ASSESSING THE VIABILITY OF IMPLICIT BIAS EVIDENCE IN DISCRIMINATION CASES: AN ANALYSIS OF THE MOST SIGNIFICANT FEDERAL CASES

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Abstract

The theory of implicit bias occupies a rapidly growing field of scientific research and legal scholarship. With the advent of tools measuring individuals' subconscious biases toward people of other races, genders, ages, national origins, religions, and sexual orientations, scholars have rushed to explore the ways in which these biases might affect decision-making and produce broad societal consequences.

The question that remains unanswered for scholars, attorneys, and judges is whether evidence of implicit bias and its effects can or should be used in legal proceedings. Although the study of implicit bias dates back several decades, only recently have judicial opinions begun to make direct reference to this body of research.

The focus of this Comment is five federal cases that each discussed implicit bias extensively and together represent the most developed legal precedent on the admissibility of implicit bias evidence. Although a small number of other cases also feature extensive discussions of implicit bias, these five cases provide a unique basis for comparison because they are factually and procedurally very similar. All five cases were employment discrimination actions brought under federal law. In four of the five cases, the plaintiffs sought to introduce the testimony of the same expert witness on implicit bias. Therefore, the courts in these cases applied similar substantive and procedural standards to both the plaintiffs' prima facie cases and to their expert's proffered testimony. Three of the courts sided with the plaintiffs and treated implicit bias evidence favorably; the other two courts rejected evidence of implicit bias.

Because there are only these five cases, it is difficult to draw conclusions from them with certainty. Nevertheless, this Comment considers ways in which implicit bias evidence could be presented to increase the likelihood it will be admitted and to minimize conflict with the unfavorable precedent. It also looks at strategies for admitting implicit bias evidence that have not yet been attempted but are potentially promising.

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INTRODUCTION

The theory of implicit bias occupies a rapidly growing field of scientific research and legal scholarship. With the advent of tools measuring individuals' subconscious biases toward people of other races, genders, ages, national origins, religions, and sexual orientations, scholars have rushed to explore the ways in which these biases might affect decision-making and produce broad societal consequences.[1] An overwhelming majority of social scientists and legal commentators in the field agree that implicit bias exists and has behavioral consequences that adversely affect minority and less-favored groups in American society.[2]

This recognition of implicit bias as a problem has prompted scholars to devise ways that it might be addressed. Prominent legal commentators have long argued that implicit bias evidence should be admissible in employment discrimination cases.[3] In the wake of several high-profile police shootings of black males, many authors have also begun to argue that implicit bias should be acknowledged by law enforcement officials in the management of their departments and potentially offered as evidence in cases against officers.[4] More recent scholarship has expanded the possible applications of implicit bias research to Fourth Amendment jurisprudence and school disciplinary methods.[5]

The question that remains unanswered for scholars, attorneys, and judges is whether evidence of implicit bias and its effects can or should be used in legal proceedings. Although the study of implicit bias dates back several decades, only recently have judicial opinions begun to make direct reference to this body of research. In most cases where the implicit bias theory has been mentioned, courts have cited or introduced it by their own initiative—in other words, the parties in those cases did not mention implicit bias in their pleadings or seek to introduce evidence related to implicit bias.[6] However, in the past six years, implicit bias evidence has been offered in a handful of cases, and judges in those cases have directly confronted the question of whether that evidence is valuable and admissible.

The focus of this Comment is five federal cases that each discussed implicit bias extensively and together represent the most developed legal

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1. *See infra* notes 9, 27–29 and accompanying text.

2. *But see* Gregory Mitchell & Phillip A. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (arguing the research on implicit bias is not persuasive enough to be accepted as legislative authority); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008) (arguing there are other explanations for what some say is unconscious bias).

3. *See infra* note 9 and accompanying text.

4. *See infra* note 27.

5. *See infra* note 28.

6. *See infra* note 7.

precedent on the admissibility of implicit bias evidence. Although a small number of other cases also feature discussions of implicit bias, these five cases provide a unique basis for comparison because they are factually and procedurally very similar. All five cases were employment discrimination actions brought under federal law. In four of the five cases, the plaintiffs sought to introduce the testimony of an expert witness on implicit bias. Therefore, the courts in these cases applied similar substantive and procedural standards. Three of the courts sided with the plaintiffs and treated implicit bias evidence favorably; the other two courts rejected evidence of implicit bias. Implicit bias has also been discussed or cited in non-discrimination cases.[7] Additionally, there are a handful of state discrimination cases,[8] but those courts considered the issue far less extensively than the federal cases discussed in this Comment and have thus been excluded.

Part I of this Comment provides a general overview of implicit bias theory and the legal debate that has developed around it. Part II discusses the legal standards that were important in the five federal cases that are the focus of this Comment. Part III analyzes those cases, highlighting similarities and points of divergence. Part IV draws limited conclusions from these cases about the future of implicit bias evidence in federal discrimination actions.

I. OVERVIEW OF THE THEORY OF IMPLICIT BIAS

Implicit bias theory is a product of the study of implicit social cognition. Implicit social cognition science examines psychological phenomena in which individuals harbor unconscious associations between identity characteristics—such as race, gender, and age—and social meanings or values.[9] Implicit bias theory describes how these

7. *E.g.*, United States v. Ray, 803 F.3d 244 (6th Cir. 2015) (considering a defendant's objection to the word "felon" being used by prosecutors describing his charges); Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *1, *5 (E.D. Wash. July 7, 2006), *rev'd on other grounds*, 623 F.3d 990 (9th Cir. Oct. 7, 2010) (en banc) (considering whether felon disenfranchisement laws denied the right to vote to racial minorities); Supplemental Permanent Injunction/Judgment Order, Melendres v. Arpaio, No. CV-07-02513-PHX-GMS, 2013 WL 5498218, at *14–15 (D. Ariz. Oct. 2, 2013), *aff'd in part*, *rev'd in part*, 784 F.3d 1254 (9th Cir. Apr. 15, 2015) (granting injunctive relief to plaintiffs who sued a sheriff's department for using race as a factor in assessing whether a reasonable suspicion existed for investigating or detaining Latinos in motor vehicles in violation of the Fourth and Fourteenth Amendments).

8. *E.g.*, Pippen v. State, 854 N.W.2d 1 (Iowa 2014).

9. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–87 (1995).

associations form attitudes and stereotypes about categories of people possessing particular identity characteristics.[10]

The primary tool for measuring implicit bias is the Implicit Association Test (IAT), which was created by Dr. Anthony Greenwald.[11] The IAT is a computerized test in which participants are asked to sort pictures by identifying characteristics—such as black faces and white faces—by pressing different keys.[12] Participants are then asked to sort positive and negative words, such as trustworthy and violent, respectively.[13] Finally, participants must pair the words with the identifying characteristics according to different prompts.[14] For example, in the Race IAT, participants are first asked to pair positive words like "smart" with white faces; in the next exercise, they are asked to pair those positive words with black faces.[15] The computer measures the time required to complete these pairings and user errors.[16] Pairings that take longer and produce more errors indicate greater levels of bias. For example, participants who take longer to pair black faces with positive words are to an extent biased against African-Americans.[17]

Hundreds of thousands of individuals have taken different forms of the IAT.[18] The results of the Race IAT show an overwhelming preference for whites, even among black study participants.[19] Studies have also revealed biases against Latinos, Jews, Asians, non-Americans, women, gays, and the elderly.[20] Additionally, the IAT is predictive of bias among individuals that purport to have progressive or egalitarian beliefs.[21]

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10. *See* Krieger, *supra* note 9, at 1187; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1507–08 (2005).

11. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE ch. 3 (2013); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 952 n.23 (2006).

12. Greenwald & Krieger, *supra* note 11, at 952.

13. *Id.*

14. *Id.*

15. Kang, *supra* note 10, at 1508–09.

16. Greenwald & Krieger, *supra* note 11, at 952; *see also* BANAJI & GREENWALD, *supra* note 11, at 42.

17. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1199 (2009).

18. *See Implicit Association Test*, BLINDSPOT, http://blindspot.fas.harvard.edu/IAT (last visited June 30, 2017).

19. BANAJI & GREENWALD, *supra* note 11, at 47.

20. *See, e.g.*, Kimberly Papillon, *The Hard Science of Civil Rights: How Neuroscience Changes the Conversation*, EQUAL JUST. SOC'Y, https://equaljusticesociety.org/law/implicitbias/primer/ (last visited June 30, 2017); Nick Kim Sexton, *Study Reveals Americans' Subconscious Racial Biases*, NBC NEWS (Aug. 21, 2015, 10:06 AM), http://www.nbcnews.com/news/asian-america/new-study-exposes-racial-preferences-americans-n413371.

21. BANAJI & GREENWALD, *supra* note 11, at 47.

Another developing field of research has attempted to identify the behavioral consequences of these biases.[22] For example, one study found that employers evaluated resumes differently based on the names of the applicants. Resumes with white-sounding names received 50% more callbacks than resumes with black-sounding names.[23] Another well-known study on "shooter bias" primed non-black participants with black or white faces before asking them to identify whether an object in a subject's hand was a tool or a gun.[24] Participants more often correctly identified tools in the hands of whites and guns in the hands of blacks.[25] This has led some to infer that police officers, in high-pressure situations, are more likely to shoot a black suspect than a white suspect under otherwise identical circumstances.[26]

Scholars increasingly argue that these and related research findings should bear on cases involving police violence, discrimination,[27] and school discipline.[28] The cases discussed in this Comment represent attempts to offer the data and body of scholarship on implicit bias as evidence of employment discrimination.

II. RELEVANT LEGAL STANDARDS FOR IMPLICIT BIAS EVIDENCE IN DISCRIMINATION CASES

Common evidentiary standards and theories of employment discrimination provide a basis for comparing the five major implicit bias cases. In order to understand the comparison, it is helpful to understand such underlying standards and theories. This Part provides a brief background.

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22. Kang, *supra* note 10, at 1514.

23. *Id.* at 1516 n.122.

24. *Id.* at 1525.

25. *Id.*

26. *See, e.g.*, *id.* at 1527 n.194.

27. *E.g.*, Krieger, *supra* note 9, at 1164 (applying cognitive bias theory to employment discrimination); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2040 (2011) ("[C]ourts should reconsider their behavioral assumptions about police decisionmaking and judgments about criminality."); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 235–36 (2003) (advocating the use of "racial auditors" to gather and disseminate information about police departments' racially disparate treatment of criminal suspects).

28. *E.g.*, Jason P. Nance, *Implicit Racial Bias and Students' Fourth Amendment Rights* (forthcoming 2017); James P. Nance, *Over-Discplining Students, Racial Bias, and the School-to-Prison Pipeline*, 50 U. RICH. L. REV. 1063 (2016).

A. *Theories of Discrimination*

In federal employment discrimination actions, plaintiffs usually proceed under either disparate treatment[29] or disparate impact[30] theories of discrimination.[31] Disparate treatment is sometimes referred to as intentional discrimination, because it requires proof of discriminatory motive.[32] Circumstantial evidence may be used to prove motive in disparate treatment cases.[33] Disparate impact cases, in contrast, involve employer policies or practices that are not facially discriminatory but have a disproportionally adverse impact on a protected group of employees.[34] Disparate impact theory does not require proof of motive.[35] Under both theories of relief, a plaintiff must establish a prima facie case of discrimination; then, the burden shifts to the defendant to explain the alleged discriminatory effect.[36]

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29. There are two major categories of disparate treatment claims. One is individual disparate treatment claims, which allege specific instances of discriminatory conduct that adversely affect a single employee or applicant. 3 EMP'T DISCRIMINATION COORDINATOR, ANALYSIS OF FEDERAL LAW § 136:9, Westlaw (database updated Apr. 2016). Evidence for these claims usually takes the form of the conduct and motivations of individual employers. *Id.* § 136:8. The other category is referred to as group or "pattern and practice" disparate treatment claims. *Id.* § 136:9. These claims resemble disparate impact claims in that they often rely on statistical evidence showing an employer's systemic discriminatory treatment of a whole group of employees. *Id.*

30. Disparate impact theory prohibits "practices that are fair in form but discriminatory in operation." *Id.* § 136:11. Independently of employer motivation, policies and practices may act as "built-in headwinds" for protected groups that hinder members of those groups from succeeding in the workplace. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). Rather than proving an employer acted with the intent to discriminate, plaintiffs in disparate impact cases must identify a particular employment practice, prove there exists a disparate impact on the protected group to which the plaintiff belongs, and like in disparate treatment cases, prove causation. 3 EMP'T DISCRIMINATION COORDINATOR, *supra* note 29, § 136:11.

31. 3 EMP'T DISCRIMINATION COORDINATOR, *supra* note 29, § 136:6.A.

