rational, while racists and/or misogynists are irrational, and for the most part, these things are mutually exclusive. This characterization is logically inconsistent with the concept of unconscious bias, but this is how much of the analysis employed by the courts proceeds. The second *Thomas* factor identifies unreasonable behavior by either party, which eliminates institutional competency concerns, as the court is no longer required to evaluate the employee's work performance. This factor is another way in which we can look at the relevance of at will employment, or the idea that the employer can fire an employee for good reason, bad reason, no reason, or for purposes of this subsection, perceived unreasonableness.

The Supreme Court has explicitly identified the reasonableness of both the behavior of the employer and the employee as factors in determining whether the employer can assert an affirmative defense to liability for a supervisor's perpetuation of a hostile work environment in violation of Title VII.[175] Similarly, absent some evidence of objectively unreasonable behavior on the part of the employer, the plaintiff will not be able to prove that the employer unconsciously discriminated.[176] The court views an employer who engages in blatant racial or gender animus as a statistical aberration and clearly irrational.[177] Blatant discrimination, therefore, rebuts the judge's presumption that the defendant is a rational employer. Where there is no overt discrimination, the court will feel legally justified in finding for the plaintiff only where the employer (and

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> statistical reality, however invidious its historical roots, that blacks by and large are not as well educated in our society as whites.

Id.

[175]Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) ("[A]n employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.").

[176]*Id.* at 787.

[177]*See generally* Christopher A. Bracey, *The Cul de Sac of Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1243 (2006). One of the rationales underlying the "employers are rational, racists are not" idea stems from the focus on the individual, as opposed to systematic oppression, which allows the individual racist to be viewed as an aberration and everyone else as largely incapable of such behavior. This ties into a concept discussed by Professor Bracey, which he calls "which innocence":

> The claim of white innocence is animated by two key assumptions about the nature of racism. First, proponents of racial innocence assume that that [sic] racism is not a cultural or structural phenomenon but a product of individual racists. The rhetoric of racial innocence rests on the idea of the individual, intentional discriminator. According to this view, racism is the result of racist acts perpetrated by rogue individuals acting outside of society's rules or conventions. The focus is on the "perpetrator" as opposed to the victim of racism. The objective of antidiscrimination law, then, is to prevent the replication of racist acts by punishing the individual perpetrators of those acts.

Id.

not the employee) has exhibited behavior that is unexplainable from a market perspective. In analyzing the behavior of both parties, the court looks for the more rational actors.

Such arguments regarding employer rationality underestimate an employer's willingness to pay the associated costs of discriminating. Many judges, economists, and legal theorists assume that employers will not engage in discriminatory behavior because the market drives out discriminatory actors who are less efficient than their competitors.[178] In some cases, however, discriminatory employers can profit financially from discrimination.[179] Moreover, in some cases the structure of the firm is so complex that the market becomes an inefficient and inadequate means by which to police discrimination.[180]

As Professors Wilkins and Gulati concluded in their study on the lack of diversity in corporate law firms, employers who pay high wages are using "complex hierarchical employment structures in order to reduce the cost of acquiring information about worker performance.[181] As a result, these firms "can partially shield themselves from the kind of market pressures that neo-classical theorists assert will drive out discrimination."[182] A large pool of candidates and complex hiring structures further undermine the notion that employer rationality is contemporaneous with, and a proxy for, nondiscrimination because discrimination does not always come into conflict with the employer's economic well-being.[183] Supervisors who make hiring and firing decisions do not always consider the employer's financial well-being and

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[178]*See* David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 517-18 (1996); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 139, 76 (1992) (arguing that perfect competition eliminates discrimination); John J. Donahue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1421-22 (1986) ("The basic argument is that discriminatory firms are not maximizing profits and therefore eventually will be driven out of the market."); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987) (arguing that over time competition will erode the effects of discrimination because white employers who are not averse to associating with blacks will have lower labor costs and will gain a competitive advantage over discriminatory firms).

[179]*See* Donahue, *supra* note 178, at 1418-19 (noting that discrimination against blacks reduces the demand for black labor and depresses black wages resulting in greater profits for discriminatory firms and less profits for nondiscriminatory firms); *see also* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d. ed. 1971) (arguing that discrimination by whites against blacks is the result of an aversion that whites have to associating with blacks and this aversion makes it more costly for whites to transact with blacks than with other whites); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 673-74 (2003) (noting "that employers may continue to discriminate even when they attempt to respond to the market").

[180]Wilkins & Gulati, *supra* note 178, at 517-18.

[181]*Id.*

[182]*Id.*

[183]*Id.*

their discriminatory actions are not always detectable because of the inflated candidate pool.[184] More importantly, employers may not be consciously aware that they (or anyone else) are acting against the employer's self-interest. In fact, if discrimination is defined based on these underlying concepts of deliberate behavior, intent, or self-interest, then any arguments about rationality are futile to the extent that they are used to justify it as a legitimate response to unconscious discrimination. Yet this assumption of rationality continues to thrive.

Winning an unconscious discrimination claim is more difficult than traditional employment discrimination claims because plaintiffs have to dispel these basic assumptions about the market, which can be done by relying on the reasonableness of their own behavior, but is otherwise difficult to rebut. Consequently, cases based on both unconscious and conscious discrimination have a better chance of success than pure unconscious discrimination cases because the presence of discriminatory remarks, for example, or evidence of other questionable behavior tends to discredit the assumption that the employer is rational.[185] Otherwise, plaintiffs alleging claims based solely on unconscious discrimination must rely on the two factors derived from *Thomas* in order to prevail.[186]

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[184]Wilkins & Gulati, *supra* note 178, at 517-18.

[185]*See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146, 153-54 (2000) (relaxing *Hicks*'s "permit but does not compel" standard where there is some direct evidence of discrimination).

[186]The combination of overt and unconscious racism would work for claims predicated on some type of tangible employment decision, but it is unlikely that a hostile work environment or constructive discharge claim based on a mixture of overt and unconscious racism would be successful. Unconscious racism, by nature, is not severe and pervasive, although it could still be quite damaging to a person's career and state of mind. Unfortunately, the bar for a successful hostile work environment claim is very high. *See, e.g.*, Tucker v. Merck & Co., 131 F. App'x 852, 859 (3d Cir. 2005) ("Isolated incidents of racial harassment will not create [a hostile work environment]."). In *Tucker*, the court found that the plaintiff could not establish a hostile work environment claim based on arguments that, among other things, Merck was discriminatory in deciding his benefits. The court found that the plaintiff failed to demonstrate he was the victim of intentional discrimination, and stated:

> In his hostile work environment claim, plaintiff cannot cite a single incident involving the utterance of a racial epithet, the use of a racist symbol, or *any* direct comment concerning race. Rather, plaintiff raises eight separate incidents where Merck made determinations regarding benefits issues raised by him. These incidents were each employment decisions or actions not linked directly with conduct regarding race .... He has no direct evidence of discrimination and points to no similarly situated individual treated more favorably. Plaintiff's subjective disagreement with these decisions, and even his opinion that they were racially motivated and were offensive, is insufficient as a matter of law to establish a hostile work environ-ment [sic].

Id. Undoubtedly, there is some requirement of conscious discrimination for a hostile environment claim to succeed, as proof of the requisite discriminatory intent. While the actions that plaintiff advances as evidence of discrimination—denial of certain benefits—are prototypical acts in which unconscious discrimination can be present, these actions certainly

Because of the presumption of employer reasonableness, courts assume that in the face of illogical behavior espousing racism or discrimination, the employee should react "reasonably," as the word is defined by the judge or trier of fact. The idea that the employer must demonstrate reasonableness, however, does not account for the aversive racist or sexist employer which, as explained in Part II, is one who outwardly self-corrects but inwardly discriminates,[187] especially when there are no elements of overt discrimination present. Nor does this idea of reasonableness account for the variety of responses exhibited by plaintiffs who are exposed to discriminatory behavior. The *Hicks* plaintiff, for example, might have reacted negatively to his supervisor out of frustration for being unfairly targeted. Weighing the reasonableness of the employee's response against actions that could have either a permissible or impermissible motive hurts plaintiffs, making any decision that has a sound business justification appear reasonable. Courts often try to personalize the alleged discrimination by searching for a reason why the employer has problems with a particular employee, rather than considering that the employer may have a bias against persons of the same race or sex as the plaintiff. Unless the employer has behaved unreasonably, in which case the court will be more willing to believe that discrimination is the reason for the action, then the "rational" employer will always win because he is unrealistically viewed by the court as lacking the characteristics that define a racist or a sexist and as one who makes decisions driven solely by profit.[188]

Thus, employment at will is closely tied to the idea that the employer will make effective business decisions and not act in a manner that is contrary to its business interests.[189] In *Brown v. M & M/Mars*, for example, Edward Brown sued Mars alleging that he was fired from his position as the "B shift manager" "because of his age in violation of the [ADEA]."[190] Brown's immediate supervisor, Richard Vincent, fired Brown allegedly because of an incident (the down-time incident) that occurred during the B shift in which workers had to shut down

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do not meet the requirement of pervasiveness that is a prerequisite for establishing a hostile work environment.

[187]Lawrence, *supra* note 4, at 335.

[188]Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 468 (1997). A reasonable person "could be seen as a human being without group-related identification. Although people live in a world influenced by social construction, the reasonableness standard disavows group-based sources of identity; the reasonable person is supposed to be free of distracting memories, political commitments, and group loyalties." *Id.*

[189]*See, e.g.*, McCullough v. Real Foods, Inc., 140 F.3d 1123, 1125, 1129 (8th Cir. 1998) (holding that employer's use of subjective and informal criteria to promote a white woman with a sixth grade education over a black woman with a college education could have been influenced by racial bias and was not motivated by sound business judgment).

