the importance of looking at the conflict as part of a broader social context.¹⁴¹ An important difference to be noted, the proposed dispute system design departs from the nomenclature used in restorative justice and refrains from labeling the employer as “the offender.” After all, the research on implicit bias compels us to re-think whether it is even fair to blame individuals for their unconscious biases and whether, in fact, it is appropriate to label an individual an “offender” if that actor is acting discriminatorily based on unconscious motivations.¹⁴² As has been discussed previously, employees and employers involved in implicit bias discrimination conflicts are often both “victims” in their quest for justice.

Thus, viewed through the restorative justice lens, discriminatory acts caused by implicit bias are seen as a problem for the employee, the employer and the broader community within which they reside. In fact, “victim” and “offenders” are both “victims” of the discriminatory implicit and explicit messages that are reinforced within our society. Supporters of restorative justice princi-

¹⁴⁰ The Department of Justice has contracted with the Keybridge Foundation to design and implement a mediation program to address ADA complaints. See *U.S. Department of Justice ADA Mediation Program*, KEY BRIDGE FOUNDATION, <http://keybridge.org/u-s-department-of-justice-ada-mediation-program/> (last visited Feb. 27, 2015).

¹⁴¹ The South African Truth and Reconciliation Commission (“TRC”) was established to aid in the resolution of problems created under apartheid. TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/Trc/> (last visited Feb. 27, 2015). It also created a Reconciliation Commission to evaluate individuals who seek reconciliation for their misconduct. See generally Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (establishing the Reconciliation Commission and providing for the procedures relevant to granting or denying reconciliation to individuals).

¹⁴² We do not have the appropriate nomenclature for individuals whose actions are motivated by their implicit bias. Although I have labeled my proposed approach as reconciliation-focused, I acknowledge that the label doesn't fully capture the intent of my proposal, because the employer did not intentionally or consciously discriminate.

ples view such discrimination as an opportunity; it is an opportunity to address not only the immediate problem, but also the societal etiology that created the problem. Thus, discrimination caused by implicit bias provides an opportunity for employees and employers to learn how they might make their workplaces and their communities less contaminated by discrimination.

From the restorative justice perspective, both the employee and employer need to take responsibility for the process in order for justice to be achieved and true healing to take place; this can only be accomplished through a thorough understanding of what happened and why. Understanding is necessary to help a wronged workplace community gain the insights necessary to heal, to move forward, and to become fortified to better prevent such discrimination from ever reoccurring.¹⁴³ Central to developing such an understanding, the employer and employee must feel free to share their perspectives without fear of blame or retaliation. Believers in restorative justice optimistically appreciate that as human beings, employees and employers can come together to foster trust, to develop respectful relationships, and to create a dynamic workplace that supports participation and contribution.

Yaacov Bar-Siman-Tov and Herbert C. Kelman, peace reconciliation scholars, educate that reconciliation is more than just resolving the immediate conflict.¹⁴⁴ For true reconciliation to take place, there must be both an educational component and a psychological shift that takes place between employee and employer.¹⁴⁵ Thus, educating employees and employers about implicit bias is an important first step. However, for true reconciliation to take place between employees and employers, each must undergo a psychological shift.¹⁴⁶ In this psychological shift, each no longer demonizes the other for their implicit biases, but instead they are able to share their perspectives, to unite in their humanity, and to work together to address the discrimination.¹⁴⁷ Although the proposed

¹⁴³ See generally Kelman, *supra* note 13.