32. *Id.*

33. To advance a disparate treatment discrimination claim, a plaintiff must prove that an employer's conduct caused the plaintiff's injury. Mixed-motive analysis is a classification of this causation requirement that may be invoked by plaintiffs in Title VII actions. *Id.* § 136:44. Under this analysis, a plaintiff proves causation by presenting sufficient evidence that a protected classification was a motivating factor in an employment action. *Id.* § 136:19. A discriminatory motive does not need to be the but-for cause of a plaintiff's injury, as long as an unlawful motive was a "motivating factor." *See, e.g.*, Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 347 (5th Cir. 2007). Mixed-motive causation can be advanced in Title VII cases, but not in ADA and ADEA actions, which require but-for causation. Lewis v. Humboldt Acquisition Corp., Inc., 681 F.3d 312, 317 (6th Cir. 2012) (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009)); 3 EMP'T DISCRIMINATION COORDINATOR, *supra* note 29, § 136:19.

34. 3 EMP'T DISCRIMINATION COORDINATOR, *supra* note 29, § 136:6.

35. *Id.*

36. *Id.*

B. *Federal Rule of Evidence 702 and the Standard for Expert Testimony*

Three of the four cases discussed in this Comment turned on whether implicit bias scholar Dr. Anthony Greenwald satisfied Federal Rule of Evidence 702's requirements for expert witnesses. Important to these decisions was the distinction between the elements contained in the text of Rule 702 and those of an alternative test described in the Advisory Committee Notes to the 2000 Amendment, which applies to experts giving generalized, rather than factually specific, testimony. The purpose of the former, traditional Rule 702 test is to determine the admissibility of experts who intend to make specific conclusions about the facts of the case. For example, in a discrimination case, an expert admitted under this standard might opine that a particular employer policy had a discriminatory effect. In contrast, the purpose of the test for generalized testimony is to determine the admissibility of experts who will not make specific conclusions about the facts of the case and will instead provide general knowledge to aid the understanding of the fact-finder.[37] The traditional test in the text of Rule 702 permits testimony by a qualified expert if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[38]

Additionally, the Supreme Court's *Daubert I* opinion assigns trial judges the responsibility of acting as "gatekeepers" permitting only qualified experts that satisfy the federal rule.[39] Additionally, a corollary to the first element of Rule 702 is that expert testimony assist the trier of fact and relate to, or "fit," the underlying facts of the case.[40]

The alternative test for testimony on "general principles" is introduced in the Advisory Committee Notes to the 2000 Amendment and prescribed for situations where "[i]t might also be important . . . for an expert to educate the factfinder about general principles, without ever attempting

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37. FED. R. EVID. 702 advisory committee's note to 2000 amendment.

38. FED. R. EVID. 702.

39. Daubert v. Merrell Dow Pharms., Inc. (*Daubert I*), 509 U.S. 579, 597 (1993).

40. *See id.* at 591. This inquiry "demands 'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" Daubert v. Merrell Dow Pharms., Inc. (*Daubert II*), 43 F.3d 1311, 1317–18, 1320 (9th Cir. 1995).

to apply these principles to the specific facts of the case."[41] This test is very similar to the test in the text of Rule 702 and requires that:

> (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.[42]

The principal difference between the two tests is that the test for generalized testimony does not require that "the expert has reliably applied the principles and methods to the facts of the case."[43] Plaintiffs seeking to admit implicit bias evidence in discrimination cases have more often than not argued that this "general principles" test applies, because it relieves them of the burden of concretely linking expert testimony on the statistical prevalence of implicit bias in the United States to its operation in the specific employment decisions under review.

III. FEDERAL DISCRIMINATION CASES DISCUSSING IMPLICIT BIAS

There are three federal cases that offer endorsements of implicit bias evidence in discrimination cases: *Samaha*, *Kimble*, and *Martin*. *Martin* is discussed later in this Comment because that case was decided years after the other four cases featured here and comments on one of the cases discussed below.

A. Samaha: *Admitting Expert Testimony on Implicit Bias to Establish "General Principles"*

In *Samaha v. Washington State Department of Transportation*,[44] an Arab plaintiff who was an employee of the Washington Department of Transportation brought an individual discrimination claim against the agency under sections 1981, 1983, and 1985 of the Civil Rights Act, as well as under a state anti-discrimination statute, alleging disparate treatment on the basis of his national origin.[45] The plaintiff contended that his employer held him to a higher standard than employees of non-Arab backgrounds, particularly in performance evaluations.[46] Mr. Samaha sought to introduce the expert testimony of Dr. Anthony Greenwald,[47] the creator of the IAT. The defendant moved *in limine* to exclude Dr.

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41. FED. R. EVID. 702 advisory committee's note to 2000 amendment.

42. *Id.*

43. *See* FED. R. EVID. 702.

44. Order Denying Defendant's Motion to Exclude Testimony, Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012).

45. *Id.* at *1.

46. *Id.*

47. *Id.*

Greenwald's testimony under Federal Rule of Evidence 702.[48] District Judge Rosanna M. Peterson denied the motion.[49]

Mr. Samaha couched his description of Dr. Greenwald's testimony in general terms. His witness declaration described the purpose of his testimony as "provid[ing] a framework that can aid a judge or jury in evaluating the facts of this case to better understand the evidence as it relates to discriminatory intent."[50] Additionally, Dr. Greenwald summarized his research findings in a six-point outline,[51] including that "seventy percent of Americans 'hold implicit prejudiced views' based on race, color, national origin and ethnicity" and that "job performance evaluations conducted by personnel using subjective criterion permit implicit biases to affect the outcome."[52]

The court's consideration of Dr. Greenwald's proffered testimony was analyzed under Federal Rule of Evidence 702.[53] The defendants' motion to exclude Dr. Greenwald's testimony charged that it was "not relevant, is unfairly prejudicial, and fails to 'appl[y] the principles and methods reliably to the facts of the case.'"[54] However, the defendants did not contest Dr. Greenwald's qualifications as an expert.[55] Additionally, they did not challenge the validity or reliability of his research methodology and findings or of implicit bias theory.[56] Instead, they argued that the results of the IAT test amounted to "statistical generalizations" that had not been clearly linked to the defendants' conduct.[57] Indeed, Dr. Greenwald did not opine about the presence of implicit bias at the Washington Department of Transportation, and he admitted that his familiarity with the facts of the case was limited to reading the plaintiff's complaint.[58]

In her analysis of Rule 702's "reliability" factors (elements (b)–(c)),[59] Judge Peterson did not consider whether Dr. Greenwald's opinions had been properly applied to the facts of the case.[60] The court was satisfied

48. *Id.* at *2.

49. *Id.* at *5.

50. *Id.* at *1.

