

## **Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle**

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Professor Wax has written a provocative article that asks an interesting and important question: If much of what is defined as discrimination is unconscious, how do we go about remedying it? This is a question that has largely been neglected in the burgeoning literature on the unconscious nature of discrimination, but Professor Wax's answer turns out to be far less interesting than the question she asks. Professor Wax seems to be arguing that given the difficulty of eradicating unconscious discrimination, it would be best to leave the discrimination unremedied, as a way of freeing employers from what she considers to be the onerous and inefficient constraints of antidiscrimination law. She believes we should leave the discrimination unremedied even though she admits unconscious discrimination is exceptionally difficult to prove, and, according to her, only occasionally infects the employment process. The costs, are nevertheless, too high for employers to bear, and at one point, she even suggests that we look at the victims of discrimination as the "cheapest cost avoiders,"<sup>1</sup> an argument that elevates blaming the victim to a whole new level. Ultimately, after raising a serious and important question, Professor Wax retreats into a well-worn law and economics discussion that is principally concerned with the costs employers face to eradicate workplace discrimination, a discussion that is sure to garner few converts.

In this brief response, I hope to expose the flaws in Professor Wax's argument and will do so primarily by demonstrating that her argument is based on a misunderstanding of the nature of unconscious discrimination. Professor Wax seems to think that labeling discrimination as unconscious means it is beyond the control of the actor, subject perhaps to retrieval only at the hands of a trained analyst, a claim that is neither substantiated in the article nor endemic to the concept of unconscious discrimination. Once that proposition drops out of the analysis, the rest of her argument goes as well. I will also spend some time discussing the limits of her economic analysis, although it is also important to highlight up-front that her economic analysis is fully dependent on the notion that unconscious discrimination is uncontrollable, a proposition that seems fundamentally at odds with the neoclassical model she wants to follow. That said, I will seek to reveal the assumptions and biases that drive Wax's economic analysis; in a nutshell, her argument ultimately amounts to little more than an obsessive concern with the potential costs that eradicating unconscious discrimination has on employers without any concurrent concern for the costs that discrimination imposes on victims and society.

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<sup>1</sup> Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129,1206 (1999).

This response may seem unduly critical, and that will be so for two reasons. First, I will not spend any time discussing the areas where I may agree with Professor Wax, thus giving the appearance of greater disagreement than there may actually be. But more to the point, the idea that we should largely ignore unconscious, which can also be described as subtle, discrimination questions the very purpose of our antidiscrimination laws. Since 1973, the Supreme Court has consistently held that Title VII prohibits discrimination that is subtle in nature, which the Court has also noted on many occasions characterizes most workplace discrimination.<sup>2</sup> Therefore, concluding that eradicating unconscious discrimination is not worth the cost that it imposes on employers is tantamount to largely shutting down our antidiscrimination apparatus—although it would be doing so not because workplace discrimination had been eliminated, not even Professor Wax is willing to make that claim. Rather, it would be because the cost of preventing such discrimination was somehow too burdensome for employers, an issue most conservative scholars have been unwilling to advance previously.<sup>3</sup> Indeed, outside of the limited context of the Americans with Disabilities Act and cases involving religious discrimination, employers have generally not been allowed to assert a cost defense to claims of employment discrimination.<sup>4</sup> Taken to its logical extreme, Professor Wax's argument would actually advance the issue one step further by largely precluding claims based on unconscious discrimination: no defense would even be necessary. This is a strikingly dangerous idea, one that runs counter to everything we know about proving claims of discrimination.

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<sup>2</sup>See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting that “women still face pervasive, although at times more subtle, discrimination”); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (stating that “Title VII tolerates no racial discrimination, subtle or otherwise”).

<sup>3</sup>The notable exception is Richard A. Epstein in his book *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

<sup>4</sup>See 42 U.S.C. § 12111(10) (1994) (defining undue hardship); *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977) (limiting employers' duty to accommodate religious beliefs to accommodations that do not impose more than a de minimis cost on employers). As one example of the irrelevance of costs, the Supreme Court has prohibited the use of forms of statistical discrimination even where the discrimination is accurate. See *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708-17 (1978) (prohibiting differential pension plans for men and women). Occasionally, issues of cost do arise in the context of disparate impact and age discrimination cases, particularly in the latter scenario when an employer seeks to save money by laying off the higher salaried employees. However, it is never a defense to argue that discrimination was cost-effective.

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As should be apparent, I am treating Wax's article as advocating that we prohibit liability for claims based on unconscious discrimination despite her rather heroic retreat at the end of her article where she concludes that we should leave our existing liability system intact. I will not speculate on why she may favor this conclusion but will note it is wholly inconsistent with her preceding hundred or so pages, all of which are orientated toward concluding that it is unwise, and surely inefficient, to hold employers liable for unconscious discrimination.<sup>5</sup> Thus I will emphasize her analysis rather than her conclusion, although I do not believe my critique will stand or fall on whether one accepts that Wax is proposing to do away with liability for unconscious discrimination.

## I. THE NATURE OF UNCONSCIOUS DISCRIMINATION

One reason it is somewhat difficult to evaluate her argument is that Professor Wax never adequately defines what she means by unconscious discrimination. In some ways, the term might be self-defining—it is discrimination that is not conscious, that the decisionmaker is not aware of. The problem with that definition is that it is difficult to know whether the decisionmaker was, in fact, aware of the discriminatory nature of his actions. Let me give an example. Suppose a hiring manager routinely rejects female candidates, voting against them ninety-five percent of the time while supporting male candidates approximately fifty percent of the time. What if the manager says that he was unaware of this pattern, that he never kept track of gender, and also had reasons for why he rejected a number of the candidates? What if it turns out that some of those reasons were factually incorrect, or that the manager was treating two identically qualified individuals differently and the only apparent difference was their gender? How is this example to be categorized—does it represent unconscious discrimination or would we treat it as pretextual, assuming instead that he must have been aware of the discriminatory pattern?