[190]Brown v. M & M/Mars, 883 F.2d 505, 506-07 (7th Cir. 1989).

production when a relief operator flooded the caramel cookie production line because of an incorrectly positioned water valve.[191] Mars claimed that Brown was fired for a series of performance problems, culminating in the down-time incident.[192] Brown introduced testimony at trial that he was a loyal worker and an effective manager, evidence that the jury apparently credited over Mars's version of events because the jury found in Brown's favor.[193] On appeal, the court found that the jury could have believed that Vincent's reasons for firing Brown were pretextual because there was also evidence that there were other down-time incidents similar to the one that led to Brown's firing, but Mars did not fire the other managers of those shifts, who were younger than Brown.[194]

The *Brown* court hinted at the importance of reasonableness in diminishing the employer's credibility, stating that "[e]liminating Brown's performance and the down-time incident as reasons for firing Brown leaves the 'antagonistic' relationship between Brown and Vincent as a reason for firing Brown. Firing Brown because of his inability to get along with Vincent would not violate the ADEA."[195] Here we see the operation of the personal animosity presumption. The *Brown* court later discounted the antagonistic relationship between Brown and Vincent, and found that there were sufficient doubts as to Vincent's other reasons for firing Brown since Brown outperformed younger shift managers whose performance statistics were inferior to Brown's yet he was the only one fired.[196] Thus, unreasonableness on the part of the employer can also be used to discount the personal animosity presumption that so often dooms these claims. Since it is unreasonable to fire the superior employee and keep an inferior one, Vincent's unreasonable behavior affected his credibility in other areas and allowed the court to safely discount the "antagonistic" relationship between the two. Furthermore, unlike the plaintiff in *Hicks*, there is no indication that Brown behaved unreasonably at any time, even during the notorious down-time incident. Unlike the *Hicks* plaintiff, Brown's credibility never became an issue.

If one compares *Brown* with the *Thomas* case, one can see many parallels. As mentioned previously, the court viewed Thomas's behavior as "reasonable" because she refused to sign the discriminatory appraisals and she reported her supervisor's behavior to upper management. Kodak, however, was not a rational employer because it laid off a more worthy

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[191] *Id.* at 507.

[192] *Id.*

[193] *Id.* at 508, 511.

[194] *Brown*, 883 F.2d at 510-11.

[195] *Id.* at 510.

[196] *Id.* (stating that "given that there was reason to doubt Vincent's other asserted reasons for firing Brown, the jury was entitled to look askance at the theory that Vincent fired Brown because of his 'antagonism'").

employee in the face of evidence that she was being treated unfairly by a supervisor who may not have been qualified for their position. Furthermore, there is no evidence that Kodak investigated Thomas's steep decline.

Another case that is very instructive of how a court distinguishes between employer and employee reasonableness is *Edwards v. Foucar, Ray & Simon, Inc.*[197] and Professor Terry Smith's corresponding discussion of how the case sheds light on Title VII's treatment of subtle discrimination.[198] In *Edwards*, the plaintiff, who is black, was fired for gross insubordination after a white supervisor called him "sunshine," to which the plaintiff responded, "Don't call me 'sunshine,' you motherfucker. My name is Donald Edwards."[199] This exchange ultimately resulted in a physical altercation between the plaintiff and the supervisor, who fired him.[200] Prior to this incident, the plaintiff warned the supervisor not to call him "sunshine," a word which could be interpreted as being racially charged.[201] The court noted that there is conflicting testimony that prior to the beginning of the fight the supervisor stated to Edwards, "I finally got you, you nigger bastard."[202] Furthermore, Edwards had previously complained of disparate treatment at the hands of the supervisor.[203] Despite this evidence, the court found that the termination was justified because of the physical altercation.[204] Although this case involved interpreting the terms of a collective bargaining agreement and not Title VII, Professor Smith notes that this case can be refashioned as a Title VII retaliation case, in which:

> Edwards's earlier, pre-altercation request to Johnson that he not be called "sunshine," as well as his complaints regarding Johnson's supervision of him, would qualify as opposition to unlawful employment practices under Title VII's anti-retaliation provision. Johnson's continuation of the name-calling, and his announced firing of Edwards contrary to the

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[197] 23 Fair Empl. Prac. Cas. (BNA) 1644 (N.D. Cal. 1980).

[198] Smith, *supra* note 78, at 531.

[199] *Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1645.

[200] *Id.*

[201] *Id.*

[202] *Id.* at 1645 n.1.

[203] *Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1648 ("There was also evidence that Johnson had been accused of harassing Edwards in the manner in which he worked, the allotment of overtime, the routes which he was assigned and available overtime.").

[204] *Id.* at 1649. In adopting the magistrate's report, the court stated, "Our review of all of the testimony, particularly Edwards' admission that he engaged in a violent fight with Johnson following the vocal coffee room confrontation, establishes Edwards was terminated because he was insubordinate and violated the terms of the collective bargaining agreement his union had with Foucar." *Id.*

> collective bargaining agreement, would constitute penultimate retaliation for Edwards's past protests as well as a necessary foreground to his retaliatory coup de grace, the discharge for the physical altercation. Although this altercation might provide a legitimate justification for Edwards's dismissal, since the fight was so intertwined with the provocation which set it in motion, the employer, under a mixed-motive regime, would have to show that it would have reached the same decision to fire Edwards whether or not he engaged in the protected activity.[205]

Notwithstanding Professor Smith's analysis of the case, let us assume, for purposes of argument, that there was no collective bargaining agreement. It is likely that, even under a mixed motive regime or if applying Title VII's antiretaliation provision, the employer still would have prevailed, as the physical altercation places this case in the same realm of unreasonableness exhibited by the plaintiff in *Hicks*.[206] Thus, expanding Title VII's antiretaliation provisions or applying a mixed motive analysis would not have changed the outcome, especially where the court discounts the unreasonable behavior of the employer where the employee has responded in a manner that the court deems inappropriate.

With the exception of the supervisor's racial epithet ("nigger bastard"), a statement the court did not seem to credit, there is no indication that the court appreciated the racial undertones of the word "Sunshine."[207] What animates the court's decision is that the employer does not have to retain an unreasonable employee, a fact that has less to do with the limitations of Title VII than it does with deference to employment at will or in this case, the collective bargaining agreement

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[205]Smith, *supra* note 78, at 532 (citations omitted).

[206]*See* Selmi, *supra* note 5, at 658. Selmi criticizes Professor Smith for arguing that this behavior should be actionable under Title VII because

> [i]t certainly cannot be the case that any response to the use of a derogatory name should constitute protected activity under Title VII, and at one point Professor Smith concedes as much by noting that the response must be reasonable under the circumstances. This observation is not meant to condone the use of the term, or to suggest that Edwards should have shrugged it off, but it appears that other avenues of complaint were available and it is difficult to conclude that Edwards's response in this instance should be excused, particularly since it represents the kind of behavior that would typically result in dismissal from a workplace.

Id. (citations omitted). *Edwards* demonstrates the reasonableness of the employee's response is the ultimate consideration, a consideration that trumps the more subtle insults, as well as the most egregious racial epithets.

[207]*Edwards*, 23 Fair Empl. Prac. Cas. (BNA) at 1645.

which allowed discharges if an employee is insubordinate. *Thomas*, *Hicks*, and *Edwards* all indicate that the employee must always be reasonable in order to prevail. Despite the supervisor's unreasonable use of the word "Sunshine," the plaintiff's earlier admonition to refrain from using the term, and the supervisor's later use of a racial epithet, the *Edwards* court overlooked these factors because of the plaintiff's confrontation with his supervisor. Arguably, employment at will gives the employer significantly more room to be unreasonable, but the doctrine limits the employee's ability to do the same.

IV. USING THE FIRM TO SOLVE THE CONUNDRUM OF UNCONSCIOUS DISCRIMINATION

From the foregoing discussion, it is clear that unconscious discrimination claims may be better addressed by placing the burden on the firm to reduce the incidence of unconscious bias ex ante, as opposed to putting the burden on the employee of proving it in court ex post. In other words, this section advocates for the creation of a firm-based diversity norm, where firms implement programs, training, and inter-group cooperation that increase diversity in the workplace and address conscious and unconscious discrimination. The goal is for these initiatives to become an industry standard that furthers antidiscrimination and workplace equality principles.

There are, however, some difficulties in implementing this proposal. As the previous section acknowledges, unconscious discrimination claims rarely rise to the level of actionable discrimination. Why then should firms modify their behavior to address this problem? One possibility is the fear of litigation and its corresponding reputational harms but, as the next section discusses, the harm is, at best, speculative. Pressure from the Delaware courts is another alternative, but this suggestion is hampered by the lack of incentive that these courts have to become involved in this dispute. Another possibility is that firms may be more responsive to economic pressure from a company that has already been subjected to extensive Title VII litigation rather than from lawsuits that have little chance of success, but the idea here is for less, rather than more, Title VII litigation. It is apparent that all of these options have their weaknesses, but this proposal imagines a role for each of these alternatives in creating a coherent solution to the problem of unconscious discrimination. The idea is that big firms (previously subjected to Title VII litigation) will put market pressure on their suppliers and, to some extent, their smaller competitors to implement workplace diversity programs. The courts then would further the creation of this new norm

by immortalizing it in the case law. The remaining sections deconstruct this premise and provide a roadmap for firm involvement in this area.

A. *What Incentives Does the Firm Have to Act?: Reputation and Speculative Harms*

The goal of this article is to induce firms to adopt diversity initiatives unilaterally without the impetus of a Title VII lawsuit. Ironically, more (rather than less) litigation and the public relations blitz that follows to repair the firms' damaged reputation is the first step towards the creation of the new norm, which ultimately will result in less Title VII litigation overall. Although companies rarely face extensive Title VII litigation, the lawsuits that do occur, especially those involving huge, multinational corporations, lay an important foundation that can serve as an impetus for industry change. Moreover, it is unlikely that firms will implement any new diversity initiatives ex ante without the bad press that comes from litigation already underway. This change comes about because of the impact of the litigation on the firm's reputetion.