¹⁴⁴ *Id.*

¹⁴⁵ Yaacov Bar-Siman-Tov, *Dialectics Between Stable Peace and Reconciliation*, in FROM CONFLICT TO RECONCILIATION 73, 73 (Bar-Siman-Tov ed. 2004); Herbert C. Kelman, *Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Group*, Landscapes of Violence Vol. 1 No. 1 Art. 5 (2010) <http://scholarworks.umass.edu/lov/vol1/iss1/5>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

design creates a structure for this to happen, the choice to learn and change rests within the employee and the employer.¹⁴⁸

For many, the framing of this dispute system design as a reconciliation opportunity is controversial. After all, there are those who vehemently believe that we must punish those who discriminate. Yet a reconciliation-focused approach has a restorative goal, not a retributive purpose.¹⁴⁹ As we have been saying, implicit bias is not a crime, but an unconscious process. As a restorative approach, the focus is on having employees and employers work together to sustain a discrimination-free workplace for all. As has been shown, a retributive focus has not worked to quash implicit bias in the workplace. Rather, this dispute system designer believes a reconciliation-focused dispute system design is a more responsive approach to compensate for the limitations of our current court system and adjunct mediation programs.

Voicing another anticipated objection, labor lawyers representing management might be reluctant to have their clients participate in any process where evidence against the employer might be uncovered and used against the employer in other forums. Additionally, counsel who is representing management might fear that information disclosed in mediation might leave the employer vulnerable to more litigation by other employees. These attorney concerns could be addressed by encouraging the use of confidentiality agreements and supportive practices that are enforceable to the extent realistically possible.¹⁵⁰

¹⁴⁸ See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role on Motivation in Reducing Workplace Discrimination*, 95 VA. L. REV. 1893–1972 (2009).

¹⁴⁹ This is a departure from retributive justice approaches that require a *mens rea* for the guilty act. OLIVER WENDELL HOLMES, *THE COMMON LAW* 46 (1881) (supporting the proposition that retribution is a justifiable goal of punishment but that some level of culpability is required). A different response to determining employers' discrimination is more appropriate for implicit biases, since the unconscious mind's intent cannot be measured or said as having a *mens rea*. Therefore, in this context, I am using the term restorative process to focus on the goal of creating a workplace environment that is free of discrimination. See *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) (noting that Congress designed the remedial measures in Title VII and the ADEA not only to eliminate workplace discrimination and act as a deterrent, but also to act as a catalyst in order for employers to self-evaluate and self-regulate and eliminate discrimination).

¹⁵⁰ See generally Elayne E. Greenberg, *Confidentiality: The Illusion and the Reality—Affirmative Steps for Lawyers and Mediators to Help Safeguard Their Mediation Communications*, 6 N.Y. DISPUTE RESOL. LAW. 10 (2013), <http://www.stjohns.edu/sites/default/files/documents/law/greenberg-the-ethical-compass-confidentiality.pdf>.

C. *The Educational Component*

For reconciliation to begin, employees, employers, and their attorneys first need to be educated about implicit bias. All three groups need to receive general information about implicit bias, how it works, how it may inadvertently shape workplace decision-making, and how to implement recommended workplace procedures to minimize implicit biases' influence. There may also be some focused differences in the information provided to all three groups. In one example, the educational materials for lawyers should also address the concerns some may have about how to address implicit bias without incurring employer liability.

As one of the gatekeepers of workplace discrimination claims, the EEOC could disseminate educational information about implicit bias in multiple forms: on its website, in podcasts, webinars, pamphlets and in-person workshops. The IAT could be available on the EEOC website as one tool to help employees and employers become aware of their own implicit biases. As we have been discussing, since nobody wants to be labeled a discriminator, the materials need to include language about developing heightened awareness and be devoid of any accusatory language or labeling.

Since many employers are unaware of their implicit biases and its discriminatory influence in the workplace, the EEOC could incentivize participation in education programs so that education is viewed as a sign of workplace strength as opposed to culpability. One possible incentive is to educate about the economic toll on the business if the conflict is not resolved. Another possible incentive is to create a highly valued certificate of participation that employers could display as part of their commitment to maintaining a discrimination-free workplace if employers and their staff attend a workshop on implicit bias and workplace discrimination. A third possible incentive is to encourage employers and their staff to take the IAT in the privacy and safety of their own offices, so that they themselves begin to understand the complexity of workplace discrimination. Finally, employers might be more likely to participate if they become convinced this is not a faultfinding process.