So long as the manager says that he was not aware of the pattern, it is conceivable that under Professor Wax's schema for treating unconscious discrimination differently, no liability would attach regardless of the evidence one

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<sup>5</sup>Well, I am willing to speculate a little. One reason Wax may refuse to carry her analysis to its full implications and advocate prohibiting liability for unconscious discrimination, is that such a proposal would surely fail on its own terms—even if one wanted to reduce employer costs, her proposal would be as likely to increase than decrease costs. The reason is that by effectively prohibiting claims based on unconscious discrimination, her proposal would simply create a system of litigation regarding whether the discrimination in question was unconscious or conscious in nature. As noted, currently very few cases involve discussions of unconscious discrimination, but under her system employers would clearly have an incentive to argue that the discrimination in question was unconscious in nature and therefore not remediable under Title VII. Plaintiffs, somewhat bizarrely but no less true, would then be required to argue that the discrimination was not really unconscious but had some conscious components. It might even be possible to create a system of mixed-mixed-motives analysis, where the employer could argue that it had some nondiscriminatory motives for its decision and that much of its discriminatory motive was unconscious in nature. The absurdity should be plain, and without clear definitions of unconscious discrimination, it is unlikely that any such proposal would actually result in a reduction of costs at all, and may very well increase litigation costs.

might introduce, with the possible exception of some statement the manager may have affirmatively made regarding his awareness that his conduct was intentionally discriminatory. It may be that Professor Wax would allow circumstantial evidence to demonstrate the manager's intent, but if that is the case, it is difficult to see how her system would differ from the current proof structure, other than to introduce a new element—conscious awareness—into an already complicated and burdensome proof structure.<sup>6</sup>

This definitional issue is a common problem in the literature on unconscious discrimination where it often appears that such discrimination arises any time the claim is not accompanied by direct evidence of discrimination, such as derogatory statements made about someone's competence based on their race or sex.<sup>7</sup> Of course, such direct evidence is rare these days and this kind of definition would sweep most claims of discrimination into the unconscious discrimination category. Since Wax's concept would undoubtedly make discrimination claims more difficult to prove, a broad definition of unconscious discrimination would likely substantially impact the incentives to file discrimination claims, thus having a significant effect on efforts to reduce discrimination. Without a working definition of unconscious discrimination, it is simply not possible to know what kind of

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<sup>6</sup>Although it is only tangentially related to her argument, Wax provides a confused and ultimately incorrect discussion of the proof structures that have been developed for employment discrimination claims. Wax, like other commentators before her, contends that the *McDonnell Douglas* pretext structure "presupposes that the actor's reasons are transparent to him: he can and does in fact know through introspection what his reasons really are." Wax, *supra* note 1, at 1147 (emphasis in original). As I have argued elsewhere, this is simply a misreading of the structure. See Michael Selmi, *Proving Intentional Discrimination: The Realty of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 286-94 (1997). All the *McDonnell Douglas* proof structure requires is that the employer articulate the reason for its decision—the person was lazy or not as good as another candidate—not the motive for that decision ("I thought he was lazy because . . ."). The motive, or the "why" behind the "what," will naturally be part of the case, but it is the plaintiff's burden to prove that the reason underlying the decision was discrimination, conscious or otherwise. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

<sup>7</sup>It is also possible, though Professor Wax does not seem to fall into this category, that unconscious discrimination becomes all encompassing in the most circular of fashions so that all of our actions are not just unconscious but discriminatory as well. For example, in a recent article Professor Linda Krieger provides a self-analysis to the comments that an African-American student made in her class, comments that she defined as "halting and somewhat confused." Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1287-88 (1998). Professor Krieger concludes that her evaluation of the student was likely influenced by her own unconscious stereotypes because "my nonprejudiced beliefs did not displace the stereotypes." *Id.* at 1287. But what if the student's comments were just halting and confused; is that not possible? In Krieger's schema, apparently not—one who believes the judgment was not influenced by stereotypes is simply unaware of the operations of her unconscious, a means of analysis that ultimately devolves into a game of "gotcha." That said, I agree with Professor Krieger's ultimate conclusion that "the poor performance of a distinctive minority student is more likely to be remembered," than that of a white student, *id.* at 1288; what I disagree with is the notion that all evaluations are somehow tinged with the forces of unconscious discrimination.

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claims would be subject to Professor Wax's analysis or even why it is an issue at all.<sup>8</sup>

The difficulty that arises from determining when behavior can be defined as unconscious in nature is one reason why I now prefer to use the term "subtle discrimination" to define discrimination that relies on circumstantial evidence for proof.<sup>9</sup> Another reason is that bringing the unconscious into the debate obscures the meaning of intent as used in antidiscrimination law. As I have argued elsewhere, claims of intentional discrimination do not require proof of animus, motive or an intent to harm.<sup>10</sup> Rather, claims of discrimination require proof of

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<sup>8</sup>Late in her article, Wax makes the rather odd statement that "unconscious discrimination, by its nature, must be proved statistically." Wax, *supra* note 1, at 1214. Here she may be equating unconscious discrimination with disparate impact theory, in which case her definition would be a narrow one given that disparate impact cases consume a very small portion of existing litigation. By the same measure, her purported focus on performance appraisals, which are often subjective in nature, is wholly inconsistent with her analogy to statistical proof. Although it is theoretically possible to establish a disparate impact claim based on subjective employment practices, such cases are both difficult and rare. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (permitting a disparate impact challenge to subjective employment practices). While it is not essential to her discussion, it may be worth pointing out that the example she uses regarding disparate impact standards—where minority employees have a promotion rate that is 90% that of nonminorities—falls below the standard set by the Equal Employment Opportunity Commission ("EEOC") for establishing a disparate impact claim and certainly could not meet the statistical test required for proving a claim. See *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607.4 (1998) (establishing a rule of thumb showing evidence of adverse impact where promotion rates for minorities fall below 80% of the rate of nonminorities).