Reputation, defined as officer or director prestige among the corporation's shareholders and the public at large, has concrete value which, when diminished, can affect the firm's profitability. One would think that if a company's reputation is truly "damaged," then shareholders would sell their stock, or there would be some other appreciable short-term effect on stock price that reflects the reputational harm. For example, when the Enron scandal broke, its stock plummeted from about $84 per share to pennies on the dollar, and this damage occurred without an actual prosecution for any wrongdoing.[208] While corporate officers and directors may experience shame and harm to their reputations as a result of corporate criminal prosecutions, the deterrent and punitive effect is not the same in the context of civil litigation because of the lack of criminal sanctions. In reality, reputational damage does not necessarily affect the overall value of the firm where the potential liability is civil, as opposed to criminal, unless the events surrounding the claims are especially salacious.[209] For example, Texaco's stock dropped 2.6%[210]

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[208]James K. Glassman, *Diversify, Diversify, Diversify*, WALL ST. J., Jan. 18, 2002, at A10 (stating that Enron stock price plummeted from $84 per share to practically zero); Michael Lietdke, *Proud "Papa" Recognizes Some Faults in 401(k)s*, HOUSTON CHRON., Sept. 23, 2002, at B3 (stating that Enron employees lost $1.3 billion in retirement accounts).

[209]Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 945-46 (2005) (stating "the negative publicity from reaction to public reports of potential criminal acts or liability can weaken an entity's competitive position and increase the cost of doing business to the point of bankruptcy or even liquidation").

on the New York Stock Exchange after the *New York Times* published a story, later determined to be erroneous, of a secretly recorded meeting in which management officials allegedly used racial epithets.[211] Such events, however, are not the norm.

In fact, one can actually test whether the negative publicity garnered by discrimination lawsuits actually affects shareholder confidence as reflected by changes in the stock price. If there is minimal or no movement in the price of a company's stock in relation to various milestones in the litigation, then one can safely assume that short-term shareholder confidence in the corporation was not shaken by the pending litigation as it would be in the case of a criminal prosecution. Of course, this method is faulty, for there are various factors that can affect share price, but it gives us some indication of whether the litigation had any impact on the firm's stock price.

We can test this theory on Wal-Mart. This company best illustrates the harm that Title VII litigation can cause to the reputation of a huge, multinational corporation, and this factor (harm to a market giant) is a necessary step in the creation of the proposed diversity norm. In 2004, a sex discrimination lawsuit filed against Wal-Mart resulted in the certification of the largest class ever, with an estimated 1.5 to 1.6 million women claiming that Wal-Mart discriminated against them in pay and promotion.[212] The district court found that Wal-Mart created a corporate culture in which women were routinely passed over for promotion, and when combined with the subjective evaluation process and the statistical evidence indicating the disparities between men and women employees, the court found that this evidence was sufficient to create an inference of sex discrimination under Title VII.[213] In 2007, the Ninth Circuit affirmed the district court's decision.[214]

The idea that Wal-Mart's corporate culture contributed to the discrimination at issue in *Dukes* is tantalizing, for it raises the question of whether corporate officers and directors have a duty to their shareholders to create a culture amenable to diversity to avoid liability under Title VII. Commentators had concluded that the retail giant's enormous growth has been overshadowed by the sex discrimination litigation against it.[215] If one looks at the overall drop in Wal-Mart's share price from right before

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[210]Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and Its Effects*, 81 TEX. L. REV. 1249, 1270 (2003).

[211]Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A-1.

[212]Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 142, 162 (N.D. Cal. 2004).

[213]*Id.* at 166.

[214]Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1244 (9th Cir. 2007).

[215]Ann Zimmerman, *CEO Scott Rebuts Critics of Pay Scales, Outlines Workplace-Diversity Moves*, WALL ST. J., Oct. 6, 2004, at B1.

the litigation was filed in 2001 (selling for roughly $60 per share) to its selling price in 2007 (selling at about $44 per share) to its current selling price of about $56 per share, it is undisputed that something affected Wal-Mart's stock price short-term, but it was not necessarily the Title VII litigation.[216] First, if one looks at Wal-Mart's daily stock price and compares it to the corresponding dates of notable events over the course of the litigation, such as the day the lawsuit was filed,[217] or the day the class was certified,[218] Wal-Mart's share price was largely unaffected.[219]

Second, the drop in Wal-Mart's stock price could be attributed to allegations that Wal-Mart is underpaying its employees and refusing to allow its workers to unionize, allegations that have received a large amount of media coverage that may have taken precedence over the sex discrimination litigation.[220] There have also been other notable incidents that have had a negative effect on the economy overall, including Y2K, the September 11th tragedy, the more recent housing market crisis, and the overall fall in the stock market. These events likely have impacted Wal-Mart's stock price. Thus, harm to a company's reputation as a result of pending civil litigation may not have an impact on stock price, a finding that is consistent with Professor Selmi's empirical analysis of class action lawsuits in employment discrimination cases and their corresponding effect on a corporation's stock price.[221] From the Wal-Mart example, we can conclude that there was some factor, other then purely financial concerns regarding the bottom line, which prompted the firm to implement diversity initiatives.[222]

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[216]A review of Wal-Mart's share price over the past ten years shows drop from upper $50s per share in 2001 to mid $40s per share through 2007, recovering only in 2008. Wal-Mart Stores, Inc. Historical Prices, http://finance.yahoo.com/q/hp?s=WMTGA=07GC=1998Gd=066e=14GF=2008Pg=MG2=668Y=66 (last visited July 13, 2008) (providing Wal-Mart's monthly stock price from 1998-2008).

[217]Equal Rights Advocates, *Dukes v. Wal-Mart Stores*, *available at* http://www.equalrights.org/professional/walmart.asp (stating that the suit was filed on June 19, 2001).

[218]*Judge Certifies Wal-Mart Class Action Lawsuit*, MSNBC.COM, June 22, 2004, http://www.msnbc.msn.com/id/5269131/ (describing certification of the class on June 22, 2004).

[219]Wal-Mart Stores, Inc. Historical Prices, http://finance.yahoo.com/q/hp?s=WMTGA=07GC=1998Gd=066e=14GF=2008Pg=MG2=668Y=66. *Cf.* Selmi, *supra* note 210, at 1270 (discussing the Home Depot litigation and the slight loss in share price upon the filing of the discrimination lawsuit, but noting that the loss was recovered the next day).

[220]Chuck Bartels, *Wal-Mart Touts Expansion at Annual Meeting*, WASHINGTONPOST.COM, June 2, 2006, *available at* http://www.washingtonpost.com/wpdyn/content/article/2006/06/02/AR2006060200840.html; Greg Edwards, *Vigil Targets Wal-Mart Work Conditions*, RICHMOND TIMES-DISPATCH, Dec. 15, 2006, at B.11.

[221]Selmi, *supra* note 210, at 1265.

[222]This is not to suggest that these lawsuits raise no financial concerns among management and shareholders, regardless of their low prospect of success or minimal impact on share price. If the firm decides to settle, these cases can cost millions. Texaco, for example, paid $176 million to settle its discrimination lawsuit and Coca-Cola paid $192 million; and more recently, Smith Barney paid $33 million. *See Class Action Alleges Race*

In other words, firm value concerns more than simply share price. There are indications that the sex discrimination litigation has affected shareholder perceptions of Wal-Mart, and that shareholders believe that Wal-Mart's practices negatively impact profits, despite the weak direct link between the litigation and the fall in Wal-Mart's share price. These concerns may be sufficient to prompt shareholders to bring suit against Wal-Mart's board for breaching their fiduciary duties, a concern that has likely prompted Wal-Mart's board to act despite the fact that there has been no official finding of any wrongdoing in the sex discrimination litigation.[223] Shareholders have directly urged Wal-Mart to "clean up its act" in the face of all of the employee scandals.[224] Some of its largest United States and United Kingdom investors wrote a letter, asking Wal-Mart to form an independent review board to analyze its employment practices because such practices are hurting stock prices.[225] In response to this criticism, at the 2004 shareholder meeting, Lee Scott, Wal-Mart's CEO, announced that Wal-Mart would be instituting company-wide computer postings of management openings, hiring a director of diversity and, most notably, cutting executive managers' bonuses if they fail to hit certain diversity targets. All of these initiatives were implemented at little or no cost to the company itself.[226] In fact, Scott stands to personally forfeit $600,000 if he fails to meet certain diversity initiatives.[227]

While there was no clear impact on stock price specifically because of the sex discrimination litigation, the perception of wrong-

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Discrimination at Coca-Cola Inc., LEGAL INTELLIGENCER, Apr. 26, 1999, at A1; Bob Egelko, *Smith Barney to Pay $33 Million in Bias Case*, SAN FRANCISCO CHRONICLE, Aug. 14, 2008, at B2; Jack E. White, *Texaco's High-Octane Racism Problems: Piles of Cash and Substantial Reforms Fail to Reverse the Call for a Boycott*, TIME, Nov. 25, 1996, at 34; Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, Nov. 17, 2000, at A1. Publix Supermarkets paid $81.5 million and Home Depot paid at least $104 million to settle sexual harassment or sex discrimination claims. *See generally* Steven M. H. Wallman, *Equality is More Than "Ordinary Business,"* N.Y. TIMES, Mar. 30, 1997, at 12; Robert S. Whitman, *Employment Liability: From the Courtroom to the Proxy Ballot*, 19 CORP. BOARD 11 (1998). This article suggests only that the impact of Title VII litigation on firm value encompasses more than just gauging the litigation's measurable impact on the bottom line, but also includes other intangibles that prompt firm management to act.

[223] *See* Reiner Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733, 1738 (1994) (noting the different ways in which shareholder derivative suits can add "value" to the firm by not only "confer[ing] monetary benefits on shareholders . . . [but the] suit—or, more precisely, the prospect of suit—can add to corporate value by deterring wrongdoing").

[224] *"Wal-Mart Urged to "Clean up Act,"* BBC NEWS, June 3, 2005, http://news.bbc.co.uk/2/hi/business/4605733.stm.

