2010

A Modern Theory of Direct Corporate Liability for Title VII

Sandra F. Sperino
University of Cincinnati College of Law, sandra.sperino@uc.edu

A MODERN THEORY OF DIRECT CORPORATE LIABILITY FOR TITLE VII

Sandra F. Sperino[*]

INTRODUCTION

Something is missing from Title VII—a modern and fully functional theory of direct employer liability for individual discrimination claims. Courts largely focus on finding employers indirectly liable for discrimination through the acts of their agents, rather than viewing the employer as

* Assistant Professor of Law, Temple University Beasley School of Law. I would like to thank Ann McGinley, Jeremi Duru, Jarod Gonzalez, Melissa Hart, and Craig Green for their thoughtful comments on drafts of this Article and Lauren Moser for her research assistance.

the culpable actor in appropriate circumstances.[1] This Article posits that five major problems with Title VII can be eliminated or reduced by once again recognizing the importance of direct employer liability and by re-theorizing direct liability using modern conceptions of corporate character.

In the first decade after Title VII's enactment, two types of claims dominated enforcement efforts: individual disparate treatment claims, involving company policies that overtly discriminated on the basis of a protected trait, and (to a lesser extent) disparate impact cases, involving facially neutral company policies that resulted in discrimination.[2] Courts considering these cases held employers directly liable for their policies.[3]

However, in the 1970s, the landscape changed. Plaintiffs began using, as the primary basis for Title VII liability, individual disparate treatment claims that did not rely on a facially discriminatory company policy.[4] This change then led to a theoretical shift in the basis for holding companies liable for discrimination. As this new type of discrimination claim gained favor, and especially with the advent of harassment and sexual propositioning claims, indirect liability became the primary mode used to impress liability on companies in individual disparate treatment cases.[5]

This focus on indirect liability forgets that there are two types of liability within Title VII's definition of employer: the liability that the entity itself possesses and the entity's indirect liability for the actions of its agents. Relying primarily on indirect liability causes, contributes to, or amplifies five major problems within the employment discrimination field: conceptualizations of discrimination that rely on the rogue actor, oversimplification of workplace decisionmaking, overreliance on the stray remarks doctrine, a current inability or unwillingness to incorporate unconscious or structural discrimination theories into workable liability structures, and the false division of employment discrimination claims into fixed categories. Because of these problems, employment discrimination law has been unable to fully capture the realities of the modern workplace and fully effectuate Title VII's antidiscrimination mandates.

---

1. This Article uses the term "indirect liability," rather than terms such as vicarious liability and respondeat superior. This choice was made because the Supreme Court's enunciation of these latter principles in the Title VII context often differs from common law enunciations, and the Author did not want to invite confusion. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 802 n.3 (1998) (describing that agency analysis under Title VII is not bound by agency principles in other contexts); *see also* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 760–61 (1999) (describing differences in agency analysis). The term "indirect liability" is meant to refer to a situation in which the employer is found liable primarily through the intent of its agents.

2. *See infra* Part I.B. (discussing historical development of agency issues within Title VII).

3. *See infra* Part I.B.

4. *See infra* Part I.B.

5. *See infra* Parts I.B–C.

Borrowing the emerging concept of corporate character from criminal law and corporate law scholarship, this Article attempts to demonstrate how employment discrimination law can benefit from a fuller conception of direct liability. Undergirded by a realist view of the corporation, the concept of corporate character posits that the corporation has a life and intent of its own, separate from the individual actions of its agents.[6] This Article combines current scholarship regarding corporate intent in the corporate and criminal contexts with a fair interpretation of Title VII's text, case law, and theoretical underpinnings to demonstrate that direct corporate liability—as retheorized in this Article—can be a viable, and powerful, tool in employment discrimination cases.

In Part I, this Article provides the first, comprehensive historical account of agency developments under Title VII, which helps to explain the statute's present overreliance on indirect liability. Part II continues by reviewing the employment discrimination literature to outline the major difficulties caused by overreliance on derivative liability. Part III outlines the corporate character doctrine being developed outside the employment discrimination context. Part IV demonstrates how this concept can be imported into the Title VII context, consistent with Title VII's statutory text and case law.

I. EXAMINING TITLE VII'S STATUTORY FRAMEWORK AND HISTORICAL DEVELOPMENT

This Part explores the statutory framework and case law that is fundamental to understanding Title VII's current overreliance on holding the

6. *See, e.g.*, Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 2 (1995) ("Corporations can act and be at fault in ways that are different from the ways in which their members can act and be at fault."); *see also* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 851–52 (2000) (discussing ways in which corporate identities are separate from those of company's agents); Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 510–27, 555 (1996) ("Thus, while it is indeed accurate to describe a corporation as a legal fiction, an aggregate, and a nexus-of-contracts because each of these descriptions captures some aspect of the beast, it is also necessary to say that corporations are not *just* fictions, aggregates, or contractual nexi. They are also real entities that produce real behavior that is fully explainable by none of the other theories and that has a real impact on the quality of the lives that all of us lead. It is, of course, true that organizations would not exist without individuals, but it is also equally true that phenomena such as risky shift and groupthink would not exist without organizations.") (citations omitted); Metzger & Dalton, *supra*, at 555 ("Organizations are sociological systems that shape their members and their members' behavior.") (citations omitted); Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 767–80 (1992) (describing corporate character concept). *See generally* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (proposing a corporate ethos doctrine based on the idea of separate corporate intent); Moore, *supra*, at 762 (applying a corporate character model). Various advocates of the corporate character doctrine have articulated slightly different iterations of the doctrine. *See* Moore, *supra*, at 768 & n.124.

employer liable primarily through the intent of its agents. It also provides a historical account of how agency principles developed under Title VII.

A. The Statutory Framework

Both the discrimination and retaliation provisions of Title VII begin with the same introductory words: "It shall be an unlawful employment practice *for an employer* . . . ."[7] The term "employer" is defined, in part, as follows: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ."[8] The statutory text itself provides little direction regarding the meaning of the term "employer." An examination of the historical development of the term through case law becomes necessary and helps to explain how the courts began to view most individual disparate treatment claims through the lens of indirect liability.

B. Historical Development

In trying to articulate how corporate liability should be assessed, it is important to understand how current agency principles under Title VII developed. The earliest plaintiffs seeking relief under Title VII brought claims asserting that the employer (or union) had either a specific policy or practice that facially discriminated based on a protected class or a facially neutral policy that resulted in a disparate impact based on a protected class.[9] For example, one of the first reported federal cases in the

7. 42 U.S.C. §§ 2000e-2(a), 2000e-3(a) (2006) (emphasis added). Portions of Title VII also apply to labor organizations and employment agencies. *See* 42 U.S.C. § 2000e-2(a)(1). The liability of these two types of entities is not relevant to the instant discussion and will not be discussed further. When the Article mentions liability under Title VII, it is referring to the employer's liability.

8. The term "employer" is defined, in full, under Title VII as follows:

> [A] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (2006).

9. While it would not be fruitful to provide citation to every Title VII case decided during this period, the following citations describe the types of claims being brought in the 1960s. *See, e.g.*, Griggs v. Duke Power Co., 292 F. Supp. 243, 244–45 (M.D.N.C. 1968) (addressing whether educational requirements were discriminatory); Vogler v. McCarty, Inc., 294 F. Supp. 368, 374 (E.D. La. 1968) (alleging that employer engaged in discrimination by only hiring union members, when union itself engaged in discriminatory membership practices); Weeks v. S. Bell Tel. & Tel. Co., 277 F. Supp. 117, 117–18 (S.D. Ga. 1967) (alleging that employer had a policy of making gender a qualifica-

Westlaw database invoking Title VII for actions taken after the statute's effective date involved claims that a company maintained a race-segregated job classification structure and had a policy of providing certain jobs, training opportunities, wage increases, and transfers only to white employees.[10]

In these early cases, allegations of discrimination by individual actors remained ancillary to the larger claims against the company, if they were made at all.[11] Very few of these early cases specifically allege discrimination being taken by a specific agent of the company, and even when such allegations are present, it is not clear whether the agent is acting pursuant to company policy or on his own.[12] The few cases involving individual claims of discrimination that do not primarily rely on company policy are described as being brought against the employer, with no discussion about whether the employer's liability is derivative or direct.[13]

---

tion for a switchman position); Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 781 (E.D. La. 1967) (alleging discrimination based on company policy that required women to resign upon marriage); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 336 (S.D. Ind. 1967) (alleging that company's use of male and female layoff lists was discriminatory); Evenson v. Nw. Airlines, Inc., 268 F. Supp. 29, 30 (E.D. Va. 1967) (alleging discrimination based on company policy that required women to resign upon marriage); Int'l Chem. Workers Union v. Planters Mfg. Co., 259 F. Supp. 365, 366 & n.1 (N.D. Miss. 1966) (alleging that company did not include "Negro employees in the top operating classifications" and that it maintained discriminatory wage rates, and discriminated in overtime pay and allowance of vacation time); United States v. Bldg. & Constr. Trades Council, 271 F. Supp. 447, 450 (E.D. Mo. 1966) (alleging that unions had policy discriminating against people based on race); Glover v. St. Louis-S.F. R.R. Co., No. CA 65-477, 1966 WL 68, at *1 (N.D. Ala. July 13, 1966) (alleging employer and union maintained a discriminatory seniority roster); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M.D. Tenn. 1966) (alleging the employer maintained a segregated job structure). Although some of the early cases do not specifically mention a company policy or procedure, the nature of the claims and the posture of the case suggest that company-wide claims are likely at issue. *See, e.g.*, Dent v. St. Louis-S.F. Ry. Co., 265 F. Supp. 56, 57 (N.D. Ala. 1967) (raising individual and class-based race discrimination claim against union and employer), *rev'd*, 406 F.2d 399 (5th Cir. 1969); Freese v. John Morrell & Co., No. 7-1823-C-1, 1966 WL 89, at *1 (S.D. Iowa Nov. 16, 1966) (alleging that women were discriminated against by employer and union). Many of the early decisions do not fully describe the claims being asserted by the plaintiff. *See, e.g.*, Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267, 267 (4th Cir. 1967) (describing that plaintiff sent in an application and was denied a job, but not stating specifically whether denial was due to policy or individual practice); Mickel v. S.C. State Employment Serv., 377 F.2d 239, 240 (4th Cir. 1967) (alleging that employment agency refused to process application based on race, but not indicating whether based on policy or individual action); Quarles v. Philip Morris, Inc., 271 F. Supp. 842, 844 (E.D. Va. 1967) (indicating only that both individual and class race discrimination issues were raised).