D. *The Mediation Component*

This proposed dispute system design recommends a mediation prototype that offers employees and employers a safe forum in

which they may continue the educational and psychological shifts towards reconciliation. The design of the mediation prototype is guided by three basic tenets.¹⁵¹ First, and foremost, the designers and administrators of the mediation program need to clearly articulate that the central purpose of the mediation program is to confront implicit biases in the workplace. Central to that articulation of purpose is an ongoing commitment and focus to garner compliance rather than punishment.¹⁵² Second, flowing from the articulated purpose, there must be a purposeful mediation structure and design that primes employees and employers to have a heightened awareness of their implicit biases, creates positive associations with the disfavored groups, and motivates employees and employers to address implicit biases without fear of punishment.¹⁵³ Third, there needs to be ongoing assessment, programmatic tweaking based on those assessments, and enforcement mechanisms to ensure that the implementation of the program is consistent with its purpose. Throughout the design creation and implementation phase of the mediation group, the system designer in collaboration with the program administrator, should convene a representative group of stakeholders that consists of representatives from employees, employers, mediators, program administrators, and favored and disfavored groups.¹⁵⁴ This stakeholders group has the potential to become an invaluable resource that ensures the needs and interests of all potential mediation participants are considered.¹⁵⁵

First and foremost, there must be a clearly articulated statement that this mediation program is a reconciliation opportunity for employers and employees to address implicit biases in work-

¹⁵¹ See generally, NANCY H. ROGERS, ROBERT C. BORDONE, FRANK E.A. SANDER & CRAIG A. MCEWEN, *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (Aspen Publishers, 2013) [hereinafter ROGERS & BORDONE].

¹⁵² See, e.g., Robert W. Burg, *Amnesty, Civil Rights, and the Meaning of Liberal Republicanism, 1862-1872*, 4 *AMERICAN NINETEENTH CENTURY HISTORY* 3, 29-60 (2003).

¹⁵³ GLADWELL, *supra* note 24, at 53-58 (defining priming as what happens when subtle triggers influence our behavior without an individual's awareness); Levinson & Young, *supra* note 53, at 38 (stating that bias reducing training courses should be implemented in law schools, law firms, and other agencies); See also Milton J. Bennett, *Becoming Interculturally Competent, in TOWARD MULTICULTURALISM: A READER IN MULTICULTURAL EDUCATION* 63 (2d ed. 2004) ("People with a Denial worldview generally are disinterested in cultural difference even when it is brought to their attention, although they may act aggressively to avoid or eliminate a difference if it impinges on them").

¹⁵⁴ ROGERS & BORDONE, *supra* note 151, at 68.

¹⁵⁵ See *id.*

place discrimination.¹⁵⁶ This clearly articulated statement serves multiple purposes. One purpose is that this expanded and re-conceptualized characterization of discrimination recognizes that implicit bias is very much a part of workplace discrimination, in a way it is not currently interpreted and understood by our legal system and existing mediation program.¹⁵⁷ Another rationale for this defined purpose, by anchoring the values and purpose of this program, this clear statement of purpose provides conflict resolution designers and program administrators a benchmark to help align future design choices and programmatic decisions with the stated purpose.¹⁵⁸ The focused statement of purpose also allows potential participants to make a more informed decision about whether or not to mediate in such a program.¹⁵⁹

Providing a clearly articulated statement of purpose and framing this mediation program as a reconciliation opportunity is also a critical design choice that emphasizes the greater value of helping employers comply with the spirit and intent of discrimination laws; rather than punishing employers for their transgressions. As we have been discussing, a reconciliation-focused approach helps destigmatize those employers for their unconscious biases by creating a mediation environment that is about gaining heightened awareness, not about finding blame.¹⁶⁰ As with any reconciliation approach, participants may begin with different realities of what went wrong. However, if participants are able to discuss their differences in the safe environment of a reconciliation-focused mediation without fear of retribution, participants might then be more open to considering each other's reality, deepening their understanding of what went wrong, and contemplating how to develop a more internally consistent approach going forward.