[225] *Id.*

[226] *Big Plans Announced at Wal-Mart Shareholders Meeting*, 4029TV.COM, June 4, 2004, http://www.4029tv.com/news/3383806/detail.html

[227] Zimmerman, *supra* note 215.

doing attributed to the company from shareholders and the public at large was sufficient to force the Wal-Mart board to act.[228] It is clear that reputation, to some extent, involves intangibles that cannot be measured entirely by the litigation's impact on share price. Wal-Mart took steps while the litigation was still pending to mend what it, and others, viewed as a damaged reputation.[229] In fact, Scott acknowledged that the new initiatives came as a result of bad publicity stemming from the discrimination lawsuit.[230] Another such initiative came in 2005, when Wal-Mart took the unprecedented step of holding a press conference to revitalize its damaged reputation, a move that indicates it is not immune to reputational concerns despite its size and continued profitability.[231] One sees a similar result in the Texaco case, after the firm faced extensive Title VII litigation and

> committed itself to increasing its minority employees by the year 2000 to 29% of the firm's total (from its 1996 level of 23%), and to increase its employment of African Americans from 9% to 13%. The firm also pledged to increase the promotion of women and minorities throughout the firm, and to increase its spending with minority- and women-owned businesses to $200 million a year from its previous annual level of $135 million. To ensure the goals were met, the company agreed to tie a portion of its managers' bonuses to meeting diversity goals, and also agreed to enroll all of its employees in diversity training. Texaco also established scholarship programs for minorities and women interested in engineering, increased its recruiting of women and minorities, and became the principal sponsor of UniverSoul Big Top Circus, the nation's only circus owned by African Americans.[232]

Because the case settled, these actions were taken in the absence of any official finding of wrongdoing. Wal-Mart and Texaco have taken a number of the steps that indirectly combat unconscious discrimination, steps that are desirable of large, multinational firms, but the question is whether they have done so without the impetus of a lawsuit? Probably not. The perception of impropriety that was brought out by this lawsuit,

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[228] *Id.*

[229] Parija Bhatnagar, *Wal-Mart Invites the Media Home*, CNNMONEY.COM, Feb. 23, 2005, http://money.cnn.com/2005/02/22/news/fortune500/walmart_press/.

[230] *Big Plans Announced at Wal-Mart Shareholders Meeting*, *supra* note 226.

[231] Bhatnagar, *supra* note 229.

[232] Selmi, *supra* note 210, at 1274-75 (internal citations omitted).

and, on some level, the fear of being replaced by a new slate of officers and directors, is likely what induced the top executives of these companies to tie a significant portion of their bonus checks to meeting certain diversity initiatives. For example, among the allegations being made by the women suing Wal-Mart for sex discrimination is that the top executives at the firm, including CEO Lee Scott, "knew that female employees were paid less and promoted less."[233] This allegation is alarming because after all, no one wants to be called a racist or a sexist. It is likely that perceived reputational harms, both to a firm and its officers and directors, incentivizes a firm to adopt diversity initiatives, but only in response to litigation. Even then, adoption of these initiatives still depends on the circumstances of each case. The publicity has to be extensive enough that the corporation believes such steps are warranted to repair its image.[234] In any event, since the entire purpose is to avoid litigation, the question then becomes how can we use current and past litigation as a foundation for the new norm. One option, as discussed in the next section, is whether the legal system should step in and "encourage" firms to preemptively adopt these types of initiatives to avoid future litigation.

B. *Avoiding the Scandal: Should the Delaware Judiciary Induce Firms to Act?*

Even if litigation brought pursuant to Title VII has little or no effect on company share price, it is clear that these types of lawsuits have some ancillary benefits because they force firms to adopt new antidiscrimination measures to avoid bad publicity. The programs adopted by Wal-Mart as a response to its sex discrimination lawsuit are exactly the types of initiatives that can combat the effects of unconscious discrimination,[235] and companies can likely avoid costly litigation by adopting such initiatives. There are, however, a few problems. It is likely that no lawsuit will ever be on the same level as the Wal-Mart

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[233]Stephanie Armour, *Women Say Wal-Mart Execs Knew of Sex Bias*, USA TODAY, June 24, 2004, at B.01.

[234]*See* Selmi, *supra* note 210, at 1288-89. Professor Selmi contrasted the effect of adverse publicity in the Home Depot and Texaco cases, noting that:

> Home Depot has provided extremely limited information on its progress, and maintains that it never had any need for improvement. Unlike Texaco, the company has not sought any recognition as a "best place for women to work," though *Fortune* magazine continues to list the company as one of the most admired retailers in the country. This is in part due to the limited attention the lawsuit brought, which meant that Home Depot had less of a need to repair its public image than Texaco did.

Id. (footnote omitted).

[235]*See infra* Part IV.D.

litigation, and as discussed in Part III, single plaintiff litigation, which constitutes the bulk of unconscious discrimination cases, would not prompt the same industry-wide changes because most of these cases fail. Moreover, Wal-Mart is a megacorporation and there may be minimal fallout from this type of litigation in the long term. Its stock prices have already rebounded to close to its pre-9/11 selling price. Nevertheless, a corporation that is significantly smaller and could suffer serious, long-term financial damage from these suits might not rebound as quickly as Wal-Mart or other large corporations. Since smaller firms may not be able to absorb these losses, it makes sense for courts to induce firms to implement these programs because it may reduce the incidence of future litigation at a relatively low cost while providing a mechanism to address the problem of unconscious bias. Delaware courts are in a unique position to make this happen.

Delaware stands as a king among peasants in the corporate law arena. It has established itself as a haven for corporations, and its judges have become some of the foremost experts on corporate law matters. Delaware's judiciary has the ability to affect corporate norms in a way that cannot be replicated anywhere else. As one scholar noted, "[T]here are few substantive differences between Delaware law and that of other states,"[236] yet Delaware is far and away the leader when it comes to attracting corporate charters.[237] The evidence suggests that Delaware has advantages that other states will never have. If the responsiveness of the legislature to corporate concerns corresponds to franchise revenue share, as argued by Professor Roberta Romano, then corporations will be hard pressed to find a state that is as responsive as Delaware.[238] The Delaware court system is specialized when it comes to this area of the law—three-fourths of the cases pending before the Delaware Court of Chancery, which is a trial level court, are corporate in nature.[239] Unlike other states, Delaware has committed a substantial portion of its judicial and legislative resources to cultivating a regime designed to benefit

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[236]Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1062 (2000).

[237]Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 888-89 (1990) (noting that "the General Corporation Law of Delaware controls the internal affairs of thousands of corporations, including more than half of the 500 largest industrial firms in the United States"); *see also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240 (1985) ("We can comfortably conclude that if Delaware has not always been the leader in corporate law innovation, it is, with extraordinary consistency, the most sensitive to new ideas.").

[238]Romano, *supra* note 237, at 239-40.

[239]Fisch, *supra* note 236, at 1077-78 (citing Alva, *supra* note 237, at 903). Also of note is the fact that the decisions of one chancery court do not bind another and are readily overturned by the Delaware Supreme Court, given the decisions little stare decisis effect which, as Professor Fisch notes, makes the court "willing to revise previously announced legal doctrines on the theory that a different approach reflects sounder policy." *Id.* at 1077.

corporations.[240] These advantages may make it more favorable for directors to comply with adverse decisions rather than incorporate elsewhere.

Many commentators have characterized Delaware's successful attraction of corporate charters as a "race to the bottom," in which rules are promulgated that benefit management at the expense of shareholders.[241] This theory explains, in part, why decisions in which management lose to shareholders cause an outcry. Despite the alleged pro-management bias, there have been times where the court has failed to act according to the expectations of management. In *Smith v. Van Gorkom*,[242] for example, the Delaware Supreme Court found that the board of directors for Trans Union Corporation were not shielded by the business judgment rule and were liable for damages from a merger in which the board failed to completely inform itself about the transaction and failed to disclose all material facts to stockholders prior to securing their approval of the merger.[243]

Many corporate officers, directors, and scholars considered this finding of liability by the court unprecedented.[244] Therefore, it is possible that, despite the "race to the bottom" theory, a shareholder derivative lawsuit can make it far enough in the litigation process to win key motions and garner damaging publicity, inducing behavioral changes among officers and directors.[245] Specifically, if shareholders succeed at

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[240]Romano, *supra* note 237, at 226-27. Professor Romano also stated that:

> additional institutional features . . . precommit a state to a responsive legal regime and enable it to build a reputation for responsiveness and obtain first-mover advantages. These characteristics of the corporate charter market make it costly for a newcomer to break into the business and go some way in explaining one state's—Delaware's—preeminence.

Id. at 226.

[241]William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 703 (1974). In contrast, "race to the top" theorists posit that states compete against each other for corporate charters and the result is rules that maximize shareholder wealth. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (Ann Petty ed., 1993); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

[242]488 A.2d 858 (Del. 1985).

[243]*Id.* at 864. The business judgment rule is a presumption that the board of directors make business decisions "on an informed basis, in good faith, and in honest belief that the action taken was in the best interests of the company." *Id.* at 872.

[244]Fred R. Bleakley, *Business Judgment Case Finds Directors Liable*, N.Y. TIMES, Jan. 31, 1985, at D1 (noting that *Van Gorkom* is "one of the few times in modern corporate law history . . . that directors have been found liable for not living up to the standards of the business judgment rule."); Leo Herzel et al., *Next-to-Last Word on Endangered Directors*, HARV. BUS. REV., Jan.-Feb. 1987, at 38-39 ("The court's decision [in *Van Gorkom*] is more than a little strange .... Indeed, a good director avoids getting bogged down in technical details. Admittedly, Trans Union's board may have been a bit slapdash in its approach to business formalities . . . but being casual doesn't have to mean being careless.").