51. *Id.*

52. *Id.*

53. *Id.* at *2–3.

54. *Id.* at *2.

55. *Id.* at *3. In addition to the four elements Rule 702 requires expert to satisfy, Rule 702 requires that a witness be "qualified as an expert by knowledge, skill, experience, training, or education." FED. R. EVID. 702.

56. *Samaha*, 2012 WL 11091843, at *3 ("Defendants do not directly challenge the validity of implicit bias theory.").

57. *Id.*

58. *Id.* at *1.

59. *See supra* text accompanying note 38.

60. Samaha, 2012 WL 11091843, at *3.

that Dr. Greenwald's research findings were corroborated by other social scientists in the field and "includ[ed] implicit bias relating to Arabs and other persons of color."[61] Therefore, Judge Peterson found that his opinions were "sufficiently 'ground[ed] in the methods and procedures of science.'"[62]

Under the "helpfulness and fit" requirements of Rule 702 (element (a)),[63] the court examined the defendants' contention that Dr. Greenwald's testimony had not been connected to specific conduct in the case[64] but concluded that the alternative test for generalized testimony applied. Under this analysis, Dr. Greenwald's testimony did not have to be applied to the facts of the case, and the defendants had effectively conceded parts (1) and (3) of the test[65] by admitting, respectively, that Dr. Greenwald was qualified and that his research methodology was reliable. Without extensive discussion, Judge Peterson concluded that the other elements of the test were also satisfied, because "Dr. Greenwald's testimony is likely to provide the jury with information that it will be able to use to draw its own conclusions."[66] Therefore, the court held that the testimony was "helpful enough to survive the admissibility threshold" and denied the defendants' motion to exclude it.[67]

B. Kimble*: Affirming the Relevance of Implicit Bias as Circumstantial Evidence in Discrimination Cases*

The other federal decision treating implicit bias evidence favorably is the Eastern District of Wisconsin's *Kimble v. Wisconsin Department of Workforce Development*.[68] In *Kimble*, a black male supervisor employed by the Equal Rights Division of the Wisconsin Department of Workforce Development sued his employer and an individual administrator under Title VII of the Civil Rights Act for intentional discrimination.[69] Specifically, Mr. Kimble argued that the defendants had discriminated against him on the basis of a combination of race and gender by not giving him a raise.[70] Unlike in *Samaha* and the other two cases discussed in this Comment, *infra*, Mr. Kimble did not present an expert on implicit bias. Therefore, the court did not undertake a Federal Rule of Evidence 702

61. *Id.*
62. *Id.* (quoting *Daubert I*, 509 U.S. 579, 590 (1993)).
63. *See supra* text accompanying note 38.
64. *Samaha*, 2012 WL 11091843, at *3–4.
65. *See supra* notes 55–56 and accompanying text.
66. *Samaha*, 2012 WL 11091843, at *4.
67. *Id.*
68. 690 F. Supp. 2d 765 (E.D. Wis. 2010).
69. *Id.* at 767.
70. *Id.*

analysis. Mr. Kimble's case went to a bench trial,[71] and implicit bias factored into Judge Lynn Adelman's examination of the circumstantial evidence of discrimination. Considering the plaintiff's case and the defendants' explanation for the alleged disparate treatment, the court found the defendants had violated Title VII.[72]

After rejecting the defendants' explanation for their allegedly discriminatory conduct, Judge Adelman wrote at length about "additional evidence" supporting her decision, "[even though the court's] rejection of defendants' explanation is a sufficient basis for finding liability."[73] Judge Adelman characterized this section as an "explanation" of her findings,[74] in which she made reference to a collection of implicit bias scholars, including Dr. Anthony Greenwald.[75] Additionally, Judge Adelman reviewed parts of the record—particularly, the testimony of the plaintiff's supervisor—and found that "[w]hile the supervisor may have intentionally discriminated against the Salvadoran, he might also have treated him poorly because he viewed him through the lens of an uncomplimentary stereotype."[76]

Furthermore, the court noted other circumstances that gave rise to the possibility that implicit bias caused discrimination: most notably, "when the evaluation of employees is highly subjective, there is a risk that supervisors will make judgments based on stereotypes of which they may or may not be entirely aware."[77] This combination of factors led Judge Adelman to conclude that, "in addition to failing to provide a credible explanation of the conduct complained of, [the defendant supervisor] behaved in a manner suggesting the presence of implicit bias."[78] Interestingly, this reference to implicit bias was of the court's own initiative and was not mentioned in any of the pleadings.

The *Samaha* and *Kimble* cases, taken together, offer plaintiffs in discrimination cases room to argue that evidence of implicit bias is admissible and can bolster circumstantial evidence of discriminatory

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71. *Id.*

72. *Id.* at 775. Judge Adelman described the standard of review in individual Title VII disparate treatment cases as requiring "only [a determination] that the employer made the challenged decision based on a protected trait." *Id.* at 768. Furthermore, Judge Adelman qualified that "a trier of fact [need not] decide whether a decision-maker acted purposively or based on stereotypical attitudes of which he or she was partially or entirely unaware." *Id.* "As in most Title VII cases," Mr. Kimble relied on circumstantial evidence to prove discrimination. *Id.* at 769.

73. *Id.* at 775–78.

74. *Id.* at 775.

75. *Id.* at 776 (citing Greenwald & Krieger, *supra* note 11).

76. *Id.*

77. *Id.* at 775–76 (citing United States v. Stephens, 421 F.3d 503, 515 (7th Cir. 2005); Thomas v. Troy City Bd. of Educ., 302 F. Supp. 2d 1303, 1309 (M.D. Ala. 2004)).

78. *Id.* at 778.

intent. However, two other district court cases, *Jones* and *Karlo*, firmly rejected implicit bias evidence on several grounds.

C. Jones I: *Rejecting Expert Testimony on Implicit Bias as a Way of Establishing "General Principles"*

Jones v. National Council of Young Men's Christian Associations of the United States[79] was a class action brought by black employees of the YMCA against their employer alleging unintentional discrimination and disparate impact under Title VII of the Civil Rights Act of 1964, Section 1981 of the Civil Rights Act of 1866, and state discrimination statutes.[80] The employees challenged the YMCA's practices with regard to performance evaluations, compensation, promotion, and job assignment.[81] The issue during the stage of the case that concerns this Comment was class certification of the plaintiffs' Title VII claims.[82] The plaintiffs sought to introduce the expert testimony of Dr. Anthony Greenwald, and the YMCA moved to strike the testimony.[83] The motion was considered both by a magistrate judge[84] and a district judge[85] in the Northern District of Illinois. Magistrate Judge Arlander Keys recommended that the district court grant the defendants' motion to strike, and his recommendation was adopted in its entirety.[86]

In *Jones I*, like in *Samaha*, Dr. Greenwald's witness declaration spoke generally of his research and findings.[87] The plaintiffs asserted that the court should rule under the Advisory Committee's standard for generalized testimony.[88] Like in *Samaha*, Dr. Greenwald was familiar with employment at the YMCA only from reading materials given to him by the plaintiffs.[89] The *Jones* defendants, however, made several strategic choices that the *Samaha* defendants had not. First, they disputed the

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79. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States (*Jones II*), 34 F. Supp. 3d 896 (N.D. Ill. 2014).