10. *Hall*, 251 F. Supp. at 188.

11. *See, e.g.*, *Int'l Chem. Workers Union*, 259 F. Supp. at 366 & n.1 (alleging that black workers were subjected to racial insults, in addition to claims of segregated workforce and discriminatory wages).

12. *See, e.g.*, Edwards v. N. Am. Rockwell Corp., 291 F. Supp. 199, 202 (C.D. Cal. 1968) (alleging that a member of management tried to coerce plaintiff to work in unsafe conditions, but also alleging that the company required women to do work that men in the same job description were not required to perform); Choate v. Caterpillar Tractor Co., 274 F. Supp. 776, 777 & n.3 (S.D. Ill. 1967) (alleging that an agent of the employer told plaintiff that "she would not be employed for the reason that defendant would employ men to the exclusion of women as factory workers so long as male applicants for such work were available"), *rev'd*, 402 F.2d 357 (7th Cir. 1968).

13. *See* Johnson v. Seaboard Air Line R.R. Co., 405 F.2d 645, 647 (4th Cir. 1968) (former employee alleged that he was terminated for conduct that would not have resulted in termination of

Given the types of claims being asserted in these Title VII cases, it is not surprising that the earliest Title VII cases discussing the term "employer" are not concerned with the imputation of liability to the employer, but rather with other technical issues, such as whether the employer is one that employs enough employees to fall within the coverage of the statute[14] or whether the employer falls within one of the statute's exemptions.[15]

During the 1970s, the types of discrimination cases being heard by federal courts began to change. While the 1970s still witnessed numerous claims brought against employers and unions based on explicit company policies that were discriminatory,[16] claims brought by individuals alleging non-policy-based discrimination began to increase.[17] In the early cases involving claims of discrimination committed by individual employees, there is no discussion of agency issues.[18] When the courts did begin to address the term "employer" in an indirect liability context, the courts routinely found the employer liable for the acts of agents.[19] Indeed, some of the earliest cases also imposed liability on the agents themselves,[20] a holding that has since been rejected by a majority of circuit courts.[21]

---

white employees); Walker v. Keathley's, Inc., No. C-69-205, 1969 WL 137, at *1 (W.D. Tenn. Dec. 30, 1969) (alleging, among other things, that plaintiff was terminated under circumstances in which a white employee would not have been terminated); Hutchings v. U.S. Indus., Inc., 309 F. Supp. 691, 692 (E.D. Tex. 1969) (plaintiff alleging that he was not given position of shift leader and discontinued a job classification because of his race), *rev'd*, 428 F.2d 303 (5th Cir. 1970); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232, 1234–35 (N.D. Ga. 1969) (employee claiming he was not promoted based on his race), *rev'd*, 421 F.2d 888 (5th Cir. 1970); Washington v. Aerojet-Gen. Corp., 282 F. Supp. 517, 518 (C.D. Cal. 1968) (employee alleging he was given a disciplinary layoff based on his race).

14. *See, e.g.*, U.S. by Clark v. Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC, 301 F. Supp. 906, 909 (E.D. La. 1969) (mentioning that parties had stipulated to the fact that defendant met the requirements of an employer); United States v. Med. Soc. of S.C., 298 F. Supp. 145, 152 (D.S.C. 1969) (finding employer with 523 employees falls within Title VII's coverage); *Vogler*, 294 F. Supp. at 374 (finding that employers have the requisite number of employees to fall within the scope of the act); Coon v. Tingle, 277 F. Supp. 304, 306 (N.D. Ga. 1967) (finding that employers are not large enough to fall within Title VII's coverage).

15. Barrister v. Stineberg, No. 1224, 1967 WL 100, at *2 (S.D.N.Y. July 27, 1967) (indicating that a hospital is not an employer because it is a private membership organization).

16. *See, e.g.*, Healen v. E. Airlines, Inc., No. 18097, 1973 WL 358, at *1 (N.D. Ga. Sept. 10, 1973) (alleging discriminatory policy affecting pregnant flight attendants).

17. *See infra* notes 18–27.

18. *See supra* note 13.

19. Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D. N.J. 1976) ("If a supervisor is acting within the purview of his authority, the doctrine of *respondeat superior* may be employed whether he is driving a company car or victimizing a female."), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Slack v. Havens, No. 72-59-GT, 1973 WL 339, at *5 (S.D. Cal. May 15, 1973) (indicating that Title VII imputes liability for the actions of agents and that management had ratified the conduct of the supervisor); Tidwell v. Am. Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971) (holding employer liable when a supervisor fired an individual based on race).

20. Hanshaw v. Del. Tech. & Comm. Coll., 405 F. Supp. 292, 295–96 (D. Del. 1975) (indicating that individual defendants could be sued because they were acting as agents of the employer); Byron v. Univ. of Fla., 403 F. Supp. 49, 53 (N.D. Fla. 1975) (same); Doski v. M. Goldseker Co., No. B-74-1142, 1975 WL 157, at *8 (D. Md. 1975) (same); Padilla v. Stringer, 395 F. Supp. 495, 497 (D.N.M. 1974) (same); Schaefer v. Tannian, 394 F. Supp. 1128, 1132 (E.D. Mich. 1974)

In the 1970s, employers began to argue that they could not be held responsible for the discriminatory actions of supervisors or coworkers if these individuals were not acting according to company policy.[22] In traditional discrimination cases, courts usually rejected this argument with little discussion.[23] However, courts were willing to engage in a more robust discussion of agency issues in cases involving claims of harassment or in sex discrimination cases where women claimed that their acceptance or rejection of sexual advances was part of workplace decisionmaking.[24] It is largely through these types of cases that Title VII's agency jurisprudence developed.[25]

With the development of these types of claims during the 1970s the courts appear to begin to struggle with imposing indirect liability on em-

---

(same).

21. *See* Creusere v. Bd. of Educ., 88 F. App'x 813, 822 n.12 (6th Cir. 2003); Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1179 (9th Cir. 2003); Newsome v. Admin. Office, 51 F. App'x 76, 79 n.1 (3d Cir. 2002); Arnolie v. Orleans Sch. Bd., 48 F. App'x 917, 917 (5th Cir. 2002) (per curiam); Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180–82 (4th Cir. 1998); Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 493 (7th Cir. 1998); Wathen v. Gen. Elec. Co., 115 F.3d 400, 405–06 (6th Cir. 1997); Dici v. Pennsylvania, 91 F.3d 542, 551–53 (3d Cir. 1996); Haynes v. Williams, 88 F.3d 898, 900–01 (10th Cir. 1996); Williams v. Banning, 72 F.3d 552, 553–55 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1313–17 (2d Cir. 1995); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 379–81 (8th Cir. 1995); Cross v. Alabama, 49 F.3d 1490, 1503–04 (11th Cir. 1995); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587–88 (9th Cir. 1993). Although the bulk of the recent district court decisions within the First Circuit have found that no liability exists under the statute, a minority of courts have held that term "employer" should be interpreted to allow individual liability. *Compare, e.g.*, Gonzalez v. Guidant Corp., 364 F. Supp. 2d 112, 115–16 (D.P.R. 2005) (holding that Title VII does not provide for individual liability), *and* Daley v. Wellpoint Health Networks, Inc., 146 F. Supp. 2d 92, 104 (D. Mass. 2001) (same), *and* Acevedo Vargas v. Colon, 2 F. Supp. 2d 203, 206–07 (D.P.R. 1998) (same), *with* Douglas v. Coca-Cola Bottling Co., 855 F. Supp. 518, 520–21 (D.N.H. 1994) (holding that Title VII provides for individual liability), *and* Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993) (same). The Supreme Court has not addressed whether individual liability attaches under Title VII.

22. *See, e.g.*, Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972); *see also* Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.3 (3d Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654, 660 (D.D.C. 1976), *vacated*, Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

23. *See, e.g.*, Gay v. Bd. of Trs., 608 F.2d 127, 128 (5th Cir. 1979); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson*, 464 F.2d at 725; *see also* Calcote v. Texas Educ. Found., Inc., 578 F.2d 95, 98 (5th Cir. 1978) (finding foundation liable for discriminatory acts of supervisor).

24. *See, e.g.*, Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976) ("It is conceivable, under plaintiff's theory, that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *see also infra* note 27.

25. *See, e.g.*, Miller v. Bank of America, 600 F.2d 211, 212 (9th Cir. 1979) (applying respondeat superior to hold employer liable when supervisor terminated employee based on her refusal to grant sexual favors); Barnes v. Costle, 561 F.2d 983, 985–90 (D.C. Cir. 1977) (holding employer liable when supervisor engaged in harassing activity and terminated employee based on refusal of sexual advances); Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (holding employer liable for harassment). *But see* Howard v. Nat'l Cash Register Co., 388 F. Supp. 603, 605–07 (S.D. Ohio 1975) (refusing to hold company liable for racial harassment by co-workers).

ployers for the acts of employees.[26] This period also coincides with disagreements among the courts about the contours of harassment and quid pro quo claims[27] and marks a transition in Title VII away from a predominant reliance on cases challenging explicit discriminatory company policies.[28]

In cases of harassment or where a woman's employment was affected by her response to requests for sexual favors, some courts took issue with the idea that an employer would be indirectly liable for the actions of agents, who appeared to be acting from purely personal motives,[29] especially when the employer's policy prohibited such conduct and the employer was either unaware the conduct was occurring or took steps to stop the behavior.[30] The courts began developing a varied approach to agency in these contexts.

Many of the early court rulings that found such conduct actionable under Title VII also indicated the employer would be liable for such conduct.[31] In some cases, liability attached even when no tangible employment

---

26. *See, e.g.*, Friend v. Leidinger, 588 F.2d 61, 67 (4th Cir. 1978) ("[T]he defendants had taken corrective disciplinary action against white officers and employees who had harassed or discriminated against blacks. The incidents of racial discrimination against blacks were from fellow employees, had been isolated and contrary to Bureau policy, and the same had not been participated in or condoned by the Bureau or any of the defendants.").