<sup>9</sup>Subtle discrimination is not necessarily the same as unconscious discrimination, as conscious discrimination can be directed in subtle ways. See ELIZABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 73 (1996). However, to the extent courts have discussed the issue at all, they tend to interchange the terms or purport to distinguish them without providing any guidance for determining between the two. See *Smith v. Great Am. Restaurants, Inc.*, 969 F.2d 430, 435 (7th Cir. 1992) (noting that "first-tier age discrimination may be 'subtle and even unconscious'"); *Brown v. M&M/Mars*, 883 F.2d 505, 514 (7th Cir. 1989) (holding that a "plaintiff who proves only this subtle and unconscious discrimination has not shown willful discrimination [under the Age Discrimination in Employment Act ("ADEA")]"); *Brooks v. Woodline Motor Freight*, 852 F.2d 1061, 1064 (8th Cir. 1988) ("Age discrimination is often subtle and 'may simply arise from an *unconscious* application of stereotyped notions of ability . . . .") (quoting *Sycock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154-55 (7th Cir. 1981) (emphasis in original)); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985) (discussing difficulty of proving discrimination where "the employer is too sophisticated to implicate itself or where the discrimination is subtle or unconscious"); *Wright v. National Archives & Records Serv.*, 609 F.2d 702, 713 (4th Cir. 1979) (noting that adverse impact theory had "been a mighty instrument in correcting the more subtle and sometimes unconscious forms of discrimination").

<sup>10</sup>See *Selmi*, *supra* note 6, at 286-94. Professor Wax seems to be aware that her interpretation of intent is inconsistent with the legal definition as she discusses the causal element of intent. Wax, *supra* note 1, at 1138-39. Yet, after stating the proper definition, she moves back to the view of intent that best supports her argument. For a period of time, Wax seems to mix things up by arguing that unconscious discrimination is at odds with the existing legal regime. *Id.* at 1146-48. Yet, she then backtracks from this position, and notes that claims of unconscious bias are not precluded, all of which suggests a confused

disparate treatment that resulted from some deliberate action. Accordingly, succeeding on a claim of employment discrimination requires not that the actor wanted in some conscious fashion to treat an individual in a discriminatory fashion—to exclude women from employment, for example—but rather it requires proof that the actions in question evince evidence that we construe as including an intent to discriminate.

Professor Wax's analysis thus rests on legally inaccurate conception of intent—one that is akin to motive or animus—and it is through this idea that she is able to conclude that unconscious discrimination should be treated differently than discrimination that involves conscious elements. On top of this crabbed definition of intent, Professor Wax adds an unusually restrictive concept of unconscious discrimination. Central to her argument is the notion that unconscious discrimination is uncontrollable, not only by the actor but presumably by anyone, including the actor's supervisors.<sup>11</sup> Her own examples, however, clearly undermine her argument. Take her very first example: the case of a supervisor who places more weight on errors in grammar or spelling in a memo prepared by a Hispanic clerk than one prepared by an Anglo.<sup>12</sup> Certainly, this situation is not beyond control—bringing the situation to the attention of the actor is likely to both remedy the present situation and to prevent its recurrence. But even if it does not, one might institute a review process to ensure that such disparate treatment does not recur. Nothing in this situation seems difficult to control or remedy.

This is true of each of her examples, the case of the supervisor who provides a less favorable evaluation to a black employee,<sup>13</sup> or the professor who favors the more attractive student over the less attractive one.<sup>14</sup> After all, to borrow her own metaphor, the person who speeds “unconsciously” (“I did not know I was going 80 mph”) is not told that slowing down is beyond her control, she is told to look at the speedometer.<sup>15</sup> A supervisor who takes race into account in evaluating his employees should, likewise, be told to look at the situation more objectively—that is one of the reasons objective criteria or standards are often used as a means of

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approach to the question of intent, one that does not ultimately advance her argument. *See id.* at 1150-51.

<sup>11</sup>*See Wax, supra* note 1, at 1131.

<sup>12</sup>*See id.*

<sup>13</sup>*See id.* at 1135.

<sup>14</sup>*See id.*

<sup>15</sup>It may be worth spending a moment pondering what it means to call something an accident. In order to best understand what Professor Wax means by discrimination as an accident we might look to two other contexts in which we use the term accident—that of torts, and our personal lives where we frequently try to explain and sometimes excuse acts by labeling them accidents. However, in neither context does an accident mean free of responsibility or liability. Imagine how torts would be redefined if a defendant was never liable for accidents, or if children could avoid punishment by simply saying “it was an accident.” Employers are also held liable for workplace accidents through worker compensation schemes. In all of these contexts calling something an accident does not mean that the act could not have been prevented, only that the actor in question did not intend a particular result, or would have preferred that the result not have occurred. Only under Professor Wax's analysis would accident potentially mean liability-free. Surely, the area of antidiscrimination law is a curious one to create such a regime.

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reducing subjective bias.<sup>16</sup> One can only find these actions uncontrollable by focusing on the motive rather than the action, but as noted earlier, disparate treatment concerns the deliberate actions of the supervisor, such as the poor evaluations, not the reason why the supervisor did what he did. As such, the problem with unconscious discrimination arises with the matter of proof rather than in its remedy.

The case of Ann Hopkins, surely the most famous legal case of stereotyping which Wax equates with unconscious discrimination, provides another example of how such discrimination can be controlled. In that case, the evidence regarding Ms. Hopkins' discriminatory treatment included that she was told to "walk more femininely, talk more femininely," etc., and it seemed apparent that many of her accomplishments were viewed through a gender lens in that her negative qualities were highlighted while her successes were downplayed.<sup>17</sup> Still, hers was not an easy case to prove; indeed, five of the thirteen judges who reviewed the case thought the evidence did not rise to the level of establishing discrimination. However, accepting that she was the subject of discriminatory treatment, that discrimination did not seem uncontrollable—reviewing her accomplishments on an objective scale, having someone review the decision with an eye on whether she might be the victim of discrimination, and simply informing individuals of the influences stereotypes can have should lead to some substantial reduction in the level of discrimination.