[245]*See* Charles M. Elson & Robert B. Thompson, Van Gorkom*'s Legacy: The Limits of*

making it past the motion to dismiss stage, then it is likely that the court's decision will have a lasting impact on board behavior.[246] For example, in 2005, the Delaware Court of Chancery determined that Disney's board of directors did not breach their fiduciary duties in connection with the $140 million severance package it awarded Disney's former president after roughly fourteen months of work.[247] Nonetheless, many corporate boards were alarmed when the court initially refused to dismiss the Disney shareholders' complaint after the defendants filed a motion to dismiss because, in the absence of accusations of self-dealing by the board, these cases usually do not make it past the motion to dismiss

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Judicially Enforced Constraints and the Promise of Proprietary Incentives, 96 NW. U. L. REV. 579, 584 (2002). The decision produced two notable changes in board behavior:

> 1) the widespread use of third-party advisers to give expert opinions to the board for various corporate transactions, and 2) the rise of elaborate decision-making procedures involving lengthy meetings, voluminous documentation and the like that today accompany board decisions, as compared to a simpler process in the pre-*Van Gorkom* era.

Id.

[246]Contrary to "race to the bottom" theory, Delaware has an incentive to consider the interests of shareholders in conjunction with, rather than subordinate to, that of management. *Cf.* Romano, *supra* note 237, at 231 ("A state with a small fiscal base, to whom franchise taxes may be a highly significant proportion of revenue . . . has little financial incentive to take account of shareholder interest.") (quoting Melvin Aron Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. MIAMI. L. REV. 187, 188-89 (1983)) *with* Winter, *supra* note 241, at 261 (rejecting the race to the bottom theory in part because while Delaware's law may be non-interventionist, this does not necessarily disadvantage shareholders; instead, the court weighs the cost of more regulation which "may reduce the yield to shareholders generally . . . against the benefits to be gained by the reduction of self-dealing or mismanagement."). Thus, in balancing the equities, the court may let a shareholder derivative suit proceed where the shareholders have presented a colorable claim that the management has breached their fiduciary duties. Yet, because Delaware courts are generally very receptive to the interests of management, any decisions that criticize management behavior are taken seriously regardless if the case is ultimately dismissed. After *Van Gorkom* and, later, *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005), there were serious changes in management behavior that continue to persist to this day. *See* Patricia A. Teren, *"It's Not Polite to Ask Questions" in the Boardroom:* Van Gorkom*'s Due Care Standard Minimized in* Paramount v. QVC, 44 BUFF. L. REV. 887 (1996). *See, e.g.*, Kris Maher, *Directors Are Poised to Focus on Growth Issues, Survey Says*, WALL ST. J., Oct. 12, 2004, at B.8 (discussing a survey of 1,279 corporate directors at large publicly traded companies who stated that directors "meet more frequently, spend more time in full board and committee meetings, and perceive more risk associated with their role"). These changes persist despite the fact the court rarely imposes liability for breaches of fiduciary duties:

> When faced with the same situation [as *Van Gorkom*] nine years later, in *Paramount*, the Delaware Supreme Court took the easy way out. Relying on precedents much less explosive than *Van Gorkom*, the *Paramount* court managed to hold the Paramount Board liable for breaching their duty of care, while tempering the impact of that analysis with an examination of the duty of loyalty.

Teren, *supra* note 246, at 921.

[247]*In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 779.

stage.[248] The actions of the court caused many boards to reevaluate and change their executive compensation structure.[249]

Given the expertise of the Delaware judiciary in resolving corporate law cases, the idea that the firm should be an outlet for addressing unconscious discrimination becomes even more attractive. Besides its experience in this area, Delaware can aid in the creation of the new diversity norm because of the means in which it articulates its case holdings. In its opinions, the court "makes statements" that have the ability to affect norms similar to when it announces binding propositions of law.[250] According to Professor Edward Rock, "despite the fact-specific, narrative quality of Delaware opinions, . . . the *process* . . . leads to reasonably precise standards . . . through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms."[251] Besides announcing binding propositions of law, the judges tell a story with either praise or criticism

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[248]*In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 291 (Del. Ch. 2003). The decision was surprising, especially in light of the fact that the Delaware legislature had taken steps to reduce judicial oversight of corporate transactions. In response to *Van Gorkom*, the Delaware legislature passed DEL. CODE ANN. tit. 8, 102(b)(7) (2001), which authorizes corporations to eliminate directors' personal liability for breaches of the duty of care. However, commentators have noted that this provision has done little to diminish the court's role. See, e.g., Charles M. Elson & Robert B. Thompson, *The Limits of Judicially Enforced Constraints and the Promise of Proprietary Incentives*, 96 NW. U. L. REV. 579, 584-585 (2002). Professors Elson and Thompson noted that:

> [e]xculpation clauses such as section 102(b)(7) relieve only the possibility of personal liability for money damages. Failure to meet the duty of care as set out by the court in *Van Gorkom* can still lead to injunctive action that could stop the transactions from being accomplished, an outcome that directors would want to avoid.

Id.

[249]Waller Lansden Dortch & Davis, LLP, DESPITE OUTCOME, DISNEY DECISION STANDS AS A WARNING TO ALL DIRECTORS (Aug. 25, 2005), http://www.wallerlaw.com/articles/Tax-Exempt%20Organizations?id=48893; LeBoeuf, Lamb, Greene & MacRae, LLP, RAMIFICATIONS OF THE IN RE THE WALT DISNEY COMPANY DERIVATIVE LITIGATION (June 16, 2003), http://www.deweyleboeuf.com/files/News/2305de78-d1d7-4765-aef7b00d26067735/Presentation/NewsAttachment/5d9d5b83cffa-4a1e-b809-c52918eb0320/article_592.pdf. In the wake of *Disney*, the law firm of LeBoeuf, Lamb, Greene, and MacRae, L.L.P. advised its clients that:

> [i]f the ideas expressed in this case stand, all compensation committees will have to be far more diligent about setting compensation for senior executives, or risk personal liability for a perceived failure. Certain procedural safeguards (retaining an outside consultant, control of negotiations, a record of deliberations) could apparently have protected the Disney committee.

Id. It is clear that even though the court ultimately found in favor of the directors, it is arguable that its dicta regarding the appropriate procedural safeguards for analyzing executive compensation actually carried more weight than its ultimate finding of no liability.

[250]Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028 (1996).

[251]Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) (emphasis omitted).

for the main characters, and readers react accordingly by adjusting their own behavior.[252] Through this process, the opinions express both the law and behavioral norms, which allows the court to overcome resistance among firms to changing the industry response to unconscious discrimination. If firms are hesitant to implement programs that are more far reaching than current antidiscrimination policies, the courts' judicial opinions provide guidance to corporate management in a way that can lend itself to creating new norms regarding the eradication of unconscious discrimination through its own form of storytelling.

The court's largely standards-based approach serves an important role by giving it greater flexibility in testing the boundaries of the law without the rigid adherence to stare decisis found in most courts.[253] The Delaware courts also have a high degree of legislative lawmaking power but similar to federal judges, are largely insulated from political pressure.[254]

It is conceivable, therefore, that the Delaware courts could decide that ignoring obligations that arise pursuant to Title VII can constitute a breach of the duty that corporate officers and directors have to monitor the activities of the firm to ensure profitability and legal compliance.[255] One of the few commentators to address this issue concluded that "inappropriate corporate responses to allegations of racial discrimination . . . breach the fiduciary duty of care that corporate managers owe to the corporation and its shareholders."[256] The answer why is obvious.

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[252]*In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 760 (finding that the directors did not act with the requisite bad faith to establish liability, but still referring to their actions as "at most ordinarily negligent"). In absolving Disney's CEO, Michael Eisner, of liability for "waste" by forcing the board of directors to hire a company president who earned $140 million after working only fourteen months, the court noted that "[d]espite all of the legitimate criticisms that may be leveled at Eisner, especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom, I nonetheless conclude, after carefully considering and weighing all the evidence, that Eisner's actions were taken in good faith." *Id.* at 763. It is clear that the court used this opportunity to caution corporate boards against blind deference to the company's CEO.

[253]Fisch, *supra* note 236, at 1079. Professor Fisch concluded that "Delaware courts aggressively adopt and modify corporate law doctrine, exhibiting a degree of activism that more closely resembles the legislative process." *Id.* at 1080.

[254]Romano, *supra* note 237, at 226. *See also* DEL. CONST. art. IV, § 3 (mandating that no more than a simple majority from either political party sit on each court within the state).

[255]Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 971 (Del. Ch. 2003) (noting that the "duty to monitor may arise when the board has reason to suspect wrongdoing").

[256]Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 397 (2002). Professor Wade uses the discrimination lawsuit against Texaco to convincingly argue that management has a responsibility, pursuant to the duty of care, to ensure that the firm addresses complaints of racial discrimination. The article does not, however, adequately grapple with the lack of incentive that firms have "to create a system of investigation and monitoring that goes beyond window dressing," given that the most employment discrimination cases fail and

Despite the uphill battle faced by employees who bring these claims, the cost of litigation and the possible reputational harm that comes from defending these cases ultimately affect the profitability of the firm, which can prompt shareholder action (even if the financial harm is perceived rather than actual) and possibly court involvement. As such, this can trigger liability under the duty to monitor.

The duty to monitor, which governs the responsibility that managers have to ensure compliance with Title VII, flows from the duties of care and loyalty.[257] *Caremark* requires directors to act with reasonable diligence, but

> liability for failure to monitor [can ensue where the director has acted with] . . . bad faith—because their indolence was so persistent that it could not be ascribed to anything other than a knowing decision not to even try to make sure the corporation's officers had developed and were implementing a prudent approach to ensuring law compliance.[258]

Arguably, ensuring compliance with Title VII falls within the realm of corporate officer and director liability under the duty to monitor.[259]

Director liability for failing to adhere to statutory mandates would not be unusual. In the criminal context, prosecutors sanction corporate management for failing to watch over the affairs of the corporation closely.[260] Scholars argue that "[w]here 'image and reputation are at the

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the mega-lawsuits faced by Wal-Mart and Texaco are the exception rather than the rule. *Id.* at 410. Nor does the article imagine an additional role for the Delaware courts outside of enforcing the duty of care, a role in which the court could enshrine diversity norms within the case law. This is why I propose a system in which a new norm is created through the actions of multiple actors, including corporate management, retail giants, and the Delaware court system.

[257] *Beam*, 833 A.2d at 971.

[258] Desimone v. Barrows, 924 A.2d 908, 935 (Del. Ch. 2007) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch. 1996)).