This brings us to the second strategic design consideration of a reconciliation-focused mediation to address implicit bias: creating a

¹⁵⁶ Yogi Berra once said, “[i]f you don’t know where you’re going, you will wind up somewhere else.” *Yogi Berra Quotes*, THINGS PEOPLE SAID, <http://rinkworks.com/said/yogiberra.shtml> (last visited Feb. 27, 2015).

¹⁵⁷ See, e.g., Talesh, *supra* note 138, at 464, 477 (discussing the design of lemon law programs which provide opportunities to re-conceptualize lemon laws).

¹⁵⁸ See, e.g., ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (Jossey-Bass 2004) (noting how the transformative approach to conflict’s purpose serves as benchmark to evaluate whether the mediator’s practices are consistent with that purpose).

¹⁵⁹ See generally Jacqueline Nolan-Haley, *Lawyers, Clients and Mediation*, 73 NOTRE DAME L. REV 1369 (1998).

¹⁶⁰ “Any program for the reduction of prejudice must include a large measure of semantic therapy.” ALLPORT, *supra* note 22, at 187.

mediation structure and environment that promotes the articulated purpose of confronting implicit bias. There are two main foci of this design framework. As a first focus, prior to mediation, employees, employers and their counsel can be primed through education, promotional materials, podcasts, webcasts, and the physical design of the mediation center. A second focus of this reconciliation-focused framework is the training, selection, standards, and supervision of the mediators. Combined, the priming of mediation participants so that they are more likely to be open to discussing implicit biases, and the training and supervision of skilled mediators who are aware of their own implicit biases and have the ability to support mediation to discuss the effect of their own implicit biases in the workplace, contribute to building a de-biased mediation framework to address workplace discrimination.

For a reconciliation-focused approach to succeed, it is critical during the pre-mediation phase of mediation to educate employers and their counsel about implicit bias to get their support and buy-in for the mediation option.¹⁶¹ Although there may be overlap in the education provided to employers and their attorneys, there are also some focused differences. As soon as a charge against the employer is filed with the EEOC, there are opportunities to educate employers and their attorneys about implicit bias. As was discussed in the previous section, information about implicit bias and ways to curb these biases could be included in promotional materials for this mediation program and EEOC websites.

Adding to the education materials provided for employees, the educational materials that are targeted for attorneys should also address the additional concerns about mediation that attorneys may have. For example, many of these lawyers may have pre-conceived ideas about mediation and mediation advocacy based on past experience, and they need to be educated about how this mediation forum is different and requires a different type of advocacy. Relevant information about implicit bias, mediation advocacy in this type of mediation forum, and advantages of this process for their clients could be disseminated in printed material, in person during CLE courses, in webinars, and in podcasts. As was discussed in the previous section, there should be incentives to encourage employers to participate in this alternative mediation program. As the EEOC mediation data showed, many employers are reluctant to attend mediation if they believe they have done

¹⁶¹ See Elayne E. Greenberg, *Starting Here, Starting Now*, in *DEFINITIVE-CREATIVE IMPASSE-BREAKING TECHNIQUES IN MEDIATION* 1, 15 (New York State Bar Association Press 2011).

nothing wrong. One possible incentive is to create a highly valued certificate of participation that employers could display as part of their commitment to maintaining a discrimination-free workplace.

An oft-neglected design consideration, the strategic design and structure of this mediation program is an opportunity to prime participants to develop comfort with disfavored and discriminated-against groups.¹⁶² As was mentioned in Part I, priming is the introduction of stimuli to influence a subsequent behavior.¹⁶³ Beyond education, the introduction of positive images and associations of disfavored or discriminated-against groups can help prime mediation participants to be more receptive to members of those groups. One way to prime participants is to ensure that the physical design of the mediation center includes photos and art of diverse workers, including members of disfavored groups.¹⁶⁴ Another suggestion, explained further below, is to ensure a varied roster of mediators that includes representatives from traditionally favored and disfavored groups.