80. *Id.* at 897–98.

81. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States (*Jones I*), No. 09-C-6437, 2013 WL 7046374, at *1 (N.D. Ill. Sept. 5, 2013).

82. *See id.*

83. *Id.* at *4–5.

84. *Id.* at *1.

85. *Jones II*, 34 F. Supp. 3d at 897.

86. *Jones I*, 2013 WL 7046374, at *1; *Jones II*, 34 F. Supp. 3d at 898. However, District Judge John J. Tharp, Jr. wrote separately and at length to detail his rejection of the testimony. *Jones II*, 34 F. Supp. 3d at 898–901. In this Comment, the magistrate judge's opinion is referred to as "*Jones I*" and the district judge's opinion is referred to as "*Jones II*."

87. *Jones I*, 2013 WL 7046374, at *6.

88. *Id.* at *7.

89. *Id.* at *6.

helpfulness of Dr. Greenwald's testimony.[90] The second element of the Advisory Committee test for generalized testimony requires that an expert "address a subject matter on which the factfinder can be assisted by an expert."[91] The *Jones* defendants argued that discrimination was within an ordinary juror's understanding and not appropriately the subject of expert testimony on "general principles."[92] Magistrate Judge Keys, however, rejected this characterization of Dr. Greenwald's research and would "not rule out the possibility of a need for a factfinder to be educated on implicit bias."[93]

The *Jones* defendants also challenged Dr. Greenwald's methodology,[94] which the *Samaha* defendants had conceded.[95] They argued that the plaintiffs could not satisfy Rule 702's reliability prong without presenting evidence that Dr. Greenwald's laboratory testing "applies to employment decision-making."[96] Furthermore, the *Jones* defendants brought in their own expert, Dr. Philip Tetlock, to support their contention that Dr. Greenwald's research findings were "far removed from workplace realities" and did not account for "debiasing conditions and factors" potentially present at the YMCA.[97] The magistrate judge found this rebuttal persuasive in light of the fact that Dr. Greenwald admittedly had not conducted IAT tests specific to employment decisions and had not investigated potential variables at the YMCA.[98] Accordingly, the court recommended that the defendants' motion to strike be granted because the plaintiffs' proffered testimony had not satisfied the reliability element of the test for generalized testimony.[99]

D. Jones II: *Doubting Whether the Test for Generalized Testimony Applies to Experts on Implicit Bias*

The district court adopted Magistrate Judge Keys's report and recommendation in full.[100] However, District Judge Tharp went further than the report and recommendation in his rejection of Dr. Greenwald's testimony. The district court not only found that Dr. Greenwald's testimony failed the general principles test on multiple grounds; it also

90. *Id.* at *7.
91. FED. R. EVID. 702 advisory committee's note to 2000 amendment.
92. *Jones I*, 2013 WL 7046374, at *7.
93. *Id.*
94. *Id.* at *8.
95. *See supra* note 56 and accompanying text.
96. *Jones I*, 2013 WL 7046374, at *8.
97. *Id.*
98. *Id.*
99. *Id.* at *9.
100. *Jones II*, 34 F. Supp. 3d 896, 898 (N.D. Ill. 2014).

questioned whether his testimony was truly being offered to elucidate general principles.[101]

"Even at the level of general principles," Judge Tharp was not satisfied that Dr. Greenwald's testimony would "fit" the case closely enough to aid the jury, which is the fourth requirement of the Advisory Committee test.[102] Combining the adopted report and recommendation with Judge Tharp's separate opinion, the plaintiffs were defeated on two elements of the test—reliability and fit. Despite holding under a different element of the general principles test, Judge Tharp's reasoning was very similar to Judge Keys's. He found Dr. Greenwald's research on implicit bias did not fit the case because it was "derived solely from laboratory testing that does not remotely approximate the conditions that apply in this case."[103]

Furthermore, the district court questioned whether Dr. Greenwald's opinions even qualified as generalized testimony.[104] Specifically, Judge Tharp suspected that the general principles on which Dr. Greenwald was to educate the jury were effectively conclusory statements on causation.[105] One particular phrase in Dr. Greenwald's report troubled the court: his conclusion that "it is more likely than not that adverse impact is a consequence of unintended discrimination, which can be brought about by managers."[106] Judge Tharp saw this as a finding specific to the facts of the case, not a general principle, and thus argued that the plaintiffs should have to justify it under the text of Rule 702, not the test for generalized testimony.[107] This was a critical blow to the plaintiffs, who "[did] not attempt to defend the admissibility of [Dr. Greenwald's] opinions on the basis that he has applied the general principles of his implicit bias theory to the facts of this case."[108]

E. Karlo: *Fundamentally Questioning the Relevance of Implicit Bias Evidence in Discrimination Cases*

The Western District of Pennsylvania's decision in *Karlo v. Pittsburgh Glass Works*[109] represents the most negative treatment of both Dr. Anthony Greenwald's testimony and implicit bias theory generally.

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101. *See id.* at 899–901.
102. *Id.* at 900.
103. *Id.*
104. *Id.*
105. *Id.* at 899–901.
106. *Id.* at 899.
107. *Id.* at 900.
108. *Id.*
109. Karlo v. Pittsburgh Glass Works, LLC (*Karlo II*), No. 2:10-cv-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015), *vacated*, 849 F.3d 61 (3d Cir. 2017).