In her recent book, that Professor Wax cites favorably, Virginia Valian provides an example of a successful effort by the medical school at Johns Hopkins to remedy a pattern of disparate treatment against female faculty members. According to Professor Valian, upon investigation a committee determined that mentors invited male junior faculty to chair conferences six times more often than they invited women junior faculty.<sup>18</sup> Male junior faculty were also far more aware of the requirements for promotion than female faculty members. Both of these patterns of disparate treatment were significantly altered by implementing a few institutional policies, including broad awareness on the faculty of the pattern that had been discovered. As a result, while in 1990 there had been only four female associate professors, by 1995 there were twenty-six, and nearly twice as many female faculty members reported being advised of the criteria for promotion as had done so previously.<sup>19</sup> Valian concludes, "The Johns Hopkins program demonstrates that institutions can, with major efforts, significantly improve the

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<sup>16</sup>As Virginia Valian notes, "The development within the organization of objective criteria for success will help, for several reasons. Such criteria make the standards of judgment explicit; they allow employees to know what is expected for success and allow employers to guard against the tendency to use irrelevant criteria . . ." VIRGINIA VALIAN, *WHY SO SLOW?* 296 (1998).

<sup>17</sup>*See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

<sup>18</sup>VALIAN, *supra* note 16, at 320. To take an example from my own experience, in considering a young female lateral candidate, a male colleague commented that "her publication record was thin." He seemed to back off his criticism a bit when it was pointed out that she had published more articles in less time than he had. Whether this form of discrimination is termed conscious or unconscious—he denied that he was aware of any bias or disparate treatment in his assessment—again, it is not so difficult to remedy.

<sup>19</sup>*See id.*

status of their female employees.”<sup>20</sup> I, and others, have also argued that affirmative action plans can serve as monitoring devices to control discriminatory impulses, whether those impulses arise from conscious or unconscious forces.<sup>21</sup> To be sure, not every effort will be successful, but my sense is the prospects of improvement by eradicating subtle discrimination are greater than the likelihood that the efforts will fail. In any event, before we give up hope at eliminating subtle discrimination, whether it has an unconscious source or not, we surely need far greater evidence than Professor Wax has marshaled.

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<sup>20</sup>*Id.* The School of Science at the Massachusetts Institute of Technology recently embarked on similar changes to remedy what it now concedes were years of discriminatory treatment toward female professors. See Kate Zernike, *MIT Women Win a Fight Against Bias: In Rare Move, School Admits Discrimination*, BOSTON GLOBE, Mar. 21, 1999, at A1.

<sup>21</sup>See BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 13-17 (1996); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1296-98 (1995).

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On that score, let me say a few words about the evidence Wax collects, but I do want to restrict myself to a few words since I do not want to become embattled over proper interpretations of the literature, or devote time to expanding on the literature in any significant way. Rather, my intent is to highlight some of the limitations of the works Wax cites. First, her citations are actually quite limited in number, particularly given the depth of the social psychology literature, and she suggests a far greater consensus on the nature of unconscious discrimination than actually appears to exist. For example, within social psychology, there appears to be substantial disagreement on the prevalence and definition of unconscious discrimination, and perhaps more important, on the ability to control the use of stereotypes, a fact Professor Wax occasionally acknowledges through string citations in footnotes.<sup>22</sup> Professor Susan Fiske recently summarized the state of social psychology research on stereotyping, prejudice, and discrimination as follows:

Social psychological research, reviewed here in four major sections, explains that stereotyping, prejudice, and discrimination have (1) some apparently automatic aspects and (2) some socially pragmatic aspects, both of which tend to sustain them. But, as research also indicates, change is possible, for (3) stereotyping, prejudice, and discrimination seem individually controllable, and consequently, (4) social structure influences their occurrence.<sup>23</sup>

Many others have suggested ways in which stereotyping can be controlled or limited by the actor herself, and as noted earlier, installing review or monitoring devices can likewise limit the effect of an individual's judgment.<sup>24</sup> This is also an area where Wax seems to

<sup>22</sup>Wax, *supra* note 1, at 1164 n.105 ("As a general matter, research yields an uncertain answer on whether more or less 'individuating' information about targets make for better or more accurate judgments."); *see also id.* at 1140 n.24, 1141 n.26, 1142 n.29, 1167 n.115, 1168 n.116.

<sup>23</sup>Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, in 2 THE HANDBOOK ON SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998). Fiske concludes her summary by noting,

The bad news is that people's habitual use of subjectively diagnostic information, certain information configurations, and perceived covariation sustains stereotypes. . . .

The good news is that people can sometimes control even apparently automatic biases, if appropriately motivated, given the right kind of information, and in the right mood. People therefore *can* make the hard choice.

*Id.* at 391 (emphasis in original).

<sup>24</sup>For a sampling of the extensive literature suggesting that stereotyping can be controlled, see Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 627 (1993) ("Our main program of research . . . has been showing that social structure affects attention, and if people pay more attention, at least some of them are less likely to stereotype."); Susan T. Fiske & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, J. SOC. ISSUES, Spring 1995, at 97, 110-12 (discussing ways in which organizations can decrease the effect of stereotyping); Samuel L. Gaertner et al., *Reducing Intergroup Bias: Elements of Intergroup Cooperation*, 76 J. OF PERSONALITY & SOC. PSYCHOL. 388, 398 (1999) ("Any intergroup activity that induces the perception of common identity among the groups has the potential to reduce intergroup bias, with or without the components of intergroup cooperative interaction."); Steven L. Neuberg, *The Goal of Forming Accurate Impressions During Social Interactions: Attenuating the Impact of Negative Expectancies*, 56 J. OF

confuse two different concepts. As Patricia Devine has argued, “[A]lthough one may have *knowledge of a stereotype*, his or her *personal beliefs* may or may not be congruent with the stereotype. Moreover, there is no good evidence that knowledge of a stereotype of a group implies prejudice toward that group.”<sup>25</sup> In other words, it is one thing to suggest that all people have access to stereotypes, and quite another to suggest that those stereotypes will automatically control or determine behavior.