27. *See, e.g.*, Fisher v. Flynn, 598 F.2d 663, 666 (1st Cir. 1979) (indicating that subjection to sexual advances without those advances becoming "but for" cause of a subsequent job consequence was not a cognizable claim under Title VII); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1048–49 (3d Cir. 1977) (describing disagreement among courts about whether claims are cognizable); Grayson v. Wickes Corp., 450 F. Supp. 1112, 1118 (N.D. Ill. 1978) ("[T]itle VII does not make an employer responsible for every inconsiderate remark made by office personnel."); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (indicating that discriminators' sexual advances toward a female employee appeared "to be nothing more than a personal proclivity, peculiarity or mannerism" and were not cognizable under Title VII), *vacated*, 562 F.2d 55 (9th Cir. 1977); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (recognizing sexual harassment as a viable cause of action under Title VII).

28. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997) (discussing how cases based on facially discriminatory practices and policies are rare and asserting that "blatant racial classifications gradually became the exception rather than the rule in legal challenges involving allegedly discriminatory conduct"); *id.* at 340 (discussing that during the 1970s, discrimination as an explanatory hypothesis became less viable as members of certain protected groups made significant gains in the workplace).

29. *See, e.g.*, *Corne*, 390 F. Supp. 161 (finding that employer could not be liable because no company policy allowed harassment and because harassment did not benefit the employer).

30. *See, e.g.*, Ludington v. Sambo's Rests., Inc., 474 F. Supp. 480, 483 (E.D. Wis. 1979) (holding employer not liable for sexual harassment unless it approved actions or unless actions were taken based on company policy); Croker v. Boeing Co. (Vertol Div.), 437 F. Supp. 1138, 1191 (E.D. Pa. 1977) ("[A]n employer cannot be liable for the unauthorized acts of its employees, even if those employees are front line supervisors."); *Howard*, 388 F. Supp. at 605 (refusing to hold company liable for racial harassment by coworkers when company investigated claims, instructed employees not to engage in behavior, and disciplined one employee for actions).

31. Young v. Sw. Sav. & Loan Ass'n, 509 F.2d 140, 144 n.7 (5th Cir. 1975); Lucero v. Beth Israel Hosp. & Geriatric Ctr., 479 F. Supp. 452, 454 (D. Colo. 1979) (holding employer liable for harassment when supervisors failed to monitor whether antidiscrimination policies were being carried out); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389 (D. Colo. 1978) (citing Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977)); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977); Tidwell v. Am. Oil Co., 332 F. Supp. 424 (D. Utah 1971). *But see Corne*,

action was taken against the employee.[32] However, some courts also began to hold that employers would be exempted from liability for the acts of their agents in these types of cases under certain circumstances. For example, courts would hold that employers were not liable under Title VII if the employer had a policy prohibiting the discrimination, if the employer was not apprised of the discrimination or immediately corrected harassment once it learned of it, or if the employer did not condone the actions.[33] In some cases courts applied this exemption analysis even when a tangible employment action was taken against the plaintiff.[34]

During the late 1970s and into the early 1980s, harassment claims still constituted a very small portion of the claims being raised by plaintiffs.[35] As the courts further developed harassment doctrine in the 1980s, some courts began to assume that the employer's liability for harassment was derivative and not direct, and this assumption began to be imbedded in the legal tests for considering harassment claims.[36] This is not surprising, given that plaintiffs often were challenging the actions of individuals in creating harassment.[37] In the 1980s and 1990s, the Supreme Court (perhaps inadvertently) solidified this view of harassment as indirect liability, an attitude that also began to dominate thinking about other types of individual disparate treatment claims.

---

390 F. Supp. 161.

32. *See, e.g.*, Compston v. Borden, Inc., 424 F. Supp. 157, 160 (S.D. Ohio 1976) (holding company liable for repeated verbal abuse inflicted on a subordinate by a supervisor, but finding that tangible employment actions not taken based on religion).

33. *See, e.g.*, Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1049 (3d Cir. 1977) (finding that company could be liable when supervisor conditioned good performance evaluation on acquiescence to sexual advances and when company knew about conduct but failed to correct it); *Barnes*, 561 F.2d at 993 (indicating that employer might have been able to escape liability if the discrimination was taken without the employer's knowledge or if it was rectified once discovered); *Heelan*, 451 F. Supp. at 1388–90 (finding employer could be liable for acts of its agent because it knew about employment decisions being tied to requests for sexual favors and failed to correct situation); *Munford*, 441 F. Supp. at 466 (holding that company could be liable for ratifying supervisor's termination of employee without investigating whether it was discriminatory); Bell v. St. Regis Paper Co., Container Div., 425 F. Supp. 1126, 1137 (N.D. Ohio 1976) (holding employer may be liable by "merely condoning" harassment by its employees).

34. *See, e.g.*, *Ludington*, 474 F. Supp. at 483 (holding that plaintiffs failed to state a claim by alleging they were terminated by supervisor for complaining about his sexual advances).

35. *See* Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1283 n.72 (1995) (noting that the EEOC saw a massive increase in the number of sexual harassment claims in the early 1980s, reporting only 75 such charges filed in 1980 and 3,812 in 1981).

36. *See* Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (describing the fifth element of a harassment claim as respondeat superior).

37. *See id.*

C. Supreme Court Involvement in Indirect Liability

In 1986, the Supreme Court recognized sexual harassment as a cognizable claim under Title VII.[38] In *Meritor Savings Bank v. Vinson*, the Court indicated that Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[39] However, the Court struggled with the question of whether employers should be automatically liable for sexual harassment and left this question unresolved.[40] In 1998, the Supreme Court decided whether employers would be liable for sexual harassment in two cases, *Burlington Industries, Inc. v. Ellerth*[41] and *Faragher v. City of Boca Raton*,[42] both issued by the Court on the same day, with the first opinion written by Justice Kennedy and the latter by Justice Souter.[43]

Ellerth and *Faragher* relate to indirect liability, and do not address the potential direct liability of the employer. However, as this Article argues, the indirect liability framework developed in these cases soon came to dominate thinking about employer liability, leading to a current model where direct liability plays only a minor role.

The Supreme Court's reasoning in both cases demonstrates that the Court was only concerned with indirect liability, and not direct liability. The Supreme Court indicated that it was interpreting the part of the definitional section of employer that referred to "agents."[44] The Court interpreted this definitional section as an instruction by Congress for the federal courts to "interpret Title VII based on agency principles."[45] In both cases, the Court characterized the plaintiff's claims as challenging the spe-

38. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).
39. *Id.*
40. *Id.*
41. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
42. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
43. A full discussion of these cases is unnecessary here. Rather, the point that is relevant to the instant discussion is that neither of these cases deals with direct employer liability. For other scholarly works critiquing these decisions, see, for example, Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 131–41 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4 (2003). One of the most valid criticisms of *Faragher* and *Ellerth* is that the holding of the cases does not appear to be supported by the agency principles enunciated by the Court. Michael C. Harper, *Employer Liability for Harassment Under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 SAN DIEGO L. REV. 41, 52, 55 (1999) ("They cited no common law cases in their cursory, formal, and rather abstract discussion of the Restatement exception on which they relied. In fact, there seem to be no common law cases that allow any kind of affirmative defense to employers.").
44. *Ellerth*, 524 U.S. at 754 (citing 42 U.S.C. § 2000e(b)).
45. *Ellerth*, 524 U.S. at 754. In *Faragher*, the Court even noted with approval cases in which the employer had been held liable because of its "adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy." *Faragher*, 524 U.S. at 789.

cific acts of individuals within the organization, rather than a broader claim of harassment by the organization.[46]

In developing agency principles for Title VII, the Court looked to the Restatement (Second) of Agency, Section 219(1), which provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[47] Intentional torts committed by employees are less likely to create liability for the employer because they may not fall within the scope of the employee's employment.[48] In reaching its ultimate conclusion regarding sexual harassment, the Court held that sexual harassment is generally outside the scope of employment and that section 219(1) of the Restatement does not usually provide a basis for employer indirect liability.[49]

The cases then continue by examining another portion of the Restatement that provides for employer liability for the acts of agents, even if the actions taken are outside the scope of employment.[50] The Court then listed the following four scenarios where such liability might be imputed:

> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[51]

In discussing these four possibilities, the Court indicated that an employer would be held liable under subsection (a) when the person commit-

---

46. *Ellerth*, 524 U.S. at 754 ("[The issue in this case is] whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat."); *id.* at 758 ("Subsection (a) addresses direct liability, where the employer acts with tortious intent, and indirect liability, where the agent's high rank in the company makes him or her the employer's alter ego. None of the parties contend Slowik's rank imputes liability under this principle."); *Faragher*, 524 U.S. at 780 ("[T]he complaint alleged that Terry and Silverman created a 'sexually hostile atmosphere' at the beach by repeatedly subjecting Faragher and other female lifeguards to 'uninvited and offensive touching,' by making lewd remarks, and by speaking of women in offensive terms.").

47. *Ellerth*, 524 U.S. at 755–56 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958)).

48. *Id.*

49. *Faragher*, 524 U.S. at 796–98; *see also* Fisk & Chemerinsky, *supra* note **Error! Bookmark not defined.**, at 768 ("This aspect of the opinion is puzzling because the bulk of the Court's analysis points to the opposite conclusion than the Court ultimately reached.").

50. *Ellerth*, 524 U.S. at 758.

51. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958)).

ting a discriminatory action was an alter ego of the company.[52] The Court recognized that negligent or reckless conduct on the part of the employer would lead to liability for discriminatory conduct in some instances.[53] The Court rejected the argument that any nondelegable duties created liability under subsection (c).[54]

In looking at factor (d), the Court indicated that, in most cases, an apparent authority argument would not be appropriate.[55] Relying primarily on the second portion of subsection (d), the Court in *Ellerth* indicated that a company would face automatic liability for tangible employment actions taken against the employee.[56] This liability was premised on the idea that indirect liability is appropriate when an employee is aided and abetted by the employer in engaging in discriminatory acts.[57] When a company places a supervisor in a position to take official actions against the employee, the Court found that liability should be automatically imputed to the employer.[58]

However, in instances where a direct supervisor of the plaintiff acted, but where no tangible employment action resulted, the Court indicated that employer liability would be presumed, unless the employer could establish an affirmative defense to the imputation of liability.[59] In these situations, an employer can avoid liability if it can establish: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[60] The Court rejected an interpretation of Title VII that would create employer liability every time harassing conduct took place in the workplace.[61]

Important to our discussion here, the Court based its employer liability for tangible employment actions not on the direct liability of the employer, but rather on an indirect liability theory. The Court did not discuss direct employer liability for harassment or discuss whether such claims would be viable. Nonetheless, the Court's focus on indirect liability helped to solidify a growing assumption about employment discrimination—that it was largely being perpetrated by individual actors acting with animus.