The court not only expressly followed the *Jones* court and rejected *Samaha*, it also criticized Dr. Greenwald's methodology and the validity of implicit bias research and scholarship.[110]

In *Karlo*, former employees of Pittsburgh Glass Works (PGW) brought an action against the company under the Age Discrimination in Employment Act of 1967, alleging that the defendant's lay-off practices illegally discriminated on the basis of age.[111] The case, at the stages relevant to this Comment, was comprised of the individual disparate impact and disparate treatment claims of several plaintiffs.[112] The plaintiffs sought to introduce several experts, including Dr. Anthony Greenwald.[113] After conducting an analysis under Federal Rule of Evidence 702,[114] the court granted the defendant's motion to exclude Dr. Greenwald's testimony.[115] Like in *Jones* and *Samaha*, Dr. Greenwald's witness declaration stated that his testimony would "provide a framework that can aid a judge or jury in evaluating the facts" and thus sought to introduce Dr. Greenwald as an expert on general principles.[116]

However, the *Karlo* plaintiffs also used tactics in their effort to enter Dr. Greenwald's testimony that the *Jones* plaintiffs had not. For one, they charged violations under both disparate impact and disparate treatment theories.[117] Additionally, Dr. Greenwald seemed to be more acquainted with the facts and specific employment conditions at PGW than he had been with conditions at the YMCA. For example, in addition to reading the plaintiffs' complaint, he examined the depositions of several key defense witnesses and concluded there are a number of "research findings regarding implicit bias [that] bear on this case."[118] PGW responded by questioning not only Dr. Greenwald's application of his expertise to the facts of the case, but also his qualifications as an expert under Federal Rule of Evidence 404.[119] This was a step further than the defendants in *Samaha* and *Jones* had gone.[120]

Judge Terrence F. McVerry found the plaintiffs' argument unconvincing on all fronts. Noting his disagreement with *Samaha*, he wrote: "Dr. Greenwald's opinion is not based on sufficient facts or data.

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110. *See Karlo II*, 2015 WL 4232600, at *1.

111. Karlo v. Pittsburgh Glass Works, LLC (*Karlo I*), No. 2:10-cv-1283, 2014 WL 1317595, at *9–10 (W.D. Pa. Mar. 31, 2014).

112. *Id.* at *10.

113. *Karlo II*, 2015 WL 4232600, at *1.

114. FED. R. EVID. 702.

115. *Karlo II*, 2015 WL 4232600, at *9.

116. *Id.* at *8.

117. *Karlo I*, 2014 WL 1317595, at *10.

118. *Karlo II*, 2015 WL 4232600, at *7.

119. *Id.* at *5; FED. R. EVID. 404.

120. *See supra* notes 44–66, 79–105 and accompanying text.

It is not the product of reliable methods. And it would not assist the factfinder . . . ."[121] These three findings correspond to three of the four elements of Rule 702.[122] Interestingly, the court did not directly address the alternative test for generalized testimony found in the Advisory Committee Notes, even though it acknowledged that both the *Samaha* and *Jones* courts relied on that test.[123] However, Judge McVerry agreed with the district court's opinion in *Jones* that Dr. Greenwald's testimony was effectively being offered to prove causation.[124] Judge McVerry's agreement on this point suggests that he, like District Judge Tharp in *Jones II*, did not consider the Advisory Committee test applicable.

Even if the *Karlo* court had applied the general principles test, the plaintiffs would likely have failed to satisfy it because the court was deeply skeptical about implicit bias scholarship. Judge McVerry characterized Dr. Greenwald's attempt to apply his research to the facts of the case as a "superficial analysis" based on "the say-so of an academic."[125] He went further to criticize the IAT as a tool of measurement, saying Dr. Greenwald "cannot establish that his publicly available test was taken by a representative sample of the population" and that he "fails to show that the data is not skewed by those who self-select to participate."[126] The court also observed that Dr. Greenwald had not visited PGW or conducted specific research on the employment environment.[127] That criticism is closely aligned with both the magistrate and district judge opinions in *Jones*.[128]

Finally, the *Karlo* court doubted that evidence of implicit bias would be relevant to a discrimination claim even if an expert satisfied Rule 702.[129] Judge McVerry argued that the plaintiff's discriminatory treatment theory, which requires proof of motive, "seems incompatible with a theory in which bias may play an unconscious role in decision-making."[130] Furthermore, "[i]n a disparate impact claim, evidence of implicit bias makes even less sense, particularly because a plaintiff need not show motive."[131] This assessment questions whether implicit bias evidence would ever be admissible, even if not in the form of expert testimony.

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121. *Karlo II*, 2015 WL 4232600, at *7.
122. *See supra* note 38 and accompanying text.
123. *Karlo II*, 2015 WL 4232600, at *7.
124. *See id.* at *8.
125. *Id.* at *7.
126. *Id.* at *8.
127. *Id.* at *7.
128. *See supra* notes 92–105 and accompanying text.
129. *Karlo II*, 2015 WL 4232600, at *9.
130. *Id.*
131. *Id.*

As damaging as the district court's opinion in *Karlo* is, its sharpest criticisms were blunted on appeal. The Third Circuit affirmed the exclusion of Dr. Greenwald and agreed with the district court's "observ[ation] that disparate-impact claims do not inquire into the employer's state of mind" and that "population-wide statistics have only speculative application to [the defendant]."[132] However, the court qualified, "[t]hat is not to say . . . that implicit-bias testimony is never admissible."[133] The portion of the (lengthy) opinion dedicated to Dr. Greenwald is only two paragraphs long, and the court did not elaborate further.[134]

F. Martin: *An Expansion of Implicit Bias in Disparate Treatment Cases, but with Limitations*

The most recent federal discrimination case in which implicit bias was discussed expanded the ways in which expert testimony can potentially be offered, but it also limited the scope of this expansion. In *Martin v. F.E. Moran, Inc.*,[135] the Northern District of Illinois took up the question again, over two years after deciding *Jones II*.[136] The plaintiffs in *Martin* brought federal racial discrimination claims against their former employer.[137] They alleged that disparate treatment of African-American and other minority employees resulted in fewer opportunities and a disproportionate number of terminations.[138] The plaintiffs proffered two experts in support of their claims.[139] One, Destiny Peery, sought to "present sociological evidence that pervasive discriminatory attitudes in the workplace can lead to adverse employment actions,"[140] "describe the context in which [the defendant] made employment decisions,"[141] and testify as to possible implicit and explicit biases in the defendant's workplace.[142] District Judge Virginia M. Kendall held Peery's testimony was admissible, denying the defendant's motion to exclude her reports and bar her testimony.[143]

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132. Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 84–85 (3d Cir. 2017).
133. *Id.* at 85.
134. *See id.*
135. 2017 WL 1105388 (N.D. Ill. Mar. 24, 2017).
136. *See id.*
137. *Id.* at *1.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at *2.
142. *Id.*
143. *Id.* at *5.