Even if one accepts the findings Wax relies on, the studies themselves tend to provide only limited support for the notion that stereotypes are either omnipresent or uncontrollable. This is in large measure due to the nature of the experiments, which tend to involve small numbers of undergraduate psychology majors, the results of which have not necessarily been replicated. Now, I do not mean to demean the nature of social psychology, but rather would urge caution before accepting the studies she cites as definitive, particularly when Wax wants to use them in such a strong fashion. Rather than being used to radically alter employment discrimination law, the studies are far more appropriate at assisting us in understanding the nature of unconscious discrimination.

Not only does the literature fail to provide the basis for her proposal, but it is also unclear what need there is to reduce claims based on unconscious discrimination. Throughout her article, Wax purports to be concerned primarily with the costs of such discrimination on employers, which would suggest that the litigation involving claims of unconscious discrimination is unduly expensive. Unduly, in this context, should mean either that the litigation results in excessive amounts of unfounded judgments against employers or that the costs of eradicating such discrimination exceeds the benefits of the effort. Neither claim has been substantiated; indeed, the evidence suggests exactly the contrary.

Even Professor Wax acknowledges that proving a claim of unconscious discrimination is exceedingly difficult.<sup>26</sup> Indeed, based on the existing data, it would be a stretch to suggest that discrimination of any kind was somehow too easy to prove. Only about fifteen percent of the employment claims filed with the Equal Employment Opportunity Commission result in any relief being awarded to the plaintiff, an extraordinarily low level of success when compared to other kinds of claims.<sup>27</sup> When Title VII cases were tried to a judge, only prisoner

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PERSONALITY & SOC. PSYCHOL. 374, 374 (1989) (arguing that having a goal of forming accurate impressions reduces the detrimental impact of negative expectancies); Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error*, 48 SOC. PSYCHOL. Q. 227, 233 (1985) (discussing how accountability or requiring people to justify their decisions can result in “debiasing” under certain circumstances).

<sup>25</sup>Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 5 (1989) (both emphases in original).

<sup>26</sup>Wax, *supra* note 1, at 1150-52.

<sup>27</sup>See Michael Selmi, *The Value of the EEOC: Reexamining the Agency’s Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 13 (1996). The EEOC’s most recent

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cases fared worse in federal court.<sup>28</sup> The situation has likely improved now that cases are tried to a jury, but a non-scientific review of recent case law suggests that appellate courts may be reversing jury verdicts at an alarmingly high rate.<sup>29</sup> There is simply no evidence that employment discrimination claims offer a bonanza for plaintiffs (or their attorneys), or that antidiscrimination law has substantially affected corporate profits based on unjustified court judgments.

It is also not at all clear what Professor Wax is so riled up about as she also suggests that unconscious decisionmaking only rarely influences employment decisions, in which case it is unlikely to be of particular concern to employers, unless of course, employers are expected to go to great lengths to avoid judgment in the few cases where unconscious decisionmaking might be established. But as an adherent of the rational-expectations framework, Professor Wax cannot make this claim; it would certainly be irrational for an employer to render an exaggerated response to limited potential liability.<sup>30</sup> Professor

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data indicate that the patterns of recovery continue. In fiscal year 1998, cause findings accounted for only 4.6% of the merits determinations made by the EEOC, and only 12.4% of their resolutions appeared to result in some relief for the individual who filed a charge. See *EEOC Charge and Resolution Statistics Through Fiscal 1998*, DAILY LAB. REP., Feb. 9, 1999, at E-4.

<sup>28</sup>See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1588 (1989) (documenting similar success rates in employment and prisoner cases).

<sup>29</sup>The most well-known recent example of an appellate reversal is *Mungin v. Katten, Munchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997), which was recently the subject of a book. See PAUL M. BARRETT, *THE GOOD BLACK* (1999). For other examples of recent reversals of jury verdicts in a wide variety of contexts, see *Tuttle v. Missouri Department of Agriculture*, No. 98-1686, 1999 US App. LEXIS 5445 (8th Cir. Mar. 26, 1999) (age discrimination); *Coggins v. Government of District of Columbia*, No. 97-2263, 1999 US App. LEXIS 2603 (4th Cir. Feb. 19, 1999) (race discrimination case); *Dietrich v. Northwest Airlines*, 168 F.3d 961 (7th Cir. 1999) (age discrimination); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (sexual harassment); *Baltazor v. Morris Holmes*, 162 F.3d 368 (5th Cir. 1998) (race and sex discrimination); *Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998) (age discrimination); *DeJarnette v. Corning, Inc.*, 133 F.3d 293 (4th Cir. 1998) (pregnancy discrimination); *Shank v. Kelly-Springfield Tire Co.*, 128 F.3d 474 (7th Cir. 1997) (age discrimination); *Combs v. Meadowcraft, Inc.* 106 F.3d 1519 (11th Cir. 1997) (race discrimination); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997) (retaliation claim); and *Black v. Zaring Homes, Inc.*, 104 F.3d 822 (6th Cir. 1997) (sexual harassment). Obviously, I do not intend for this list of cases to demonstrate that courts are reversing jury verdicts at a rate that is either biased against plaintiffs or that is higher than other claims. Rather, I only mean to suggest that it is my impression that there is an increasing trend towards reversing jury verdicts, as evidenced by the list of cases cited above. To say more than that would require a far more extensive and complicated empirical analysis.