[259] *See* Wade, *supra* note 256, at 405. Applying the *Caremark* standard to the facts of the Texaco discrimination case and noting that:

> [t]he typical reaction of corporate managers to racial discrimination allegations embodies the conduct that Chancellor Allen describes as a duty of care violation. The reaction of Texaco's managers to discrimination allegations is illustrative. Complaints by African American Texaco employees put senior officers on notice, thereby triggering a duty to monitor and investigate alleged racial discrimination. This duty was breached when Texaco's senior officers ignored the obvious indicia of pervasive racial discrimination. It was breached also by board members who failed to install a system for reporting, investigating and monitoring race discrimination allegations.

Id.

[260] *See* Joshua Andrix, *Negotiated Shame: Inquiry into the Efficacy of Settlement in*

very heart of modern corporate life,' criminal penalties should target these central values."[261] This idea is conceptualized in the civil setting as well by imposing vicarious liability on management for the discriminatory acts of subordinates; these standards convey the idea that management has a duty to minimize the corporation's exposure to Title VII liability.

In *Meritor Savings Bank v. Vinson*,[262] the Supreme Court held that employers are liable for a hostile work environment under Title VII when the discriminatory conduct is "sufficiently severe or pervasive to 'alter the conditions of [the victim's] employment and create an abusive working environment.'"[263] "The *Meritor* Court distinguished between 'quid pro quo' harassment cases, in which a supervisor threatens to take job-related action against the victim, and environmental cases . . . in which the environment alone gives rise to the claim."[264] Environmental harassment differs from quid pro quo harassment in that there is no guarantee of an agency relationship because the supervisor can engage in unofficial discriminatory acts.[265] In contrast, quid pro quo cases, by definition, involve "the supervisor's discriminatory use of delegated power."[266] With the recognition of environmental harassment as a cause of action, the *Meritor* Court directed lower courts to use the principles of agency law to derive appropriate standards for holding employers liable.[267] This resulted in such wide disparities that the Supreme Court granted certiorari to revisit the issue in *Burlington Industries, Inc. v. Ellerth*[268] and *Faragher v. City of Boca Raton*.[269]

Ellerth and *Faragher* resolve the circuit split regarding employer liability for the discriminatory acts of subordinates, and hold that, regardless of whether the case involves quid pro quo or environmental harassment, an employer may be vicariously liable for sexual harassment committed by a supervisor "if [the employer] knew or should have

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Imposing Publicity Sanctions on Corporations, 28 CARDOZO L. REV. 1857, 1867-68 (2007) (listing reasons why publicity sanctions "further many of the goals of criminal law and federal sentencing").

[261] *Id.* at 1865 (footnote omitted).

[262] 477 U.S. 57 (1986).

[263] *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

[264] *See* Susan Grover, *After* Ellerth*: The Tangible Employment Action in Sexual Harassment Analysis*, 35 U. MICH. J.L. REFORM 809, 813 (2002).

[265] *See Vinson*, 477 U.S. at 69-72 (discussing the role of an agency relationship in hostile work environment suits); Grover, *supra* note 264, at 813.

[266] Grover, *supra* note 264, at 813.

[267] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-53 (1998) (noting that "in the wake of *Meritor* . . . [the terms quid pro quo and environmental harassment] acquired their own significance. The standard of employer responsibility turned on which type of harassment occurred").

[268] 524 U.S. 742 (1998).

[269] 524 U.S. 775 (1998).

Despite the uphill battle faced by employees who bring these claims, the cost of litigation and the possible reputational harm that comes from defending these cases ultimately affect the profitability of the firm, which can prompt shareholder action (even if the financial harm is perceived rather than actual) and possibly court involvement. As such, this can trigger liability under the duty to monitor.

The duty to monitor, which governs the responsibility that managers have to ensure compliance with Title VII, flows from the duties of care and loyalty.[257] *Caremark* requires directors to act with reasonable diligence, but

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[258] Desimone v. Barrows, 924 A.2d 908, 935 (Del. Ch. 2007) (citing *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch. 1996)).

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Id.

[260] *See* Joshua Andrix, *Negotiated Shame: Inquiry into the Efficacy of Settlement in*

Just as the duty to monitor requires that corporate officers and directors make a good faith attempt to guarantee that an adequate corporate reporting system exists to ensure compliance with the law; the employer must also ensure that he has acted reasonably to correct and prevent discrimination.[276] Thus, a breach of the duty to monitor should, under certain circumstances, render management liable under both Title VII and Delaware law for failing to ensure that there are mechanisms in place to ensure the prompt resolution of discrimination claims.[277]

This suggestion has merit. The dual threat of suit and increased liability under federal and state law, as well as the publicity incidental thereto, could do much to ensure that firms are taking the steps necessary to address discrimination firm-wide, as opposed to sitting back and waiting to be sued, or relying solely on the firm's antidiscrimination policy as being sufficient to address this problem.[278] Furthermore, enforcement through the vehicle of the Delaware courts may be a more appropriate sanction than replacing an entire board in a messy proxy fight for failing in one area. This litigation would have the benefit of sending a message to the entire corporate community, which is fairly insular, on a particular issue but without the corresponding collateral damage, (i.e., the board does not have to be replaced). While it is not clear what directors fear more—being sued or being replaced—this proposal presents an alternative means of increasing the effectiveness of Title VII without actually using (and being limited by) the statute. Because of this prospect, this type of shareholder derivative suit may have value.[279]

Id. (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)). *See also* Sturm, *supra* note 7, at 482 (noting that in *Ellerth* and *Faragher*, "the Court adopted an approach to employer liability that, if properly implemented, clearly encourages the development of workplace processes that identify the meaning of and possible solutions to the problem of sexual harassment.").

[276]*See, e.g.*, *Caremark*, 698 A.2d at 970.

[277]Note, however, that this duty to ensure Title VII compliance is not infinite and boundless. In fulfilling the duty to monitor, directors may rely in good faith on the reports of other officers, as long as they do not do so blindly.

[278]*See* Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 910 (1999). Professor Kamar aptly noted that:

> [a]lso true, but difficult to quantify, is that fiduciary claims inconvenience directors and officers and harm their reputations. This disciplining effect is bolstered by the vilifying tone that court decisions often employ when condemning a defendant's conduct. In a world of rapid information flow and attentive media coverage, these sanctions can be effective. The same is true with respect to court decisions that precede or approve settlements. These decisions also impact defendants' reputations and thus have a deterrent effect.

Id. (footnotes omitted).

[279]Kraakman et al., *supra* note 223, at 1736 (arguing that "a derivative suit increases corporate value . . . if the prospect of suit deters misconduct"). This, of course, presupposes that the cost of the suit does not exceed the gains to corporate value created by the suit.

So far, this proposal appears to increase the likelihood of litigation by offering, as a solution, another cause of action under Delaware law. If the Delaware courts suggest that the duty to monitor includes ensuring compliance with Title VII, however, then more companies will implement these suggestions in order to foreclose the possibility of future litigation.[280] More safeguards equal less litigation. The court could go even further by stating that this burden can be met by implementing diversity initiatives or, in the alternative, stating that the presence of some type of affirmative action program is relevant to liability or damages. Therefore, boards could conceivably modify their behavior at the court's suggestion because it is less costly and more predictable than litigation. Under this scenario, the Delaware courts provide a catalyst for corporate change by wielding the immense power that they hold in corporate law and like *Van Gorkom* and *Disney*, the court's decision would be followed by instant changes in how corporations address discrimination. Because of the new norm, the number of lawsuits will decrease over time. The problem, however, remains one of incentives—only this time, what incentive does the court have to become involved in this dispute at all, especially since employment discrimination is not generally an area that is addressed under the auspices of corporate law doctrine?

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[280]As Professor Sunstein noted:

> A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action when one person takes the life of another. The point bears on the cultural role of law, adjudication, and even Supreme Court decisions. The empirical effects of those decisions are highly disputed. If the Supreme Court holds that segregation is unlawful, that certain restrictions on hate speech violate the First Amendment, or that students cannot be asked to pray in school, the real-world consequences may be much smaller than is conventionally thought. But the close attention American society pays to the Court's pronouncements is connected with the expressive or symbolic character of those pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This assumption is a matter of importance quite apart from its consequences as conventionally understood.

Sunstein, *supra* note 250, at 2027-28 (footnotes omitted).

C. *Solving the Collective Action Problem: And the Answer is . . . Wal-Mart*

While diversity initiatives and other mechanisms to minimize unconscious discrimination, which are discussed in the next section, may have net positive results, the collective action problem prevents both firms and the Delaware courts from giving serious consideration to implementing programs that could be costly, despite the potential for damning publicity similar to that faced by other corporations involved in Title VII litigation. This is not to say that the idea to highlight the Title VII duties that exist within the duty to monitor is a bad one; in fact, placing the duty on the board, rather than the courts, to address unconscious discrimination is preferable. It may only take one lawsuit to change the behavior of the boards of the majority of Delaware firms, but what incentives do the Delaware courts have to take up the banner of employment discrimination? How do we get our one lawsuit? A quick search of LEXIS reveals that only a handful of Title VII cases have ever been litigated in the Delaware courts, so this may not exactly be a concern of primary importance to the Delaware judiciary. Additionally, the court also has to maintain the balance—if the judiciary becomes active in enforcing Title VII all of a sudden, this may encourage firms to incorporate elsewhere. Once again, the problem of incentives haunts us—what incentive does the court have to act?

One incentive may arise from the same publicity that prompts boards to adopt diversity initiatives in response to litigation. This publicity could also prompt the court to become involved in the melee because publicity generally highlights deficiencies in corporate management and can bring scrutiny to Delaware's mechanisms for regulating firms incorporated within the state. Such scrutiny could increase the threat that Congress will federalize corporate law, thereby substantially cutting Delaware's revenues.[281] As one commentator pointed out, "the *Disney* court's decision came during a period in which executive compensation . . . practices remained in the public spotlight."[282] Thus, there is some support for the idea that increased media scrutiny could incentivize the court to weigh in on this issue. Given the rarity of these class action suits, however, it is questionable that the bad publicity would be enough to increase the federal threat to Delaware's market share and induce its judiciary to respond.