The required standards for the training, selection, and supervision of the mediators should be calibrated with the purpose and goal of the mediation program: addressing implicit bias in a reconciliation-focused mediation. A distinguishing feature of this mediation training is that it includes a module that helps trainees develop self-awareness about their own implicit biases.¹⁶⁵ The incorporation of mindfulness training is a tool that mediators could use pre mediation as one way to quiet their mind and check their implicit biases.¹⁶⁶ The roster of mediators should be diverse and include a representative sample of individual from disfavored groups.

An important design choice, the mediators should be trained in transformative mediation theory to help mediator support employee and employer psychological shifts that are part of true rec-

¹⁶² Bennett, *supra* note 153.

¹⁶³ See generally, Levinson & Young *supra* note 53.

¹⁶⁴ See, e.g., POSITIVE EXPOSURE, <http://positiveexposure.org/about-the-program-2/> (using photographs of individuals with genetic conditions to re-define the definition of beauty) (last visited on Feb. 27, 2015); see also Jolls & Sunstein, *supra* note 61, at 22 (describing how an individual is likely to de-bias by creating an environment with positive images, such as where test takers who were taking the IAT on race scored less bias on the IAT when there was a photo of Tiger Woods in the room).

¹⁶⁵ As part of the training, mediators should take a baseline of their own implicit biases at implicit.

¹⁶⁶ See generally Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289, 315 (2010) (“[M]indful awareness affords a person an opportunity to deliberate about the significance of the particular core concern at play and to decide whether and how to address it”).

conciliation.¹⁶⁷ In a noteworthy parallel, the literature on peacemaking reconciliation and transformative mediation both report the demonizing and dehumanizing effect of seemingly intractable conflict on individuals.¹⁶⁸ Both go on to explain that psychological shifts within individuals are possible so that those previously stuck in conflict are able to become unstuck and appreciate the humanity of the other. Although the focused purpose and use of peace-reconciliation and transformative mediation are somewhat different, their beliefs in the humanity of individuals and their capacity to change are similar.¹⁶⁹ Thus, incorporation of mediators who are trained in transformative mediation will help make employees and employers with implicit bias more conscious of any unconscious discriminatory.¹⁷⁰ Moreover, such a non-directive approach to mediation has a greater likelihood of allowing the mediation conversation to shift from blame and truth to sensitivity and proactive change.¹⁷¹

Another distinct design feature of this mediation program requires that, ethically, mediators are aware of their own implicit biases and disclose their own implicit biases to mediation participants. A recommended design feature to support this mediator disclosure, the mediation program should develop its own ethical guidelines for its mediators that reflect this more honest representation of mediator impartiality.¹⁷² This is a departure from the current ABA Model Standards of Conduct for Mediators, Section II(A), which requires a mediator to “decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.”¹⁷³ We now know that freedom from bias is an ethical fiction. In this reconciliation-focused mediation prototype, normalizing the existence of implicit biases and having mediation participants, including the mediators, develop an awareness of their own implicit biases is an

¹⁶⁷ Compare Kelman, *supra* note 145 and BARUCH BUSH & FOLGER, *supra* note 158.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Bartlett, *supra* note 14, at 1893–1972.

¹⁷¹ Talesh, *supra* note 138 (comparing the training and values of two lemon law enforcement programs and how the values and training affect outcome).

¹⁷² See Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005) (arguing that uniform ethical duties should be in place depending on the particular process and that they should be mandatory).

¹⁷³ MODEL STANDARDS OF CONDUCT FOR MEDIATOR (Sept. 2005), http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.auth_checkdam.pdf.

important step before employers can monitor how those implicit biases might shape workplace discrimination.

Ideally, the roster of mediators should be diverse and include representatives of both favored and disfavored groups. Another idea worth considering is the value of a co-mediation model comprised of one mediator each from the favored and disfavored group. Some dispute resolution commentators may argue that all mediators should be impartial so that it is irrelevant whether the mediator is from a favored or disfavored group. However, as I have said, impartiality is actually an illusion. Instead, in the design of this mediation framework, we use priming opportunities, such as having diverse roster of mediators that include representatives from the disfavored groups, to help heighten the awareness of participants' own implicit biases so that they can ultimately control them.