Like in the other cases discussed *supra*, the court evaluated Dr. Peery's proffered testimony under Rule 702.[144] However, unlike in those cases, neither the plaintiffs nor the court invoked the "general principles" test. Rather, the court applied traditional Rule 702, meaning the plaintiffs had to establish that Dr. Peery "reliably appl[ied] [her] principles and methods to the facts of the case."[145] The defendant challenged both Dr. Peery's qualifications and the reliability of her testimony.[146] The court quickly rejected the challenge to Dr. Peery's qualifications but analyzed the reliability of her opinions extensively.[147] Unlike experts in favorable cases *Samaha* and *Kimble*, Dr. Peery "support[ed] her conclusions in both the record of the case and external research."[148] Specifically, she reviewed "emails and deposition testimony produced by [the defendant]."[149] However, Dr. Peery did not conduct implicit bias tests at the plaintiffs' workplace or on specific supervisors.[150] Predictably, the defendant challenged her application of implicit bias research to the facts of the case, arguing her report "lack[ed] [a] scientific basis and [a] testable methodology."[151]

The defendant's argument was misplaced, "because Peery [was] not purporting to conduct a traditional scientific assessment, but rather [was] basing her opinion on general psychological principles and her experience in the field."[152] Nevertheless, the defendant pressed that Dr. Peery's opinions were still unsupported.[153] For this argument, the defendant cited *Jones II*.[154] The court briefly distinguished the case, saying "[h]ere, Peery's opinions are rooted in the facts in the record, and her opinions are not as conclusory as the expert's in *Jones*."[155]

However, the court carefully limited its holding on this and other issues, principally by observing repeatedly that *Martin* was a bench trial, and therefore "the Court . . . need not perform the same gatekeeping role of keeping unreliable expert testimony from the jury."[156] "If the issue

144. *See id.* at *1, *3.
145. *Id.* at *1 (citation omitted).
146. *Id.* at *2.
147. *See id.* at *3–5.
148. *Id.* at *3.
149. *Id.* at *2.
150. *Id.*
151. *Id.* at *3.
152. *Id.*
153. *See id.* at *3–4.
154. *Id.* at *4 (citing *Jones II*, 34 F. Supp. 3d 896, 899–900 (N.D. Ill. 2014)).
155. *Martin*, 2017 WL 1105388, at *4.
156. *Id.*

were before a jury," certain distinctions parsed by the court that salvaged Dr. Peery's testimony "might be lost."[157]

Despite this important limitation, *Martin* still marks a success for plaintiffs offering expert testimony on implicit bias in federal discrimination cases. The plaintiffs made relatively minor adjustments to how their expert's testimony was characterized compared to the experts in *Jones* and *Karlo*. Furthermore, it is difficult to argue that Dr. Peery more extensively applied implicit bias research to the facts of the case than the expert in *Karlo*,[158] yet the *Martin* court admitted her testimony. Although the importance of *Martin* being a bench trial remains to be seen, the case stands firmly in support of expert testimony on implicit bias.

IV. ASSESSING THE VIABILITY OF IMPLICIT BIAS EVIDENCE IN DISCRIMINATION CASES GOING FORWARD

Part III analyzed the five federal cases that have extensively discussed implicit bias: *Samaha*, *Kimble*, *Jones*, *Karlo*, and *Martin*. Because there are only these five cases, it is difficult to draw firm conclusions. The plaintiffs in each case were differently situated, and the defendants made different strategic choices. Nevertheless, this Part considers ways in which implicit bias evidence could be presented to increase the likelihood it will be admitted and to minimize conflict with the unfavorable precedent. It also looks at strategies for admitting implicit bias evidence that have not yet been attempted but are potentially promising.

A. *Implicit Bias Evidence Is More Viable if Offered As Proof of Intentional Discrimination*

A comparison of the five cases discussed in this Comment indicates that implicit bias evidence is more likely to be admitted if offered to prove intentional discrimination. One glaring reason for this is that none of the plaintiffs who have attempted to use implicit bias evidence to support disparate impact claims have succeeded. In the three cases that treated implicit bias evidence favorably, *Samaha*, *Kimble*, and *Martin*, the plaintiffs advanced disparate treatment claims.[159] In the *Jones* cases, the plaintiffs proffered testimony on implicit bias to support a disparate impact theory and were unsuccessful.[160] In *Karlo*, the plaintiffs' attempt to admit his testimony under both theories was rejected, but the court was especially critical in the disparate impact context, saying "[i]n a disparate impact claim, evidence of implicit bias makes even less sense,

157. *Id.*
158. *See supra* note 118 and accompanying text.
159. *See supra* notes 46, 70, 138 and accompanying text.
160. *See supra* note 81 and accompanying text.

particularly because a plaintiff need not show motive."[161] Furthermore, the appellate court, in affirming the lower court, did not mention the plaintiffs' disparate treatment theory at all.[162]

A more nuanced reason why implicit bias evidence is more likely to be admitted in support of disparate treatment claims is the need for plaintiffs to avoid the appearance that they are offering the evidence as proof of causation. Because generalized testimony cannot encompass conclusions specific to the facts of the case, and whether employer conduct caused discrimination is a conclusion specific to the facts of the case, experts most likely cannot assert that implicit bias caused discrimination in a specific workplace.[163] However, generalized testimony can comment on the nature and operation of motive—for example, by explaining that it is often influenced by unconscious biases.[164] In both *Jones* and *Karlo*, the defendants successfully argued that Dr. Anthony Greenwald's testimony was effectively being offered to prove causation—not, as the plaintiffs claimed, for the purpose of establishing general principles underlying discrimination.[165] In contrast, the court in *Martin* stressed that "Peery opines on the *presence* of stereotypes and aversive racism at FPN and how that *could have influenced* decision makers."[166]

This "causation trap" is more likely to ensnare plaintiffs arguing disparate impact. When there is no need to prove motive, it is difficult for plaintiffs to explain the purpose, if not causation, for which implicit bias evidence should be admitted. This difficulty was seized upon by the district court in *Jones II*, which wrote "the lack of 'fit' . . . is evidenced by the plaintiffs' inability to identify a purpose for admitting his testimony."[167] In contrast, plaintiffs arguing disparate treatment can more easily assert that implicit bias evidence is useful for explaining motive without "cross[ing] into the realm of causation."[168] Indeed, expert testimony was successfully framed in *Samaha* as a means of "understand[ing] the evidence as it related to discriminatory intent."[169]

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161. *Karlo II*, No. 2:10-cv-1283, 2015 WL 4232600, at *9 (W.D. Pa. July 13, 2015).