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[281]Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 604-07 (2003) (arguing that the omnipresent threat of federal intervention influences the development of Delaware corporate law).

[282]Timothy P. Glynn, *Delaware's* VantagePoint*: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 108 (2008).

The reoccurring problem of incentives raises the fundamental problem facing not only Title VII enforcement, but also much-needed changes to firm culture generally. Here, much can be gleaned from the law firm-client relationship, where corporations hire a particular law firm in part because of the diversity of its workforce. Clients of law firms have considerable influence over ensuring that the firms that represent them have a diverse workforce.[283] While diversity in law firms is still quite low because the pool of qualified minority candidates is small, this feature has been responsible for considerable recruitment of minorities among law firms nationwide.[284] Wal-Mart already has a program in place to ensure that minority- and women-owned law firms receive a larger share of its legal work.[285] Similarly, Wal-Mart can force its distributors, wholesalers, and manufacturers from whom it purchases its products to have minority hiring targets or other diversity initiatives. Like law firms and their clients, buyer-supplier relationships are, to some extent, personal; thus, concern about the characteristics of those involved in the negotiations and business dealings would not be unusual.

By framing the problem in this manner, it is clear that there is a domino effect—large corporations that are sued in large-scale class litigation regarding its employment practices then adopt diversity initiatives in response to shareholder pressure and, in turn, pressure other corporations with which they deal to value diversity in a similar manner. What we have is the creation of a new norm with very little court intervention outside of the initial Title VII lawsuit. This is consistent with the litigation/nonlitigation strategy outlined by Professor Hart to address subtle bias, where litigation forces companies to take measures that would otherwise be costly but holding employers responsible for some preemptive workplace reform.[286] The Delaware courts could further the creation and permanency of this new norm within the Delaware corporate arena by memorializing it in the case law through a shareholder derivative suit. From this view, Delaware courts still have a prominent role that can be furthered through the duty to monitor, but incentives are less of a concern than if one tries to urge the court to

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[283]Carisa Chappell, *Corporate Efforts to Enhance the Business Case for Diversity*, DIVERSITY & THE BAR, Mar./Apr. 2008, *available at* http://www.mcca.com/index.cfm?fuse action=page.viewpage&pageid=1696.

[284]Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 719 (1997) ("The racial composition of clients may affect both the demand for and the success of minority associates and partners.").

[285]Chappell, *supra* note 283.

[286]*See generally* Hart, *supra* note 11 (arguing that litigating as well as crafting solutions in nonlitigation arenas both play significant roles in potentially changing discriminatory practices).

unilaterally expand the duty to monitor in the absence of any significant, preemptive change in corporate culture.

Additionally, incentives are less of a problem from the corporation's perspective. Wal-Mart has an incentive to force its partners to adopt similar diversity initiatives because it creates positive publicity at a time in which such publicity is sorely needed, especially to keep Wal-Mart's shareholders at bay. Indeed, Wal-Mart, has "flexed" its muscles in the past in order to force its suppliers to bend to its will on various issues from pricing to packaging, and will likely make demands in the future that its suppliers will most likely have no choice but to accede to.[287] In other words, what is the likelihood that Wal-Mart's suppliers would threaten to take their wares elsewhere in the face of demands for diversity from the largest retailer in the world? The answer is, quite simply, none.

D. *Conceptualizing the Diversity Norm: A Few Suggestions*

Addressing unconscious discrimination should be viewed as a necessary component to achieving racial and gender equality in the workplace; yet characterizing it as a part of the larger thrust to enact policies that tackle discrimination generally is necessary to confront the credibility issues that these claims have, as outlined in Part III.[288] By placing the burden on the firm to enact these policies, it would be unnecessary to determine the extent and prevalence of unconscious discrimination in the workplace, which would be required if the plaintiff was attempting to prove his case in court.[289] The value comes in increasing diversity, ethnic/gender sensitivity, and cooperation among diverse groups as well as recategorizing minorities as a part of the in-group, all of which will decrease racism and sexism that are byproducts of a mostly homogenous workplace.[290] The best way to counter stereotypes about minorities and women is to limit subjective decision

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[287]Charles Fishman, *The Wal-Mart You Don't Know*, FASTCOMPANY.COM, Dec. 2003, http://www.fastcompany.com/magazine/77/walmart.html; Greg Schneider & Dina ElBoghdady, *Stores Follow Wal-Mart's Lead in Labor: Competitors Struggle to Match Savings From Non-Union Workforce*, WASH. POST, Nov. 6, 2003, at A1, *available at* http://newsmine.org/archive/cabal-elite/corporate/walmart/wal-mart-screws-labor-force.txt.

[288]As Professor Fiske has noted, "Given subtle biases that are unconscious and indirect, change is a challenge, resisting frontal assault. Similarly, given blatant biases rooted in perceived threat to group interests and core values, direct confrontation will likely fail again. Instead, more nuanced means do work." Fiske, *supra* note 25, at 127.

[289]*But cf.* Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117 (Henry L. Roediger III et al. eds., 2001) (asserting the validity of methods measuring implicit racial attitudes).

[290]*See* Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 280 (1993). *See also* Fiske, *supra* note 25, at 127-28 (advocating constructive intergroup contact as a means of addressing implicit bias).

making, or in the alternative, to hire more of these individuals for management and supervisory positions, which may reduce the incidence of unconscious bias against them.[291]

Hiring individuals from these groups is a good starting point and can address more than unconscious discrimination. However, firms can tailor any program designed to increase diversity to their specific needs and should aim for placing workers of all backgrounds in a competitive environment designed to achieve a specific goal.[292] Private firms have more freedom than schools and other government bodies to create affirmative action plans and do not have to worry about only correcting the effects of past discrimination or tailoring their programs to address specific, identifiable discrimination, a factor that could sound the death knell for any program designed to specifically reach unconscious discrimination.[293] Nevertheless, quotas and hiring targets should not overshadow the importance of taking additional steps to decrease unconscious discrimination. Another fairly costless alternative is for firms to tie minority hiring targets to executive bonuses, a move that Wal-Mart embraced.[294]

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[291]Jolls & Sunstein, *supra* note 44, at 1108-09.

> What if . . . an institution hires certain people because of their debiasing capacity on their students, customers, or employees? [Studies have shown that] . . . the mere presence of an African American experimenter reduced race bias in White participants. Debiasing worked presumably because participants heard the African American instructor give directions, be in charge, and implicitly hold power.

Id. (footnote omitted). Professors Sunstein, Jolls, and others advocate direct debiasing to address this problem, in which individuals are hired that run directly counter to prevailing norms. *Id.* at 1109. *See also* Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 800 (2001) (arguing that exposure to admirable members of stigmatized groups can reduce automatic bias); Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 16 (2006) ("Affirmative action forces employers to identify and redress the subtle and unconscious discrimination, as well as the overt and deliberate discrimination, that occurs within their enterprises.").

[292]Consistent with *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), Title VII does not forbid private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial or gender preferences. *Id.* at 200-02.

[293]*But see* Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 834 (1995) (noting that voluntary affirmative action programs should be limited to correcting "identifiable" discrimination; for example, an employer who has never discriminated should not have to employ hiring targets because it will not solve the problem resulting from a lack of qualified applicants).

[294]Texaco employed this strategy, and in 1999, 44% of its new hires were minorities. *Id.* at 1277 n.114 (citation omitted). Texaco also unveiled a plan in which it provided financial aid and other assistance to blacks trying to open Texaco franchises. Allana Sullivan, *Texaco to Unveil Plan for Diversity in the Workplace*, WALL ST. J., Dec. 18, 1996, at B8. *But see* Selmi, *supra* note 210, at 1279-80 (explaining that Texaco has missed its diversity goals and has

There are other, more controversial means of addressing unconscious discrimination. Firms can adopt initiatives that promote diversity among its employees and celebrate differences, such as ethnicity and gender sensitivity training or training on its antidiscrimination policies, or both. The merits of such training and programs are greatly disputed in the literature, but there is evidence to suggest that these policies have value.[295] In his study of the Home Depot and Texaco litigation, Professor Selmi noted that in the wake of the lawsuits against each of these corporations, there were improvements in the number of minority employees and increased access to management positions.[296] It is also likely that there was some corresponding benefit on unconscious bias in the workplace as a result of this direct debiasing.[297]

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made little progress reforming its culture). Another industry attempting to internally address inequities is the professional sports community, which is a big supporter of affirmative action initiatives because of the dismal number of minority coaches within the profession. *See* Brian W. Collins, Note, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 888 n.99 (2007) (citing *Minority Fellowship Attracts 79 Coaches*, NFL.COM, Aug. 31, 2005, http://www.nfl.com/news/story/ 8790093) (discussing the NFL Minority Coaching Fellowship Program).

[295]*See generally* Samuel R. Bagenstos, *supra* note 291, at 29; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 U. ARK. LITTLE ROCK L. REV. 147, 162-65 (2001); Margaret S. Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCHOL. PRAC. 65, 67 (2004). *See also* Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 85-86 (2006) (arguing that although the affirmative defense in hostile environment sexual harassment cases creates an incentive for employers to design and implement policies to deter and punish sexual harassment at the workplace level, courts should place greater weight on the informal power dynamics of the workplace as part of a more rigorous affirmative defense); Anne Lawton, *Operating in an Empirical Vacuum: The* Ellerth *and* Faragher *Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 243 (2004) ("[A]llowing employers to define how and when they obtain notice of workplace harassment encourages the creation of a private system of rules over which there is no effective oversight, and provides incentives to employers to narrow the avenues available for employees to file complaints."); ALEXANDRA KALEV ET AL., TWO TO TANGO: AFFIRMATIVE ACTION, DIVERSITY PROGRAMS AND WOMEN AND AFRICAN-AMERICANS IN MANAGEMENT 1-4, http://www.si.umich.edu/ICOS/dobbin.pdf) (finding that the combination of diversity programs and affirmative action law is most effective in increasing managerial diversity but little is known about the effectiveness of particular initiatives).