<sup>30</sup>It has been well-demonstrated that employers often do make exaggerated responses to the threat of enormous punitive damages. See Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2077 (1998) (noting that a risk of extremely high awards can produce excessive caution). However, damages under Title VII and the Americans With Disabilities Act are capped at \$300,000, and the liquidated damages provision of the Age Discrimination in Employment

Wax might respond that, although unconscious impulses only occasionally infect the decisionmaking process, plaintiffs will always raise the issue and thus employers will be forced to litigate the extent of unconscious bias in every discrimination claim. This argument, however, carries little force; as noted, unconscious discrimination is difficult, not easy, to prove. To date, nearly every commentator has argued for a more relaxed standard of proof rather than the restrictive standard Wax advocates because these cases are so difficult and require a finder of fact who is willing to draw inferences from circumstantial evidence.<sup>31</sup> Moreover, there is a veritable absence of litigation over the unconscious nature of discrimination, an issue that is rarely raised in reported cases.<sup>32</sup>

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Act likewise limits the prospect of ruinous judgments, at least under federal law. *See* 42 U.S.C. § 1981a (1996); 29 U.S.C. § 626(b) (1996).

<sup>31</sup>*See, e.g.,* Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1507-18 (1997) (advocating a means of instructing fact finders on the presence of unconscious discrimination); Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 991-1017 (1993) (proposing a rule that would reconstruct the existing discriminatory intent standard); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1241-44 (1995) (advocating mixed motives standard); Charles Lawrence, *The Ego, the Id., and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 *passim* (1987) (advocating an impact standard for constitutional claims as a means of challenging unconscious discrimination); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 PA. L. REV. 899, 967-72 (1993) (urging negligence standard); Selmi, *supra* note 21, at 1255, 1296-308 (discussing use of affirmative action as a means to reduce unconscious discrimination).

<sup>32</sup>An electronic search of appellate cases for the terms "unconscious w/6 of discrimination" produced approximately a dozen cases involving employment discrimination, the vast majority of which involved the standard for proving wilfulness under the age discrimination statute. *See Oxman v. WLS-TV*, 12 F.3d 652, 657 (7th Cir. 1993) (noting that "[a]ge discrimination may be subtle and even unconscious"); *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1118 (10th Cir. 1991) (same); *Brown v. M&M/Mars*, 883 F.2d 505, 514 (7th Cir. 1989) (proof of unconscious discrimination does not rise to the level of wilfulness under the ADEA); *Burlew v. Eaton Corp.*, 869 F.2d 1063, 1066 (7th Cir. 1989) (same); *Brooks v. Woodline Motor Freight*, 852 F.2d 1061, 1064 (8th Cir. 1988) (describing age discrimination as often subtle and unconscious); *La Montagne v. American Convenience Prods.*, 750 F.2d 1405, 1410 (7th Cir. 1984) ("Age discrimination may be subtle and even unconscious."); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 925 (6th Cir. 1984) (Wellford, J., dissenting) (unconscious discrimination does not rise to a level of wilfulness under ADEA); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1184 n.12 (6th Cir. 1983) (same); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 757-78 (7th Cir. 1983) (same); *Syvoek v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 156 (7th Cir. 1981) (same). Outside of the age discrimination context, courts have mentioned "unconscious discrimination" infrequently and only in passing. *See Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 200 (3d Cir. 1994) (Alito, J., dissenting) ("Putting aside the question of whether, as a matter of law, a plaintiff in a disparate treatment case may prevail based on evidence of 'unconscious' discrimination, it seems to me that the plaintiff's reliance on this unconventional theory substantially diminished the probative value of the evidence of harassment . . ."); *Thomas v. California State Dep't of Corrections*, No. 91-1587, 1992

## II. THE PURPORTED ECONOMICS OF UNCONSCIOUS DISCRIMINATION

The last third of Wax's article is devoted to what might loosely be defined as the economics of unconscious discrimination, and for the most part treads familiar ground. Rather than working through her analysis in a point-counterpoint way, I will initially render some general observations and then critique several of her ideas in more detail.<sup>33</sup> First, it is important to keep in mind that Wax's analysis is dependent on the view that unconscious discrimination cannot be controlled or deterred; to the extent it can be, as discussed above, the cost calculus would be quite different from what she assumes and most of her analysis would be irrelevant to the question she seeks to address. Second, it may be worth noting that our antidiscrimination laws have been in place now for at least thirty-five years and if there were any substance to her argument, we would very likely already have witnessed the parade of horrors that she forecasts regarding how antidiscrimination enforcement will hurt those it is intended to help, drive costs up unreasonably, and lead to a general loss of social welfare. Indeed, one of the advantages of predicting the past is that there tends to be data to assist in the prediction. Yet, Wax never mentions or alludes to the vast literature on the effect that antidiscrimination laws have had on the employment condition of women and

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U.S. App. LEXIS 20346, at \*8-9 (9th Cir. Aug. 18, 1992) ("Were we to hold that the unsupported claim that a particular candidate was a 'superior' interviewee was sufficient without more to require summary judgment for an employer, we would immunize from effective review all sorts of conscious and unconscious discrimination."); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1273 (10th Cir. 1988) ("[S]ex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts.") (quoting *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106, 114 (1st Cir. 1979)); *Namenwirth v. Board of Regents of the Univ. of Wis.*, 769 F.2d 1235, 1243 (7th Cir. 1985) ("[F]aculty votes should not be permitted to camouflage discrimination, even the unconscious discrimination of well-meaning and established scholars."); *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 135 (7th Cir. 1985) ("[I]n view of the difficulty in proving discriminatory intent where the employer is too sophisticated to implicate itself or where the discrimination is subtle or unconscious, the prima facie threshold offers the plaintiff an opportunity to prove discriminatory intent indirectly."); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984) (noting that "patently subjective evaluations could easily mask covert or unconscious race discrimination"); *Wright v. National Archives & Records Serv.*, 609 F.2d 702, 713 (4th Cir. 1979) (stating that disparate impact law has "been a mighty instrument in correcting the more subtle and sometimes unconscious forms of discrimination").