162. *See* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 84–85 (3d Cir. 2017).

163. *See supra* notes 104–05 and accompanying text.

164. *See supra* note 50 and accompanying text.

165. *See supra* notes 104–05, 124 and accompanying text.

166. Martin v. F.E. Moran, Inc., No. 13-C-03526, 2017 WL 1105388, at *4 (N.D. Ill. Mar. 24, 2017).

167. *Jones II*, 34 F. Supp. 3d 896, 901 (N.D. Ill. 2014). The court also noted that Dr. Greenwald's testimony would be unavailing to a disparate treatment claim, but such a claim was not before the court. *Id.*

168. *Id.*

169. Samaha v. Wash. State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012).

1. Group Claims May Be More Likely to Succeed Than Individual Claims

Group disparate treatment claims advancing a pattern or practice theory of motive may offer a promising avenue for plaintiffs going forward, although it has not yet been attempted. Pattern or practice claims rely on statistical evidence gleaned from a bird's-eye view of employment decisions.[170] This type of evidence paints the collective acts of an employer's agents as indicative of the employer's motivations.[171] Structurally, this theory of motive resembles implicit bias theory, which represents that biases operating pervasively but imperceptibly can culminate in discriminatory practices. Accordingly, courts may be less willing to declare that implicit bias evidence does not "fit" a case if the evidence is offered alongside other structurally and conceptually similar evidence. Furthermore, defendants challenging implicit bias evidence are likely to argue that it represents only "statistical generalizations,"[172] but that argument will carry less force if plaintiffs employ a theory of motive that relies heavily on statistical evidence.

Additionally, advancing a pattern or practice theory of motive might relieve plaintiffs, and experts like Dr. Greenwald, of identifying specific actions that, by themselves, evince a discriminatory motive. Indeed, in *Samaha*, the defendants argued (and the plaintiffs conceded) that Dr. Greenwald's testimony did not attempt to ascertain "whether implicit bias played any role in any employment decision."[173] The *Samaha* court was not troubled by Dr. Greenwald's generalized assertions, but the *Jones* and *Karlo* court saw this lack of specificity as a critical shortcoming.[174] Therefore, framing motive in terms of a pattern or practice embodied in multiple, diverse acts may be a productive strategy for assuaging the doubts of courts taking the latter approach.

2. Title VII Disparate Treatment Claimants Are in the Best Position to Use Implicit Bias Evidence

Although disparate treatment is a theory of discrimination available under most discrimination statutes, a "mixed-motive" theory of causation is permitted only by Title VII.[175] This gives Title VII plaintiffs a way to escape the "causation trap" discussed in the previous Subsection, whereby a defendant alleges that a plaintiff's expert is being improperly

170. *See supra* note 29.
171. *See supra* note 29.
172. *See, e.g.*, *Samaha*, 2012 WL 11091843, at *3.
173. *Id.*
174. *See supra* notes 60, 65, 99–100, 121 and accompanying text.
175. *See supra* note 33.

offered to prove causation rather than abstract general principles. The mixed-motive theory allows a plaintiff to prove causation by presenting sufficient evidence that a protected classification was a "motivating factor" in an employment decision, but not necessarily a but-for cause.[176] Therefore, a mixed-motive analysis arguably allows plaintiffs to present this evidence as proof of causation. Tellingly, in the only Title VII case discussed in this Comment, *Kimble*, the court found that implicit bias was a "motivating factor" in the employer's conduct.

B. *Expert Testimony on "General Principles" Should Be Presented Cautiously*

For other plaintiffs not proceeding under Title VII, for whom a mixed motive theory of causation is not available, arguments with regard to implicit bias must be more carefully crafted to avoid blurring the line between motive and causation. Some plaintiffs have therefore chosen to offer expert testimony on implicit bias under the test for generalized testimony found in the Advisory Committee Notes to the 2000 Amendment to Federal Rule of Evidence 702, rather than the textual Rule 702 test. However, this strategy has encountered difficulties; namely, the causation trap discussed above, in addition to several courts' concerns that Dr. Greenwald's testimony is too abstract to be relevant.

In *Jones I*, Magistrate Judge Keys stressed the extent to which Dr. Greenwald was unfamiliar with the specific employment conditions at the YMCA. Judge Keys noted that "[Dr. Greenwald] did not visit the Y's offices, speak with a current or former employee of the Y . . . did not have IAT data for any Y manager . . . [did] not even recall seeing the Y's equal employment opportunity policy or its diversity policy."[177] Furthermore, Judge Keys saw Dr. Greenwald's declaration as too far removed from "workplace realities,"[178] saying "only one paragraph in his report discusses the Y, and that paragraph came from his review of Plaintiffs' statistical expert."[179] This language was quoted by Judge McVerry in *Karlo*[180] to express that Dr. Greenwald's opinion represented a "superficial analysis . . . [based on] the say-so of an academic who assumes that his general conclusions from the IAT would also apply to [the defendant]."[181]

Plaintiffs are unlikely to produce a controlled experiment in a particular workplace. It would be difficult, if not impossible, to

176. *See supra* note 33.
177. *Jones I*, No. 09-C-6437, 2013 WL 7046374, at *6 (N.D. Ill. Sept. 5, 2013).
178. *Id.* at *8.
179. *Id.* at *6.
180. *Karlo II*, No. 2:10-cv-1283, 2015 WL 4232600, at *6 (W.D. Pa. July 13, 2015).
181. *Id.* at *7.

administer the IAT to current and former employees in a discrimination case. Even if a plaintiff attempted to do so, it is hard to see how IAT test results could be used to illustrate causation. The IAT identifies the existence of bias, but it is not capable of measuring the extent to which bias played a role in a particular decision that was made in the past.[182]

Therefore, although offering expert testimony on implicit bias for its general principles rather than under the regular Rule 702 test is a viable strategy for discrimination claimants, plaintiffs pursuing this strategy must be aware of the potentially narrow window between testimony that is too general to bear on a specific case or, on the other hand, too specific to be credibly described as generalized testimony. Furthermore, the success of the plaintiffs in *Martin* under the traditional Rule 702 test illustrates that the general-principles test is not the only one implicit bias experts can satisfy.

CONCLUSION

The themes and cases discussed in this Comment represent only the beginning of how implicit bias evidence could be utilized in future litigation. Parts of the five federal cases discussed present significant challenges, but plaintiffs in discrimination suits can and should press on. Additionally, it is likely that the legal role of implicit bias will expand to other contexts and causes of action as scholarship and precedent continue to develop.

182. *See supra* Part I.