[296]Selmi, *supra* note 210, at 1276-77, 1286; *but see id.* at 1277, 1286 (acknowledging while the workforce was temporarily more diverse, by 2000 Texaco's efforts stalled and new hires and promotions declined). Similarly, the Home Depot released a "social responsibility report" that appears to show gains in female employment since settlement of the discrimination suit, however, Professor Selmi notes that the report provides no past statistics for comparison, does not explain how the figures provided translate to jobs, nor how these figures relate to the percentage of female applicants. *Id.* at 1286-87.

[297]Jolls & Sunstein, *supra* note 44, at 980-85. *See also* Robinson, *supra* note 91, at 1170. Professor Robinson focuses on "the racial and gender composition of committees that handle interviewing, promotion, and EEO matters" arguing that a diverse committee could debias target audiences because:

While increasing the numbers of minorities is certainly important, firms have to go a step further by forcing these groups to interact in order to reduce conflict.[298] In other words, there must be the creation of a common in-group identity tied to a common goal.[299] One inexpensive option is for the firm to make a focused effort to place its employees in activities or on projects that require intergroup cooperation, which many behavior psychologists believe will ameliorate bias and ease tension between groups.[300] The decategorization perspective proposes that activities that focus on intergroup cooperation have the benefit of counteracting the categorization that contributes to bias in the first place because it "permits members' attention to focus on one another's personal qualities, [and] it contributes to the development of personalized rather than categorized interactions."[301] Shared goals will enable the groups to come together and reduce the focus on characteristics that would otherwise be divisive. Competition between diverse groups within the firm can also minimize race and gender bias and bring into focus the larger group identity and goals, which is good for business.[302]

Such initiatives can help dispel stereotypes about minorities and women, ultimately having a net positive benefit on the productivity of all employees.[303] Having established programs can also help employers

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> (1) The presence of outsiders on interviewing committees will help the interviewee when bias emerges during the interview; (2) the presence of outsiders in decisionmaking groups concerning hiring and promotion will help the employee/interviewee in that the outsiders may debias the group's deliberations; (3) the employer benefits from the increased presence of outsiders in that fewer applicants and employees will perceive discrimination and bring lawsuits; and (4) when the employer is trying to determine whether to settle those claims that are not deterred, including outsiders may balance the discussions so that the employer does not exaggerate its likelihood of success.

Id. at 1170.

[298]Dovidio et al., *supra* note 22, at 97-99.

[299]Gaertner et al., *supra* note 38, at 389 (arguing that "cooperative intergroup interaction and common fate, can reduce bias ... by transforming members' cognitive representations of the memberships from separate groups to one involving a common in-group identity.").

[300]*See* Fiske, *supra* note 25, at 127-28; Gaertner et al., *supra* note 38, at 388; Gaertner et al., *supra* note 32, at 101.

[301]Samuel L. Gaertner et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 692 (1990) (citing Norman Miller & Marilyn B. Brewer, *Beyond the Contract Hypothesis: Theoretical Perspectives on Desegregation*, *in* GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION 281, 281-302 (Norman Miller & Marilyn B. Brewer eds., Academic Press 1984)); *see also* Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 123-24 (2004) (discussing social motives to avoid engaging in automatic implicit prejudice).

[302]Gaertner et al., *supra* note 32, at 103-04.

[303]*See* Kang & Banaji, *supra* note 67, at 1087 ("Individuals who belong to social groups marked by negative stereotypes about intellectual performance underperform when cues remind them of their group identity."). It follows that the firm can reinforce, through

avoid liability under Title VII, although many argue that employers should have to prove the effectiveness of these programs in actually promoting diversity.[304] According to Professor Melissa Hart, other options include "neutral and well-advertised posting of management positions and training opportunities; written standards of both expectation and evaluation; [and] monitoring and appraisal of workplace statistics."[305] This list is by no means exhaustive.[306] Such measures can be taken along with forcing supervisory personnel to explain their decisions, which can also have a debiasing effect.[307] Thus, there are common sense and inexpensive means of addressing unconscious discrimination.

Additionally, besides "direct debiasing" by hiring more minorities and women, firms can also force their decision makers to take the IAT routinely to test whether they are suffering from any impermissible bias, a test which "can be taken online, free of charge."[308] Even if the test is flawed, as many contend, this will determine at the very least whether the

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programs, the idea that there is nothing wrong with any particular group identity nor does it correlate to an employee's ability to do the job. The correlative effects of positive reinforcement is something that can be empirically tested in order to determine if it is having the desired effect. *See also* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005) (examining monitored self-regulation of the enforcement of individual rights); Jolls & Sunstein, *supra* note 44, at 981 (explaining the presence of population diversity tends to reduce the overall level of implicit bias); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, BEST PRACTICES OF PRIVATE SECTOR EMPLOYERS (1997), *available at* http://www.eeoc.gov/abouteeoc/task_reports/practice.html (identifying the best equal employment opportunity practices of several private companies).

[304]Hart, *supra* note 11, at 1644-46.

> Of course, no check-list of policies will or should automatically insulate an employer from liability for discrimination. Courts must consider how policies in fact operate in the particular context of a given workplace. But the practices described here may offer a starting point for considering what kinds of basic steps employers should be taking to reduce the likelihood of stereotyping in workplace decisions.

Id. at 1639.

[305]*Id.* at 1639.

[306]Another benefit of the Title VII litigation that has already occurred is that now firms can look at past consent decrees and implement some of the remedies proposed by plaintiffs in those cases in order to limit the firm's liability exposure. *Id.* at 1638. Scholars also advocate "the blurring of adversarial lines" where plaintiff-side employment discrimination lawyers:

> approach employers that are potential litigation targets before any complaint is filed and agree to represent those employers in efforts to achieve compliance with the law. In their compliance efforts, these lawyers typically focus on urging adoption and improvement of workplace structures that aim at preventing discrimination and mitigating its harmful effects.

Bagenstos, *supra* note 291, at 32 (citing Sturm, *supra* note 7, at 529).

[307]Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 229 (1985).

[308]Kang & Banaji, *supra* note 67, at 1091.

firm needs to have an additional level of review to account for and correct this potential bias.[309]

One obvious criticism of placing the burden on firms is that the costs, relative to the perceived gains, may be too high to justify these initiatives. Unconscious discrimination so often flies under the radar, however, resulting in disparate treatment over time as opposed to any identifiable wrongdoing by the decision maker at a specific instance. This places the firm in the best position to address this problem.[310] Moreover, firms can adopt initiatives that address their particular issues, and there are some options, discussed above, that can be implemented at low or no cost to the company.

Since the Wal-Mart case is atypical to say the least, forcing firms to act ex ante ultimately closes the gap left open by endless litigation in which the protagonist only succeeds in the most extreme cases. If the employer takes steps to address this problem at the onset, then presumably, all that will be left on the courts' dockets are unmeritorious cases, which will be dismissed, and the extreme cases which, as Part IV argues, courts can adequately resolve. Ultimately, once firms have more elaborate mechanisms in place that counter the effects of unconscious bias, most of these claims will be addressed outside of the adversarial process.

V. CONCLUSION

In a sense, we end where we began—in order to get firms to act ex ante, there must be litigation, but it is with a new sense of purpose and direction that we approach this problem. We can start with firms that have already modified their practices in response to Title VII litigation, most notably retail giant Wal-Mart, and use this as a vehicle to apply pressure on other firms to follow suit. Furthermore, we can envision more global change—the Delaware courts as a mechanism to further the creation of a new diversity norm, resulting in a less hostile forum for unconscious bias claims, a better remedy, and ultimately less litigation. Firm level remedies are the best way to address unconscious discrimination because the firm is in the best position to assess its needs, its workers, and what steps are required to ensure an integrated, equal-

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[309] *See* Anthony C. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998) (finding that the IAT is useful for assessing stereotypes about blacks).

[310] Dukes v. Wal-Mart Stores, Inc., 474 F.3d 1214, 1226 (9th Cir. 2007). In fact, Wal-Mart, in contesting class certification, argued that the plaintiff's experts failed to identify any specific discriminatory incidents or stereotyping policies in which the company engaged. Both the district court and the court of appeals rejected Wal-Mart's argument, suggesting that a corporation could be liable where general, unconscious bias results in harm. *Id.*

opportunity workplace. The process by which this solution was reached highlights huge gaps within the literature. The focus on normative theory—how judges, or the law, or both should approach unconscious discrimination claims[311]—has largely overshadowed any positive approaches to unconscious discrimination—or, what judges are actually doing to resolve these claims. As a result, scholars have proposed solutions to the problem that are improbable and unlikely to take hold. This study fills that gap by addressing both sides of the issue. Recognizing that courts will only resolve unconscious discrimination claims in certain circumstances has the benefit of allowing us to tailor the debate in a manner that provides for alternatives to this "unconventional" problem. Courts will only justify what would otherwise be a problematic departure from the doctrine of employment at will if they can infer the requisite intent by isolating the bias in unconscious discrimination cases. They can only do so if the plaintiff has eliminated every nondiscriminatory reason from the record and behaved reasonably. In most cases, one of these factors will be missing, thereby illustrating that courts are only able to act in limited circumstances. It is clear, therefore, that the remedy is not to amend or expand Title VII, for this would only give the courts more discretion that they would be unwilling or unable to use.

Scholars should thus focus less on amending or expanding Title VII and more on remedies that operate outside of Title VII case law. Placing the burden on the firm as a part of its duty to monitor firm activities and ensure compliance with the law provides a means by which unconscious discrimination can be eradicated as a matter of corporate policy. This policy can include indirect and direct debiasing through affirmative action programs and diversity initiatives, which scholars have noted are an effective means of addressing subtle biases.[312] In the end, firm-based remedies are another alternative to Title VII in addressing unconscious discrimination, one that has the potential to have greater effects than Title VII's broken doctrine.

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[311] *See supra* Part II.

[312] Jolls & Sunstein, *supra* note 44, at 980-88.