A third tenet of the design framework for this mediation process is that there is measureable proof that the suggested model, in fact, achieves the goal of the program: to confront implicit bias in workplace discrimination.¹⁷⁴ These measures could be obtained in several different ways. First, there could be measures of mediation participant satisfaction and results. There should be separate assessments from employees, employers, and counsel. As part of that measure of satisfaction, there should be a pre-mediation baseline about participants' expectations about mediation. Second, we could measure success by the quality of agreements reached, assessing whether the mediation agreements in such a de-biased program were aligned with the de-biased program's purpose. Third, we could measure the efficacy of the program by seeing if the number of mediations increased. Noteworthy, we would also want to see an increase in the numbers of defendants who decided to participate in mediation, believing there was value to participating even if they believe they didn't do anything wrong. These assessments would provide the designers and administrator of this mediation program invaluable information about what parts of the program are working and what requires further modifications.

Thus, we see that the three tenets of the mediation design—the stated purpose, specialized design, and assessments—are inherently interrelated. Each tenet is nuanced and can be modified to align with specific programmatic priorities. Different program de-

¹⁷⁴ ROGERS & BORDONE, *supra* note 151, at 319.

signers might prefer to emphasize some suggested elements and not others.

V. CONCLUSION

Until now, workplace discrimination caused by implicit biases has gone unabated, because the courts and EEOC mediation programs are better designed to address workplace discrimination caused by explicit biases. As the social science research clarifies, there are salient differences between workplace discrimination animated by implicit biases and workplace discrimination shaped by explicit biases discrimination. We now understand that we all have implicit biases, and we question whether it is even fair to punish actors for behaviors based on their unconscious. We also now understand that workplace discrimination caused by implicit bias is more than just a problem between the employee and employer. It is also a reflection of our broader societal problem with discrimination. Thus, workplace discrimination caused by implicit bias requires a different dispute resolution response that addresses both the immediate workplace discrimination between employer and employee, but also begins to address the broader social problem.

Harmonizing the research on implicit bias and scholarship on peace-making reconciliation, my proposed dispute resolution system offers a more responsive dispute system response to address finally implicit bias in the workplace. My proposed dispute system design is a multi-component, reconciliation-focused program that includes an educational, mediation and assessment loop components. Such a reconciliation-focused dispute system design offers an environment that allows employees and employers to address their unconscious, but discriminatory behavior, and to decide how they might change their hearts and minds through education, awareness, and collaboration rather than punishment.¹⁷⁵ The structural design of the education and mediation components maximizes participants' priming opportunities so that participants are able to see previously discriminated against individuals in a less

¹⁷⁵ "It took a man like Madiba to free not just the prisoner, but the jailer as well; to show that you must trust others so that they may trust you; to teach that reconciliation is not a matter of ignoring a cruel past, but a means of confronting it with inclusion and generosity and truth," Mr. Obama said in his remarks, referring to Mr. Mandela by his clan name. "He changed laws, but he also changed hearts." President Barack Obama, Remarks at the Memorial Service for Former South African President Nelson Mandela (Dec. 10, 2013), http://www.politico.com/story/2013/12/nelson-mandela-president-obama-speech-transcript-100932_Page2.html.

discriminatory way. The alignment of this proposed design with the articulated core principles of the EEOC mediation program, allow this proposal to be easily adopted by the EEOC.

This proposal is a heretofore-untaken first step in the dispute system design for implicit bias. It offers a different type of thinking about workplace discrimination caused by implicit bias and a different way to resolve it. Moreover, even though this paper focuses on a dispute system design for workplace discrimination, the ideas have broader applicability to other contexts as well. The proposed dispute system design answers many questions. It also raises questions and concerns. Therefore as our understanding of implicit bias continues to evolve, we can expect to make further adjustments to this proposal. Our commitment is to ensure that employees and employers involved in workplace discrimination allegations shaped by implicit biases finally have responsive dispute resolution forums to fit this pernicious fuss.