---

52. *Id.*
53. *Id.* at 759.
54. *Id.* at 758.
55. *Id.*
56. *Id.* It should be noted that in *Faragher*, the Court does not appear to rely so heavily on the aiding and abetting analysis when enunciating that an employer is liable for tangible employment actions. *Faragher*, 524 U.S. at 784.
57. *Ellerth*, 524 U.S. at 758.
58. *Id.*
59. *Id.*
60. *Id.* at 765.
61. *Id.* at 760.

One example of this assumption is found in *Hill v. Lockheed Martin Logistics Management, Inc.*[62] In *Hill*, the plaintiff alleged that an individual who oversaw her work performance called her names such as "useless old lady," "damn woman," and a "troubled old lady," and told her on more than one occasion that she "needed to go home and retire."[63] Plaintiff alleged that this individual submitted false disciplinary reports about her job performance and encouraged another individual to submit a disciplinary report regarding her job performance that the individual believed to be true, but that was actually false.[64] Both disciplinary reports were issued after the plaintiff claimed that she was being discriminated against, and no one investigated plaintiff's claim of discrimination or the veracity of the disciplinary reports.[65] Nor did anyone question whether the reports might be in retaliation for plaintiff's complaints of discrimination.[66] These disciplinary reports were then forwarded to other supervisors further up the plaintiff's chain of supervision, who made the decision to terminate the plaintiff based on a company policy that permitted an individual to be terminated after a certain number of disciplinary reports.[67] The plaintiff was the only woman on her work team, and she was replaced by a man.[68]

In granting summary judgment in favor of the employer, the Court of Appeals for the Fourth Circuit held that the employer could not be held liable for the conduct of the biased individual, even if that individual played a substantial role in the termination of the plaintiff, because he did "not make the final or formal employment decision."[69] The Court of Appeals based its reasoning on the Supreme Court's earlier agency cases.[70] While the Fourth Circuit may be wrong in its interpretation of indirect liability, its analysis is notable for another reason. Based on its interpretation of the Supreme Court precedent, the Court of Appeals viewed discrimination as only happening through the actions of the corporate agents and failed to consider whether company or business unit practices and culture might have caused the discrimination.

Over the past five decades, the courts have transitioned from a mindset showing a lack of concern about agency issues and assuming employer

62. Hill v. Lockheed Martin Logistics Mgmt., Inc. (*Hill II*), 354 F.3d 277 (4th Cir. 2004). As with many employment discrimination cases, the set of facts as set forth by the Fourth Circuit sitting en banc are at odds with those as recited by the panel. Hill v. Lockheed Martin Logistics Mgmt., Inc. (*Hill I*), 314 F.3d 657 (4th Cir. 2003), *vacated*, 354 F.3d 277 (4th Cir. 2004). Because the case was decided on a summary judgment request, the Article uses the version of the facts that favor the plaintiff, the non-movant.

63. *Hill I*, 314 F.3d at 660.

64. *Id.* at 660–61.

65. *Id.*

66. *Id.*

67. *Hill II*, 354 F.3d at 282.

68. *Hill I*, 314 F.3d at 662.

69. *Hill II*, 354 F.3d at 289–91.

70. *Id.*

involvement and liability to one where agency (at least implicitly) plays an important role in liability and where employer involvement is often not assumed. Courts appear to now recognize at least four distinct types of employer liability for individual disparate treatment claims under Title VII: indirect liability for the acts of certain supervisors, identification liability for the acts of certain high-level agents,[71] direct liability for corporate policies, and liability for fault in allowing discrimination by coworkers, third parties, and supervisors outside plaintiff's immediate reporting line. This Article posits that there is also a fifth basis for imposing such liability: direct liability based on the intent of the corporate enterprise.

II. IDENTIFYING THE PROBLEMS CAUSED BY AN UNDER-THEORIZED DEFINITION OF EMPLOYER INTENT

The central theme of this Article is that overreliance on indirect liability has unnecessarily curbed the development of Title VII's concepts of corporate intent. Although admittedly a strong claim, this Article hopes to demonstrate that each of the following five problems can either be completely resolved by or at least alleviated by a more completely theorized concept of direct liability. Those problems include conceptualizations of discrimination that rely on the rogue actor, oversimplification of workplace decisionmaking, overreliance on the stray remarks doctrine, a current inability to incorporate unconscious and structural discrimination theories into workable liability frameworks, and the false division of employment discrimination claims into fixed categories.

Before undertaking such a task, it is necessary to make one definitional caveat. This Article proceeds under the assumption that courts require a showing of some type of intent to prevail on an individual disparate treatment claim, and this Article uses such terminology. This Article does not advocate the position that disparate treatment requires proof of intent. Rather, it asserts, as a descriptive matter, that in many instances the courts appear to require intent to prove a disparate treatment claim[72] and that in

---

71. *See* Colvin, *supra* note 6, at 2 (describing identification liability).

72. *See, e.g.*, Derek W. Black, *A Framework for the Next Civil Rights Act: What Tort Concepts Reveal About Goals, Results, and Standards*, 60 RUTGERS L. REV. 259, 270–71 (2008) (discussing intent); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 920 (1993); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved With Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1145 (2007) (indicating that individual disparate claims require intent); Selmi, *supra* note 28, at 288 (defining intent in discrimination cases); Charles A. Sullivan, *Accounting for* Price Waterhouse*: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1118, 1136–37 (1991) (discussing the distinction between intent and causation and asserting that "the intent of the employer" is the "critical issue" in disparate treatment cases); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMPLE L. REV. 67, 97–103 (1994) (suggesting that intent was not a required element under Title VII until 1981). *See generally* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA.

many instances where the underlying allegation is individual disparate treatment or harassment, the type of intent that the courts require is one of animus or illicit motive.[73] The claims made herein are not dependent upon the existence of an intent element, and the central underlying premise—that the company may be an actor—is still important even if individual disparate treatment cases are only viewed as requiring that an individual be treated differently because of a protected trait.[74]

A. Rogue Actor

One of the current problems in employment discrimination law is that courts view discrimination largely as "a problem of errant or rogue individual discriminators acting contrary to organizational policy and interest."[75] To be sure, some workplace discrimination follows such a model, but such a conception fails to address the full panoply of possible discrimination.

Such a conception is attributable, at least in part, to primary reliance on indirect, rather than direct, employer liability. As discussed earlier, in both harassment cases and cases where a tangible employment action is taken, modern courts have begun relying on a model of employer liability premised on the idea of indirect liability. Characterizing these actions as ones based on derivative, rather than direct, liability has important consequences for discrimination law.

Traditional enunciations of indirect liability require a plaintiff to be able to prove that there is an identifiable employee or group of employees upon whose actions the company's liability can be premised, as the company's liability derives from its legal relationship with these individuals, not upon independent wrongdoing by the company.[76] The key question in an individual disparate treatment case thus becomes who is the blamewor-

---

L. REV. 495 (2001) (arguing that Title VII should be interpreted as relying on establishment of causation based on a protected trait, not intent).

73. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 706 (2005) ("[W]e continue to define intentional discrimination in the context of animus and consciously impermissible motives."). *But see* Selmi, *supra* note 28, at 288–89 (arguing that animus or illicit motive is not a requirement to establish discrimination, but providing affirmative action and disparate impact cases as exemplars); Sullivan, *supra* note 72, at 1139–45 (describing various types of conduct that might constitute the required animus under Title VII).

74. Selmi, *supra* note 28, at 289 ("What the Court means by intent is that an individual or group was treated differently because of race.").

75. Tristin K. Green, *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 356 (2008); *see also* West, *supra* note 72, at 97 ("[T]he Court has consistently viewed the problem of employment discrimination as simply the manifestation of unfair actions by a few prejudiced decision-makers taking biased but isolated action against individual employees.").

76. *See* Colvin, *supra* note 6, at 2–9.

thy individual (or group of individuals) who took an action upon whom the employer's liability can be premised.

In some cases, the search for the rogue actor is appropriate; however, in others, the search for the rogue actor asks the wrong question about culpability. It ignores the fact that multi-tiered or group decisionmaking processes may make it difficult or impossible to locate intent within a particular person. The rogue actor analysis disregards the ways that both formal and informal processes and policies within an organization shape the intentions and actions of its individual members, and the ways that the actions and intentions of the individual members shape the organization. In other words, while "organizations would not exist without individuals, . . . it is also equally true that phenomena such as . . . groupthink would not exist without organizations."[77]

Even when a bad actor does exist, an overreliance on indirect liability sometimes causes courts to narrowly examine the acts of only that actor. Reconsider the facts of the *Hill* case discussed earlier. The court did not hold the company liable for discrimination because the person with the obvious discriminatory intent was several levels removed from the ultimate decisionmaker. The court ignored, however, that another supervisor was told about possible discrimination and retaliation, failed to investigate those allegations, passed along disciplinary information that may have been false, and that the company's policies did not require independent review of the disciplinary reports. The actions of the supervisor and the company policies amplified the effect of the original discriminator's intent, yet the focus on the rogue actor allows the court to ignore these facts.

B. Oversimplification of Workplace Decisionmaking

Under an indirect liability model, courts at times seem to oversimplify how workplace decisions are made, often viewing the workplace as operating under a top-down, hierarchal management structure, where discrete and identifiable employment decisions are independently made by supervisors.[78] This phenomenon appears to be closely related to the rogue actor problem. Again, based on a need to identify culpable actors upon whom corporate liability can be appended and the specific actions that those actors have taken to discriminate, courts faced with an individual disparate treatment claim tend to focus fairly narrowly on "the" employment decision at issue.

In many instances, one individual is not responsible for employment decisions. Rather, multiple individuals may act either independently or as

77. Metzger & Dalton, *supra* note 6, at 555 (citations omitted).
78. West, *supra* note 72, at 97.

a group to make a final decision.[79] Such decisionmaking can occur in a multitude of different ways, but providing a few examples will more concretely demonstrate how direct liability could be beneficial in such instances.