<sup>33</sup>One point that requires response is her argument that our current system amounts to a form of strict liability, a claim that ignores much of the law that has developed around the antidiscrimination statutes. Although it is true that an employer may be held liable for a decision tinged with unconscious bias, however defined, the employer is presumed to have control over that decision. For example, an employee cannot be fired without the employer being aware of the firing, just as an applicant cannot be hired without the employer having knowledge of that decision at some level. This is not to say that some entity or person called the employer is charged with actual knowledge any more than it is to say that the employer is charged with actual knowledge of a decision that results in exposure in a products liability suit. Accordingly, her analysis distorts the meaning of strict liability by suggesting that strict liability flows any time the principal is liable for the action of its agents.

minorities, most of which suggests that the legal apparatus has appreciably improved the condition of women and minorities, though some of the studies suggest that social forces may be equally or more responsible.<sup>34</sup>

Another critical operative assumption underlies Wax's argument, one that has long animated critiques of existing laws. When all is said and done, Professor Wax simply does not see discrimination as much of a problem for the workplace; her world view is that employers do not discriminate often, and plaintiffs complain about discrimination at levels that far exceed its occurrence. This view repeatedly seeps through her analysis—to take but one example, Wax continually highlights the potential adverse social costs from what she labels diversity programs,<sup>35</sup> failing to ever balance the costs against the benefits. Later, Wax reveals her hand even more clearly when she notes that “a liability system targeted at unconscious disparate treatment cannot operate without a considerable amount of error.”<sup>36</sup> True enough, but the error goes in both directions: there is certainly nothing to suggest that an employer would bear the weight of all errors, and there is not even anything to suggest that more of the costs of error will fall on employers than employees. She simply does not acknowledge the costs of discrimination, and it seems, in large measure because she simply does not believe that discrimination imposes any significant degree of costs on society.

When her assumptions are unearthed, it is not difficult to see how Wax comes out as she does. If one accepts that there is little unconscious discrimination in the workplace, but that whatever discrimination does exist is practically impossible to control or deter, then it follows almost naturally that it would be socially wasteful to engage in what will likely be futile efforts to eradicate discrimination. Each of these assumptions, however, is contestable and ultimately empirically grounded, and Wax has failed to establish any of them conclusively.

Not only are her assumptions unfounded but her economic analysis is likewise misguided. This can be illustrated by Wax's attack on one of the chestnuts of neoclassical economics to which she otherwise attempts to closely adhere. At one point, Wax argues, contrary to the neoclassical school, that competitive labor markets are unlikely to eliminate unconscious discrimination for a variety of reasons, but primarily because of the control issue.<sup>37</sup> Generally such a conclusion would be treated as identifying a market failure that would support governmental regulation of some sort, but here Wax is so intent on avoiding imposing any costs on employers that she moves instead to a discussion of whether we should treat the

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<sup>34</sup>For a recent discussion of the effect of affirmative action on employment, see BARBARA F. RESKIN, *THE REALITIES OF AFFIRMATIVE ACTION IN EMPLOYMENT* (1998). For additional empirical analyses of the effect antidiscrimination laws have had, see John J. Donohue III & James Heckman, *Continuing Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991), and Jonathan S. Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, J. ECON. PERSP., Fall 1990, at 47. For an influential argument regarding the limited ability of the law to create the conditions for social change, see GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991).

<sup>35</sup>Wax, *supra* note 1, at 1190 n.173.

<sup>36</sup>*Id.* at 1194.

<sup>37</sup>*Id.* at 1296-98.

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victims of discrimination as the cheapest cost avoiders. And it is here where her flawed analysis is perhaps most easily exposed.

More than anything else, Wax's suggestion that victims might be in the best position to avoid the costs of discrimination reveals her own biases and interests. For example, in her Part II.C.7, Wax comments repeatedly that potential victims of discrimination can likely reduce their chances of being a victim by improving their credentials, changing their appearances, or becoming model employees.<sup>38</sup> This kind of argument suggests that most discrimination is largely deserved or trivial: if women and minorities would work harder and become more like the dominant worker, presumably a white male, then they would find that discrimination will recede. But this argument ignores everything we know about discrimination, including the very concept of discrimination itself. As Wax well knows, discrimination befalls strong as well as weaker employees.<sup>39</sup> More to the point, her analysis also fails to grapple with the very meaning of disparate treatment. Even if it were somehow true that African Americans or women could avoid some discrimination by becoming a model employee, the law clearly states that it would still be unequal, and thus unlawful, treatment if African Americans or women were required to perform at a level that exceeds that required of their white male counterparts as a way of avoiding discrimination. To the extent Wax is arguing that black employees need only work up to the level of whites, then she is suggesting that black employees currently perform deficiently and thus deserve the disparate treatment they receive, a claim for which she provides no evidence whatsoever. Similarly, to the extent that Wax is contending that women should become more like men in order to reduce their probability of discrimination, that sounds like a definition of discrimination rather than a means of avoiding discrimination.

Even more remarkably, Wax's cost-benefit analysis leaves out the costs, as she never bothers to pause to consider the harm that is caused to the victims of discrimination other than in reduced productivity or possibly lost income. In fact, in a breathtaking paragraph, she suggests that discrimination might actually make the victims work harder to recover their income loss,<sup>40</sup> implying that what we really need is a lot more discrimination to improve employee productivity. If this were not enough, although she cites some of the extensive literature discussing why discrimination is likely to lead to reduced investments in human capital by the victims of that discrimination, including the work of well-known economists, one of whom has a Nobel prize in his portfolio, her three-page response includes a solitary citation to support her argument that discrimination may encourage

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<sup>38</sup>See *id.* at 1200 (emphasizing "background, education, appearance, grooming, demeanor, manners, speech patterns, work habits, personal conduct, and personality type"); *id.* at 1200 n.205 ("A black man with an honors engineering degree from Harvard, for example, might avoid triggering presumptions that would attach for someone with a degree in sociology from a lesser known institution."); *id.* at 1202 (emphasizing that a person can avoid adverse treatment "by look[ing] for ways to be a better employee").

<sup>39</sup>It can also find its way into the presumably most rational of the rational. See Van W. Kolpin & Larry D. Singell, Jr., *The Gender Composition and Scholarly Performance of Economics Departments: A Test for Employment Discrimination*, 49 *INDUS. & LAB. REL. REV.* 408 (1996) (documenting the presence of gender discrimination in economics departments).