For example, in some corporations the day-to-day supervisors of employees are not the individuals vested with the power to make ultimate employment decisions, such as whether to terminate an individual. While these situations are supposed to lead to more considered decisionmaking, in some instances, the immediate supervisor may act with discriminatory motive in recommending that an employment action be taken, and the higher-level supervisor, without such a motivation, rubberstamps the discriminatory recommendation and effectuates the job action.[80] Or perhaps one supervisor, intending to discriminate, places a negative evaluation in an employee's file. Later, another individual, without discriminatory intent and without knowing the bias of the original supervisor, uses the negative evaluation as the basis for making a decision—perhaps whether the individual will be affected by a reduction-in-force. Under an indirect liability model, a plaintiff will have difficulty identifying a particular employee upon whom liability can be premised, because the act and the intent reside in different people.

Although some courts have held that a plaintiff can prove a prima facie case in the instances described above,[81] they disagree about the circumstances necessary for such liability to attach, with some courts willing to find liability in only limited circumstances.[82] While some of the difficulty with these cases relates to whether Title VII's substantive language requires intent or whether it merely expresses causation, this problem is exacerbated by the focus on indirect liability.[83]

Another instance where indirect liability may be problematic is in cases of collective or multi-tiered decisionmaking, where it may be difficult

---

79. One example of complex decision making is presented in academic hiring. For a discussion of gender discrimination issues related to academics, see generally West, *supra* note 72, at 96 ("[F]aculty personnel decisions are made by a series of faculty committees, using highly subjective standards.").

80. *See, e.g.*, Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 385-86 (2008) (describing "cat's paw" theory of liability, referring to employer liability resulting from subordinate bias).

81. Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394 (7th Cir. 1997); Long v. Eastfield Coll., 88 F.3d 300 (5th Cir. 1996); Abrams v. Lightolier, Inc., 50 F.3d 1204 (3d Cir. 1995); Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051 (8th Cir. 1993); Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993); Simpson v. Diversitech Gen. Inc., 945 F.2d 156 (6th Cir. 1991); Jiles v. Ingram, 944 F.2d 409 (8th Cir. 1991); Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

82. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 289-91 (4th Cir. 2004) (recognizing that cat's paw liability might exist in some circumstances, but did not exist in this instance, even though the intentional actor may have substantially contributed to the plaintiff's termination); Befort & Olig, *supra* note 80, at 385-86.

83. *See* Befort & Olig, *supra* note 80, at 398-412.

to determine the singular individual or group of individuals who both engaged in the employment actions and possessed the requisite intent. Indeed, such an inquiry may be inappropriate, as it may be the group dynamic itself, with multiple and various inputs from various actors, that results in a particular decision being made, and not the intent of any one or more identifiable actors.[84]

A focus on indirect liability also makes it easier to underestimate the ways that biased decisionmaking can be cloaked in objective terms and can infect an entire process. Reconsider the *Hill* case discussed earlier. In *Hill*, one allegedly biased reviewer of plaintiff's work submitted numerous disciplinary reports, some of which were false and others of which were petty and typically would not have resulted in discipline.[85] The immediate supervisor was aware of plaintiff's allegations of discrimination and retaliation, but passed along the biased (yet facially objective) disciplinary reports to two higher-level supervisors, who made the decision to terminate plaintiff.[86] It may be true to assert that the last two supervisors in the chain did not act discriminatorily; however, it is inaccurate to also conclude that the plaintiff was not discriminated against. While a jury may not ultimately find employer intent based on these facts, the plaintiff should be able to argue that corporate intent existed.

Another problem arises when courts focus too heavily on the concept of a single employment decision. For example, courts looking at discrimination claims will often examine only evidence related to a particular employment action. However, as Linda Hamilton Krieger has explained, sometimes what appears to be a singular decision is instead a conclusion reached after months or years of interaction with an employee, based on a manager's subjective evaluation of that employee.[87] And that long, subjective decisionmaking process may be affected by both overt stereotyping and more subtle forms of discrimination.

Further, a focus on finding "the" employment decision that resulted in discrimination ignores that animus can be demonstrated by the failure to take action. Consider an employer that consistently fails to investigate claims of discrimination and fails to punish employees who engage in discrimination. These repeated failures likely send a strong and powerful message within the workplace that, in some circumstances, may be tantamount to a policy allowing such discrimination. However, indirect liability analysis makes it difficult for courts to analyze such claims if the court is searching for an individual who made a discriminatory decision.

---

84. White & Krieger, *supra* note 72, at 532.

85. Hill v. Lockheed Martin Logistics Mgmt., Inc., 314 F.3d 650, 660–62 (4th Cir. 2003), *vacated*, 354 F.3d 277 (4th Cir. 2004).

86. *Id.*

87. Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1258–76 (1998).

As demonstrated in Parts IV and V below, borrowing other theories of corporate liability will provide courts with a basis for more broadly conceptualizing workplace decisionmaking.

C. Stray Remarks Doctrine

The stray remarks doctrine also poses a problem within the employment discrimination field, and this problem is one that shares some connection with the focus on the rogue actor and a simplified view of workplace decisionmaking. Under the stray remarks doctrine, courts often consider comments to be irrelevant to the issue of whether discrimination occurred if those comments are made by nonsupervisors, are remote in time from the employment decision at hand, or demonstrate bias against another protected class.[88] A court that is focused on indirect liability may simply be trying to locate the individual who discriminated and exclude evidence that was not related to that individual's decisionmaking process.

However, even in the indirect liability context, the stray remarks doctrine may be too expansive, causing courts to limit the types of evidence that plaintiffs can marshal on behalf of their claims of individual discrimination. Commentators have argued that outright exclusion of such evidence on relevance grounds is not appropriate, as such a ruling robs the plaintiff of the ability to prove the context in which a decision is made.[89] As one commentator indicated: "If the decisionmaker acted in a work environment in which discriminatory remarks and behavior were common and went unchecked by the employer, then it is more likely that the decisionmaker acted with discriminatory bias."[90]

Remarks being made by coworkers and others within the workplace may influence the decision ultimately made, as a decisionmaker may either explicitly or implicitly take these remarks into consideration when making an employment decision. Further, especially with subjective assessments that could be made over time, a comment that was made several years away from the final decision may demonstrate that the decisionmaker had biased viewpoints that led either directly or indirectly to faulty or even false assessments of the employee's performance.

Not only can these remarks be evidence of the intent of a specific individual, in at least some instances the remarks should be considered to be evidence of corporate discriminatory intent. To rephrase the quoted language above, work environments in which discriminatory remarks and behavior are common and unchecked may show not only that a decision-

88. Green, *supra* note 75, at 365–66.
89. *Id.* at 377–78.
90. *Id.* at 368.

maker acted with discriminatory bias, but also that the employer intended such a result.

As discussed above, indirect liability causes courts to focus on a single decision, made by a single decisionmaker, during a particular period of time. The stray remarks doctrine is an evidentiary limitation that supports such a conception of the workplace. By more broadly conceptualizing who or what is responsible for creating a discriminatory environment, direct corporate liability can highlight the problems with the stray remarks doctrine.

D. Unconscious Discrimination and Structural Discrimination

The concepts of unconscious discrimination and structural discrimination are gaining theoretical traction within the employment discrimination field;[91] however, the available discrimination proof structures have not yet embraced these ideas of discrimination.[92] Unconscious discrimination posits that at least some discrimination is carried out by actors who do not possess conscious intent to discriminate, but still make judgments about individuals based on the individual's protected class.[93] Structural discrimination is premised on the idea that the way the workplace is organized, including its decisionmaking processes, may lead to discrimination.[94]

For the proponents of these conceptualizations of discrimination, developing a robust concept of direct corporate liability may be helpful in transforming the theory into a remediable legal violation. This is because convincing courts that unconscious or structural discrimination exists is only half of the issue—the other half of the problem is convincing courts to provide for employer liability for such discrimination. If courts consider the employer's liability to be derivative, it may be hard for them to focus

---

91. *See generally, e.g.*, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007) [hereinafter Green, *Structural Approach*]; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green, *Workplace Dynamics*]; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Krieger, *supra* note 87, at 1258–76; Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 421–26 (2000). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006) (arguing that a structural approach to employment discrimination law undermines it); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (suggesting that the idea of unconscious discrimination is based on flawed science).

92. Hart, *supra* note 91, at 749–50 (discussing how focus on pretext draws a distinction between conscious and unconscious discrimination).

93. *Id.* at 747.

94. *See generally* Green, *Structural Approach*, *supra* note 91; Green, *Workplace Dynamics*, *supra* note 91.

on workplace structure, rather than solely the misdeeds of individual employees.

Further, if courts are reluctant to impose indirect liability on employers for the conscious harassment of their employees, it seems even more likely that courts would be reluctant to impose such liability when the actions are based on unconscious discrimination. Indeed, some courts may be unwilling to place indirect liability on employers even for tangible employment actions based on unconscious discrimination, because of an unwillingness to require the employer to bear the burden of employees' inherent thought processes. As Professor Melissa Hart posits: "[I]t seems at least arguable that every time a minority or woman is denied a job or a promotion, or suffers some other adverse employment action, race or gender played some role in the decision."[95] If this is the reality of employment decisionmaking, placing indirect liability on an employer for such unconscious discrimination seems to place the employer in an impossible legal position, where it is difficult for the employer to prove that the decision at issue was motivated not by unconscious discrimination, but by some other permissible factor.

However, if courts become convinced that practical methods exist to eliminate or reduce the effects of unconscious discrimination in the workplace, those courts may believe it is appropriate to apply direct liability to an employer who has failed to engage in such efforts. In other words, these courts may find that an employer is liable for actionable discrimination when it knows or is substantially certain that unconscious or structural discrimination is being facilitated through its processes, but still continues to use decisionmaking tools that facilitate such discrimination, such as overreliance on subjective decisionmaking when objective indicators of performance are available, allowing supervisors to continue to make unchecked subjective decisions that appear to contradict objective indicators of employee performance, or failing to provide training about unconscious decisionmaking.[96]

E. Categorization of Discrimination

Yet another problem with discrimination jurisprudence is the courts' need to rigidly classify the type of claim being brought by a plaintiff into one of several recognized proof structures, such as individual intentional discrimination,[97] pattern or practice,[98] disparate impact,[99] or harassment.[100]

---

95. Hart, *supra* note 91, at 774–75.

96. *See also* Krieger, *supra* note 87, at 1291 (arguing that it may be helpful to instruct people about potential bias); Oppenheimer, *supra* note 72, at 969–70 (arguing that employers should be held to a negligence standard for failure to institute workplace norms that limit opportunities for discrimination).

97. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (creating a proof structure for

At times, the claim that a plaintiff is trying to bring does not fit nicely within any one proof structure, and the separation of the proof structures allows the courts to dispose of each claim separately, finding that no discrimination has occurred.

We can easily posit a hypothetical falling within the cracks of several different types of claims. A woman works in a unit with thirty employees, only five of whom are women. Although the ratio of female-to-male workers has remained fairly stable over a period of time, there is a high turnover rate of female employees, many of whom have left after expressing various different gender-related complaints, such as concerns over the existence of a maternal wall or a glass ceiling, experiences of sexual harassment, and concerns that women were not being given the same opportunities to interact with clients. None of the former female employees want to file a lawsuit against the company, as they have all moved on to successful careers elsewhere.

The plaintiff alleges that she is not invited to out-of-the-office social events, which affects her ability to develop relationships within the office and with clients. She believes that such exclusion will affect her in the future, because she will not have the client base necessary for future promotions. She also feels socially isolated within the office. During a recent review, the plaintiff was criticized for failing to fit in with the company culture, but no tangible employment action was taken. Both supervisors and nonsupervisors have made derogatory, gender-based remarks to the plaintiff over time, but such comments are not severe and/or pervasive enough to constitute actionable harassment.

The hypothetical posed demonstrates a scenario in which discrimination may be occurring; however, under the current divide-and-conquer regime of employment discrimination jurisprudence, the plaintiff is unlikely to be able to make it past summary judgment. A court is likely to find that the plaintiff cannot establish a disparate impact claim because the office size and the number of women affected is not large enough to be statistically significant.[101] Nor will the plaintiff be able to establish the specif-

---

individual disparate treatment claims based on circumstantial evidence).

98. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (recognizing pattern or practice claim).

99. 42 U.S.C. § 2000e-2(k) (2006) (codifying disparate impact under Title VII); Smith v. City of Jackson, 544 U.S. 228 (2005) (plurality opinion) (recognizing disparate impact theory under the ADEA); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (recognizing claim for disparate impact).

100. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (recognizing a claim for sexual harassment). Employment discrimination also recognizes claims for retaliation and failure to accommodate. *See, e.g.*, CBOCS W., Inc. v. Humphries, 553 U.S. 442 (2008) (retaliation); U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (failure to accommodate).

101. *See, e.g.*, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006) (describing the burden of proof in disparate impact cases); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307–08 (1977) (finding statistical evidence probative when it compares percentage of women in employer's work force with the percentage in the relevant labor market).

ic employment practice that led to a disparate impact. Plaintiff will not prevail on an individual disparate treatment claim because she will not be able to show that she has suffered actionable discrimination.[102] The plaintiff may not be able to prevail on a pattern or practice claim because of the statistical deficiencies in her case and because the types of gender discrimination experienced by other former coworkers do not fit within a consistent legal theory.[103] The plaintiff will not be able to prevail on a harassment claim because the conduct is not severe or pervasive enough to constitute actionable discrimination.[104]

Such stratified thinking about proof structures ignores that discrimination should be able to be proven in cases that do not fit nicely within the proof structure parameters of any one particular theory. However, our current system pigeonholes the plaintiff's experiences and causes of action in unrealistic ways.

Such a dynamic may be driven by cognitive ease, but it may also be driven, in part and perhaps invisibly, by agency issues. Given the predominance of indirect liability in most harassment and other individual disparate treatment cases, it may be difficult to combine such claims with theories of discrimination that rely on direct employer liability, such as disparate impact or pattern and practice claims. Further, using an indirect liability model makes it difficult to apply liability when each individual actor's conduct would not rise to the level of cognizability, but when the combined actions of many actors work to create discrimination.

III. CONSIDERING ANOTHER CONCEPTUALIZATION OF CORPORATE INTENT

This Part posits that a broader understanding of corporate intent can ameliorate many problems related to Title VII. Given that in the employment discrimination context the Supreme Court has created its own interpretation of how agency issues operate, this Part will focus on ways of assessing intent that do not rely on indirect liability theories, as they have traditionally been articulated. Importing the concept of corporate character from emerging corporate and criminal law scholarship into Title VII provides another way for courts to conceive of discrimination liability, with minimal conflict to the existing Title VII doctrine.

In the wake of recent corporate scandals, both the civil and criminal law have been increasingly pressed into service to hold corporations liable

---

102. *See, e.g.*, Johnston v. Amax Coal Co., 963 F. Supp. 758 (S.D. Ind. 1997); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (describing the burden of proof in individual disparate treatment cases), *superseded by statute*, 42 U.S.C. § 2000e-2(m) (2006).

103. *See, e.g.*, Int'd Bhd of Teamsters v. United States, 431 U.S. 324, 336 (1977) (describing the burden of proof in a pattern or practice case).

104. *See, e.g.*, *Meritor*, 477 U.S. at 69 (requiring "pervasive" harassment).

for intentional conduct.[105] Implicit in the imposition of liability is the recognition that corporations can possess intent. Historically, the concept of respondeat superior provided the primary model under which intent was imputed from the acts of individuals to their corporate employers.[106]

However, the idea of corporate character is developing traction in corporate case law within the United States,[107] both in the civil and criminal contexts.[108] The concept of corporate character, undergirded by a realist view of the corporation, posits that the corporation has a life and intent of its own, separate from the individual actions of its agents.[109] Although recognizing that companies cannot possess intent in exactly the same way humans do, the idea of corporate character posits that these entities can possess intent that can be ascribed to them and for which they can be held legally accountable.[110]

Rather than merely mimicking the individual intents of its agents, the company develops its own organizational structures and processes. The "procedures, formal rules, and informal understandings" of the organization begin to shape the attitudes and actions of its employees, who are often economically dependent on the organization.[111] Corporate character

---

105. This Article does not express any opinion about the appropriateness of corporate criminal liability. For a further discussion of this issue, see, for example, Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Friedman, *supra* note 6; V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996). For a brief history of the development of corporate criminal liability in the United States, see Friedman, *supra*, at 835–39.

106. *See, e.g.*, Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scienter*, 2006 COLUM. BUS. L. REV. 81 (2006) (discussing reliance on respondeat superior); Friedman, *supra* note 6, at 836–37 (discussing adoption of respondeat superior as a basis for corporate criminal liability); Metzger & Dalton, *supra* note 6, at 500 (same); Michael Viano & Jenny R. Arnold, *Corporate Criminal Liability*, 43 AM. CRIM. L. REV. 311, 312 (2006) (discussing respondeat superior and corporate intent).

107. For a discussion of the development of corporate criminal liability outside the United States, see, for example, Eli Lederman, *Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity*, 4 BUFF. CRIM. L. REV. 641, 644–47 (2000) (discussing developments in Israel and Europe); Martin J. Weinstein & Patricia Bennett Ball, *Criminal Law's Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge*, 29 NEW ENG. L. REV. 65, 82–90 (1994) (discussing developments in certain European countries and Japan). For a discussion of other theories of imputing scienter to corporations, see William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 665–66 (1994) (discussing proactive and reactive corporate fault, as well as his own theory of constructive corporate liability).

108. This Article has chosen to use the term corporate character and has provided a definition of this concept. The growing literature in this area uses a variety of names for this concept and sometimes uses the same name to describe multiple concepts. *See, e.g.*, Abril & Olazábal, *supra* note 106, at 115. Although this Article treats this concept as theoretically distinct from respondeat superior, at least one commentator has suggested that concepts of collective knowledge may simply be a practical way of dealing with evidentiary problems related to respondeat superior. *See* V.S. Khanna, *Is the Notion of Corporate Fault A Faulty Notion?: The Case of Corporate Mens Rea,* 79 B.U. L. REV. 355, 408–09 (1999).

109. *See supra* note 6.

110. Bucy, *supra* note 6, at 1107.

111. Colvin, *supra* note 6, at 23–24 ("Organizations comprise not only individuals but also institutionalized relationships among individuals."); Lederman, *supra* note 107, at 688; Jennifer A. Quaid,

liability is premised, in part, on the idea that a company as an entity can change these processes, rules, and informal understandings to change both how decisions are made and the goals that underlie such decisionmaking.[112]

As one commentator explained, under the corporate character model, while the underlying acts are performed by human actors, "the inquiry into the question of liability . . . begins directly at the corporation, analyzing the link between the performance of corporate systems and the propriety of its processes on the one hand, and the commission of the offense in question on the other."[113]

The idea that a company has an identity separate from its individual agents has gained momentum in recent decades as corporations have become more complex, as the law has developed a rights claiming jurisprudence for nonhuman entities, as interdisciplinary research began exploring the dynamics of corporations,[114] and as corporations have demanded status similar to legal persons in other areas.[115]

Although some companies still operate in a hierarchal structure ultimately directed by one individual or a group of individuals, many companies operate under more complex structures, whose identities continue to exist, separate from their ever-changing workforce.[116] The complexity of the structure, the anonymity of certain decisionmaking, the interaction of numerous subunits within the organization, the fact that all of the information needed to make a decision may be possessed by different individuals, the need to incorporate competing concerns and organizational preferences, and the fact that people tend to make different decisions in groups than they would individually,[117] leads to situations where the ultimate decision reached on a particular issue may not reflect the intent of any one identifiable individual or group of individuals.

The corporate character idea finds practical application in the Australian Model Criminal Code, which appears to adopt a corporate scienter ba-

---

The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis, 43 MCGILL L.J. 67, 72 (1998) (describing corporations as having a "distinct personality of a collective entity, which subsumes the individual personalities composing it").

112. Quaid, *supra* note 111, at 84.

113. Lederman, *supra* note 107, at 681 (discussing the same concept, but calling it a self-identity model of corporate behavior).

114. Bucy, *supra* note 6, at 1124–26 (discussing organizational behavior research); Lederman, *supra* note 107, at 681–86.

115. Quaid, *supra* note 111, at 84–86 (discussing recognition of organizational rights). *See generally* Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996) (discussing corporations' Constitutional rights related to criminal law and procedure).

116. Quaid, *supra* note 111, at 77 (recognizing "the enduring existence of organizational identity . . . in the light of changing membership").

117. For a discussion of some of the group dynamics, see Metzger & Dalton, *supra* note 6, at 540–41.

sis for liability. It allows for corporate intent to be shown, even if that intent is not present in any one agent, if corporate culture "directed, encouraged, tolerated or led to non-compliance."[118] The Code further defines "corporate culture" as "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or within the area of the body corporate in which the relevant activities take place."[119] The corporate character theory recognizes "that corporate intent may stand apart from the intent of individual corporate agents. Thus, the focus of the intent inquiry shifts from the individual to the corporation's internal systems, including its personality, decisionmaking structure, and policies."[120]

This model of corporate scienter accomplishes three important tasks. First, it recognizes that corporate scienter may be different than the intent of particular individuals. Second, because employers do not necessarily express intent in the same way individuals do, it provides examples of ways in which corporate scienter can be demonstrated. Third, it recognizes that corporate scienter need not exist on a company-wide basis, but rather can exist within the area of the employer in which the illegal activity takes place.

The view of the corporation envisioned by corporate character theory highlights the problems of relying on an indirect liability model as the primary model for imposing liability in the Title VII context. While some discrimination certainly follows the indirect liability model, Title VII anti-discrimination mandates cannot be fully recognized without a fuller conception of direct liability.

IV. APPLYING CORPORATE CHARACTER IN THE EMPLOYMENT DISCRIMINATION CONTEXT

This Part discusses the ways in which Title VII jurisprudence already tacitly recognizes the corporate character concept. Although the specific

---

118. *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility* § 501.2.1 [hereinafter Austl. Model Criminal Code]; *see also* Colvin, *supra* note 6, at 34–35 (discussing Australian Model Criminal Code).

119. Austl. Model Criminal Code, § 501.2.2; Colvin, *supra* note 6, at 35–36. The Australian Criminal Code goes one step further and even allows for the criminal liability for a corporation that fails to require a culture of compliance. Austl. Model Criminal Code, § 501.2.1.

120. Abril & Olazábal, *supra* note 106, at 129. Although the corporate character theory has not been systematically adopted within federal criminal law in the United States, it can be identified as a concept underlying courts' acceptance of inconsistent verdicts in cases charging individuals and (derivatively) companies for criminal conduct. In some of these cases, the jury will acquit the individual, but find that the corporation is guilty. Moore, *supra* note 6, at 762 (citing United States v. Dotterweich, 320 U.S. 277 (1943); Am. Med. Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942); United States v. Gen'l Motors Corp., 121 F.2d 376, 411 (7th Cir. 1941)). It is also possible that the jury is acting irrationally or contrary to the law when issuing such verdicts. Such verdicts may reflect an idea that corporations possess responsibility outside of that created by individual agents.

details of corporate character-based theories of liability vary,[121] this Part attempts to posit circumstances under which most corporate character theorists would place liability with the corporation, to connect those circumstances with employment discrimination jurisprudence, and to discuss how application of the corporate character concept would resolve current problems within employment discrimination itself.

A. Employment Discrimination Law's Tacit Recognition of Corporate Intent

The theoretical seeds for the corporate character theory already exist within current employment discrimination jurisprudence. The central tenet of the corporate character concept is that a corporation can possess an intent distinct from that of individual employees. The Supreme Court has implicitly recognized this central tenet within the employment discrimination field.[122] While recent Supreme Court cases appear to view discrimination as the fault of a rogue actor, this recognition alone expresses the idea that the corporation's intent and that of its agents is different.[123]

Additionally, an employer may escape liability for punitive damages, if it shows that an employee's conduct was contrary to good faith efforts of the company to comply with Title VII.[124] Inherent in this affirmative defense is the recognition that the employer's intent is not synonymous with those of individual employees.

Title VII cases in which an employer is held liable for its facially discriminatory policies also suggest that intent can reside in the entity, rather than in individuals. Although these direct evidence cases are rare in the modern context, it can be credibly argued that they convey the idea that the facially discriminatory policies represent the "intent" of the corporation.

Further, the idea of corporate character is compatible with the underlying theory of pattern or practice cases, in which plaintiffs can rely on statistical disparities within the workforce and other evidence to demonstrate that intentional discrimination is occurring.[125] Such liability may be imposed independent of the individuals within the corporation and is not derivative. However, due to the way in which pattern or practice claims have developed, the idea of corporate character imbedded within the cause

121. Moore, *supra* note 6, at 768.

122. *See, e.g.*, United States v. Dotterweich, 320 U.S. 277 (1943) (acquitting the individual employee, but finding the corporation guilty); Am. Med. Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942) (same); United States v. Gen. Motors Corp., 121 F.2d 376 (7th Cir. 1941) (same).

123. *See supra* note 123.

124. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 544 (1999).

125. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). Another way of reaching the result intended by this Article may be to encourage courts to expand the reach of pattern or practice theory in a modified form into individual disparate treatment claims.

of action has limited utility for plaintiffs. First, courts often view pattern or practice cases as being distinct from individual disparate treatment cases.[126] Second, some courts apply pattern or practice analysis only in contexts where class certification of a large group of affected employees would be appropriate.[127] Third, pattern or practice claims are viewed as requiring proof of discrimination against an entire protected class, often relying primarily on complicated statistical evidence to establish intent,[128] and occasionally requiring stronger evidence of intent than that required in an individual case.[129] Even when pattern or practice evidence is used in an individual disparate treatment case, it is not clear that it is being used to establish employer liability rather than to bolster evidence that a particular individual acted with discriminatory intent.

In some senses then, the idea of corporate character already has a theoretical toehold in employment discrimination jurisprudence. However, a broader conception of corporate character in the individual disparate treatment context is needed.

B. A Broader Conception of Corporate Intent

The adoption of a broader corporate character theory in employment discrimination law can have far-reaching implications and may resolve many of the core problems facing the field.

---

126. *See, e.g.*, E.E.O.C. v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1273 (11th Cir. 2000) ("[A]n employer may be found liable [under Title VII] under any one of three discrete theories: pattern and practice discrimination, disparate treatment discrimination, or disparate impact discrimination. Both pattern and practice and disparate treatment claims require proof of discriminatory intent; disparate impact claims do not.") (citations omitted); McClosky v. Prince George's County, Md., No. 95-2913, 1996 WL 726854, at *1 (4th Cir. Dec. 18, 1996) ("Moreover, pattern and practice evidence has little, if any, relevance in an individual disparate treatment action such as this one."); United States v. New York, 631 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) ("Pattern-or-practice claims differ significantly from individual disparate treatment claims. In a case involving individual claims of discrimination, the focus is on the reason(s) for the particular employment decisions at issue. . . . In contrast, the initial focus in a pattern-or-practice case is not on individual employment decisions but on a pattern of discriminatory decisionmaking.") (internal citations and quotation marks omitted). Courts are beginning to recognize pattern or practice claims in the harassment context. E.E.O.C. v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1071 (C.D. Ill. 1998).

127. *See* Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967 (11th Cir. 2008) ("We acknowledge that our precedent does not explicitly foreclose plaintiffs' argument; plaintiffs give no indication, however, of comprehending why private pattern or practice claims for such relief must be litigated either as class actions or not at all.").

128. *See, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (indicating that a pattern or practice violation occurs where the employer's policies result in a gross statistical disparity in the success rate of one group as compared to others); Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 158 n.3 (2d Cir. 2001) (recognizing that pattern or practice claims require proof of group-wide discrimination).

129. Mister v. Ill. Cent. Gulf R.R. Co., 832 F.2d 1427, 1434 (7th Cir. 1987) (indicating that the pattern-or-practice case starts with a stronger showing than that required for individual disparate treatment).

The most important change is a shift in the lens through which the court is asked to view culpable conduct. It might be argued that such a change is unnecessary because the current disparate treatment law already holds employers liable for the tangible employment actions taken by supervisors, and that in cases involving tangible employment actions, the end result will be the same whether conduct is viewed as being directly or indirectly attributable to the employer. However, relying on indirect liability necessarily requires the identification of a specific individual or individuals from whom the company's liability is derivative, and this need affects the way judges and litigants think about the underlying substantive claim and the evidence that is admissible to support it.

By focusing on direct liability and characterizing the corporation as an entity that can possess intent, plaintiffs are no longer reliant on a narrative of discrimination that relies on a rogue actor. Instead, a wider view of intentional discrimination can be taken. In some (perhaps many) discrimination cases, the discriminatory actor is an individual employee. This Article does not argue that such a narrative is always incorrect. Rather, it argues that overreliance on the idea of discrimination as only occurring through a rogue actor unnecessarily limits the effectiveness of Title VII. In at least some instances, the company or a subunit within the company, through both its formal and informal processes and actions, may be the culpable actor. It is also possible that the employer and individual actors both engage in intentional discrimination. The corporate character idea thus allows for a fuller exposition of potential sources of discrimination than that posited by indirect liability alone.

A broader conception of corporate intent also impacts the evidence offered to prove such claims, as a corporate entity expresses its intent in ways that are different than intent expressed by individuals. Current doctrine recognizes that companies act through official company policies. Further consideration of corporate character theory adds a recognition that employers act and express intent in ways that are not necessarily reflected in official company policy.[130] As one commentator noted:

> More often, illegal acts by corporate agents result from de facto illegal policies which are communicated indirectly, or from policies which are not as such illegal, but which a reasonable person would foresee would lead to violations on the corporation's behalf. A practice of rewarding or failing to discipline employees found guilty of past violations, for example, is likely to encourage similar violations in the future. Inadequate instruction about legal standards governing employees' day-to-day activities is likely to lead

130. Moore, *supra* note 6, at 768.

> to violation of those standards. . . . For this reason, the corporate character theory holds that for a corporation to be culpable, it is not necessary for it to have formally adopted the policy in question, nor is it necessary for the policy itself to be illegal.[131]

Corporate intent may thus be demonstrated in many ways, including rewarding or failing to discipline employees found guilty of past violations, providing inadequate education about expected nondiscriminatory conduct, repeatedly allowing discrimination to continue, ignoring indications that systemic discrimination exists, and overrelying on subjective decisionmaking.

While the actions of individual actors may still play an important role in establishing liability, the corporate character idea dispenses with the idea that a single individual or group of individuals must be identified. It also allows for the broader admission of evidence of actions taken and comments made by individuals other than the alleged wrongdoer, which should minimize the effects of the stray remarks doctrine.

Likewise, because the focus is on the liability of the employer, courts will be encouraged to look more broadly at the workplace. In cases where a tangible employment action is alleged, all of the decisionmaking that affected a particular individual or even a job unit may be appropriate evidence of intent, including the decisionmaking processes and the context in which those processes occurred. Because the focus is not limited to a particular job decision, courts should be better able to perceive the workplace as it is, with complicated decisionmaking dynamics, rather than as a series of isolated decisions made by a single individual. In the harassment context, the concept of corporate character may be used to argue for a broader view of the workplace environment.

Take for example a case with the following facts.[132] A woman is sexually harassed by a supervisor who tells her that he would rate her performance more highly if she went to a hotel with him. When she complains, the Personnel Manager tells her she is a troublemaker and that the company does not really need troublemakers. After filing a Charge of Discrimination with the EEOC, the woman is moved to a department where she no longer works with the supervisor and the Personnel Manager.

The former supervisor is later put in a position where he audits the woman's work. He falsifies reports about the woman's performance and

---

131. *Id.*

132. This fact pattern is based on the underlying facts of *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169, 1173 (11th Cir. 2005), as recounted by Professor Tristin Green in her article *Insular Individualism: Employment Discrimination Law After* Ledbetter v. Goodyear. *See* Green, *supra* note 75, at 360–62. This Article uses Professor Green's narrative because the facts as presented by the Supreme Court ignore most of the underlying background. *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

tells her it is "a lot easier to downgrade you . . . . You're just a little female and these big old guys, I mean, they're going to beat up on me and push me around and cuss me."[133] He also continues to ask the plaintiff out on dates. When she refuses, her audit reports get worse.

Later, the woman is selected for a layoff, with the company asserting that the decision is based on her performance reviews by a different supervisor who was not involved in the earlier events.[134] The woman does not receive a raise during the year she is slated for layoff. In a subsequent year, the woman is also denied a raise. The questionable audit reports may have been relied on by the decisionmaker to deny the plaintiff a raise. The Personnel Manager to whom the plaintiff complained later becomes her supervisor. Later, the Plant Manager tells the woman "that [the] plant did not need women, that [women] didn't help it," and that women "caused problems."[135]

The woman has statistical evidence showing large differences between her pay and that of men in similar positions, testimony by other women regarding their discriminatory treatment by the employer, and evidence that her work performance did not correlate with her pay.

Under this set of facts, the courts are likely to do several things when deciding whether the two decisions not to give the woman a raise are discriminatory. First, the courts are likely to view the culpable actors as the supervisor and the Personnel Manager and to separate those individuals' actions and intentions from the acts of later decisionmakers.[136] Second, the two pay decisions are likely to be viewed as independent both from each other and from the other activities happening in the workplace.[137] Likewise, the performance reviews by the later supervisors will be considered independent of and not reliant upon the views of others acting with discriminatory motives.[138] Third, at least some of the comments made will be regarded as stray remarks and as not related directly to the two pay decisions.[139] Finally, each discriminatory action will be treated as a separate claim, and the court will not consider that the type of discrimination that is happening cannot be pigeonholed into just two tangible employment actions.[140]

This way of viewing the facts is not surprising if the courts think of the company's liability as being dependent on the acts and intentions of individual employees. A corporate character theory of liability changes the

133. Green, *supra* note 75, at 361.
134. *See Ledbetter*, 421 F.3d at 1188.
135. Green, *supra* note 75, at 361 (citing *Ledbetter*, 421 F.3d at 1189 n.27).
136. *See, e.g.*, *Ledbetter*, 421 F.3d at 1186–89.
137. *See, e.g.*, *id.*
138. *See, e.g.*, *id.*
139. *See, e.g.*, *id.*
140. *See, e.g.*, *id.*

view of the culpable actor from the individuals to the company or to a particular business unit within a company. This would allow the plaintiff to argue that the company engaged in intentional discrimination when it promoted individuals who engaged in harassing and retaliatory behavior, put those individuals in charge of her performance evaluations without reviewing whether their past conduct might taint the review process, allowed discriminatory and retaliatory reviews of her performance to infect the entire compensation and layoff review process, and ignored evidence that system-wide discrimination existed. While a judge or a jury is not required to believe this narrative, it is at least one plausible explanation of what the plaintiff faced.

Recognition of a corporate character doctrine also may be a necessary innovation for the importation of unconscious discrimination or structural discrimination theories into court practice. Theories of unconscious or structural discrimination that rest on direct liability may be more appealing to courts, because such claims would depend more on the unconscious or structural discrimination that the employer has allowed to be reflected in its formal and informal policies, rather than on unconscious discrimination that may be present in the mind of individuals.

Additionally, the broader account of direct corporate liability may make courts less likely to try to pigeonhole the plaintiff's cause of action into a particular framework, excluding evidence of discrimination that does not fit neatly within that framework. In other words, when the potential discriminatory actor is the employer and not an individual, courts may be more willing to consider broader evidence that demonstrates discrimination.

To borrow from the earlier hypothetical, a court that envisions the corporation as the wrongful actor may be more willing to consider that the existence of maternal wall discrimination, complaints about a glass ceiling, experiences of sexual harassment, and complaints about a lack of client development opportunities as reflecting a corporate culture of gender discrimination. In contrast, a court that is looking for an individual on whom to base indirect liability will see different types of discrimination being perpetrated by different individual actors and will likely try to claim that some or all of these other activities are irrelevant to another female employee's claims. When viewing the employer or a particular department as the appropriate actor, it is easier to see how a general culture of discrimination would lead to an actionable claim, even though that claim does not fit nicely within any of the current proof structures.

C. Addressing Potential Problems

Any thorough discussion of a new idea will, of course, attempt to anticipate its problems. In many respects, the application of corporate liabili-

ty principles in the employment discrimination context raises fewer issues than their application in the criminal context.

For example, many scholars express concern about whether the retributive purposes of criminal law should be effectuated against corporations, whose shareholders may be the ones ultimately held financially responsible for the acts.[141] In the civil context, the concept of retribution plays a more muted role. Further, at least with respect to the federal antidiscrimination statutes, statutory caps and other limitations severely limit the possibility of catastrophic losses for shareholders.

Some have argued that corporate criminal liability is simply unnecessary, because the deterrence function of such liability is better accomplished through the administration of civil penalties.[142] Such a critique is missing in the employment discrimination context, where civil remedies serve as the primary legal deterrents. Additionally, theoretically, the criminal law may be seen as tied more directly to "human deviance"[143] and based in a more individualistic viewpoint of culpability[144] than civil liability.

Of course, those who maintain a nominalist notion of the corporation may never believe that it is appropriate to consider a theory of corporate intention that is separate from those of individuals. However, in the employment discrimination cases, the Supreme Court has signaled its belief that corporate and individual intention may be different from one another. Arguably if Title VII requires intentional conduct, then corporate policy cases implicitly recognize that the corporation can engage in discrimination separate from the intent of any particular employee or groups of employees.

Perhaps the biggest challenge to the importation of corporate character liability is the argument that such importation is a ruse, intending to do more than just transform the question of who is intending to act. Rather, its adoption may change the nature of the intent requirement itself and hold employers liable for negligence. Indeed, focus on corporate compliance programs to determine corporate character may suggest that such a theory of direct liability subjects the employer to liability for acts of negligence.

Such a change is not intended or advocated in this Article. As corporate policy cases suggest, a theory of direct liability need not be based on

---

141. Friedman, *supra* note 6, at 853–54 (discussing whether retribution against corporations is desirable and contrasting with lesser concerns about retribution in civil context).

142. *See* Khanna, *supra* note 108, at 365–66 (arguing that corporate criminal liability is often unnecessary, because the deterrence function can be accomplished through various civil mechanisms).

143. Lederman, *supra* note 107, at 647; Metzger & Dalton, *supra* note 6, at 498.

144. *See, e.g.*, Quaid, *supra* note 111, at 69; *see also* Bucy, *supra* note 6, at 1134–36 (discussing corporate education and compliance efforts); *id.* at 1138–39 (discussing corporate reactions to past violations and violators).

negligence, but rather, can still incorporate an intent standard. Admittedly, it may be difficult for courts to determine when an employer is acting intentionally and when it is acting negligently. However, in the traditional torts context, courts have been able to manage the sometimes blurry line between negligent and intentional acts. While there may be some uncertainty as courts wrestle with how to apply the concept of intent to a corporate entity, the likely presence of these practical problems does not warrant complete rejection of the idea of corporate intent.

Direct liability also may cause courts to posit whether the current conception of intent, which at times appears to focus on animus, is the only conception of intent that is appropriate to apply in the individual disparate treatment context. It may invite the courts to consider whether intent is established if the corporation knew or was substantially certain that discrimination would result from its conduct. While this Article offers a solution that would work within the current employment discrimination framework, further exploration of what "intentional" discrimination means is a likely result of adoption of corporate character theory.

Additionally, corporate character has not yet been widely adopted in the criminal and/or corporate contexts, and this reality likely means that the theory will not come fully formed into the employment context. There are likely to be growing pains as the courts sort out how to best incorporate the concept of corporate character, both as a matter of law and as a matter of evidence.[145]

CONCLUSION

For the most part, employment discrimination law's concept of corporate liability has stalled. However, corporate law is developing a rich and nuanced theoretical basis for expanding corporate liability beyond respondeat superior. Incorporating the corporate character idea into the employment discrimination context could help resolve several of the key conceptual problems within the field. This adoption should also lead to a broader conversation about the concept of intent within employment law.

145. However, such inquiries do not need to be considered in a vacuum. For example, the Federal Sentencing Guidelines take corporate character into consideration when determining sentences, including a review of participation of high-level managerial employees, prior history, and the existence of corporate compliance programs. Moore, *supra* note 6, at 786–93 (discussing Federal Sentencing Guidelines). Others guideposts are provided within the corporate character literature, which advocates that company structure, Bucy, *supra* note 6, at 1129–33, and both explicit and implicit company goals can be used to determine corporate character, *id.* at 1133–34.