<sup>40</sup>See Wax, *supra* note 1, at 1207-08.

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productivity.<sup>41</sup> Wax errs in large part by concentrating on how particular individuals might respond to discrimination, whereas, social welfare involves the aggregate response.<sup>42</sup> Although some individuals may respond to discrimination by working harder, the literature seems rather conclusive that the aggregate effect is likely to depress investments in human capital.<sup>43</sup> As such, Wax clearly stretches matters when she suggests that this is an idea that ought to be taken seriously, or that treating the victims of discrimination as the cheapest cost avoiders may be the best we can do in an imperfect market. We are already doing much better under our existing model.

The reason Wax's analysis rolls so far off-track is she seems to believe that efficiency is the touchstone of any legal system, and that an efficient antidiscrimination system is measured solely by its effects on employers. Most people would contend that our legal system proscribes discrimination because it is wrong not because it is an inefficient business practice. As noted earlier, there is nothing to suggest that our laws were designed to prohibit discrimination only to

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<sup>41</sup>*See id.* at 1205 n.217. Consider how her argument might play in a financial investment scenario. Suppose investor *A* receives a return of 20% on his investment in Company *X*, while investor *B* receives only 5% on her same investment. According to Wax, this scenario should produce even greater welfare as investor *B* saves more money and works harder to increase her wealth, given that she will have less income than if she received the higher rate. Surely, in a financial market we would not countenance either her argument or such discriminatory treatment.

<sup>42</sup>*Id.* at 1204-05 (“More likely the true picture is far more mixed, with different people responding in different ways.”).

<sup>43</sup>*See, e.g.,* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 645 (1999) (discussing the effects of discrimination in suppressing incentives to invest in human capital); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2419 (1994) (“Because of existing discrimination, members of the relevant groups will invest less in human capital.”); Reuben Gronau, *Sex-Related Wage Differentials and Women's Interrupted Labor Careers—the Chicken or the Egg*, 6 J. LAB. ECON. 277, 285-86 (1988) (suggesting that women's lower investments in human capital are likely the result of lower market opportunities); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2168 (1994) (“In a market that contains such discrimination, blacks and women will invest relatively less in such programs.”); Shelly J. Lundberg & Richard Startz, *Private Discrimination and Social Intervention in Competitive Labor Markets*, 73 AMER. ECON. REV. 340 (1983) (explaining how statistical discrimination can reduce incentives to invest in human capital); Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, SOC. PHIL. & POL., Spring 1991, at 22, 29 (explaining why discrimination reduces incentives to invest in human capital); Peter P. Swire, *Equality of Opportunity and Investment in Creditworthiness*, 143 U. PA. L. REV. 1533, 1537-41 (1995) (arguing that groups subject to discrimination will generally invest less in creditworthiness). As far as I can tell the only other person who has suggested that discrimination may create positive incentives is Richard Epstein. Richard Epstein, *Standing Firm on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 13 n.27 (1994) (suggesting that blacks and women currently invest in human capital because “if one expects hostile treatment, then it pays to be a bit better to overcome the poor reception”).

the extent it was cost-effective to do so,<sup>44</sup> yet that seems to be Wax's exclusive focus, which can be revealed through her discussion of deterrence.

Indeed, Wax curiously eschews a theory that would almost certainly reduce the costs of detection, while eliminating greater levels of discrimination. The costs of detecting discrimination could perhaps be most effectively reduced by lowering the bar on claims of discrimination, rather than raising them as she advocates. One primary reason it is currently so difficult to identify subtle discrimination is that people differ over what properly constitutes discrimination, what acts and behavior should be labeled as discriminatory so as to create liability, and these differences can produce considerable and expensive litigation. If we were to change the legal definition so as to make it easier to prove discrimination, it would correspondingly be cheaper to identify that discrimination as the costs of detection are directly related to our definition of discrimination, a variant of the old rules versus standards conundrum. This suggestion, however, presumes that Wax is concerned with the cost of detecting discrimination rather than the cost of that discrimination as measured through liability judgments.

Whether we decide to raise or lower the bar of proof might depend, at least in part, on whether as a society we would prefer to over or underdeter discriminatory behavior. Assuming a system of perfect deterrence, however measured, is not feasible, then the answer to the starkly framed question should be obvious: we should prefer overdeterrence.<sup>45</sup> Absent some substantial costs, there is no apparent value to discrimination, and our goal should be, and has been stated as, deterring discrimination to a level of zero.<sup>46</sup> Obviously, overdeterrence may have its costs—at a certain level, employers may become more hesitant to hire members of protected groups as a means of avoiding liability, or they may impose unduly harsh work rules or procedures that would result in a less pleasant or demeaning workplace. Employers may also retain unproductive employees as a way of avoiding litigation costs at a higher level than they might otherwise do without the fear of litigation. These costs may be real,<sup>47</sup> but so too are the costs of discrimination, and in deciding where to draw the line, we have to keep in mind the more difficult discrimination is to prove, the less discrimination we will remedy. It is simply not possible to craft a perfect system, one in which only the meritorious claims of discrimination would succeed, and in drawing the line of liability we have to always balance the various considerations. Currently it appears the tide is clearly toward drawing a line that favors employers, but that form of line-drawing only makes sense if we want to protect employers.

Ultimately, the same is true of Professor Wax's argument: it only makes sense if we want to offer greater protection to employers. Two questions remain

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<sup>44</sup>I do not mean to suggest that we should ignore the costs of enforcement, only that they should not be the sole or determinative factor in the analysis.

<sup>45</sup>Professor Wax, in contrast, never even mentions the problem of underdeterrence.

<sup>46</sup>This is what is generally referred to as complete deterrence, which is frequently contrasted with optimal deterrence whereby we seek to reduce the targeted behavior, in this instance, discrimination, to some socially optimal level. For a recent economic discussion of these various deterrence theories, see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998).

<sup>47</sup>It is worth noting, however, that the damage caps to Title VII protect against excessive overdeterrence.

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unanswered, however: why would we want to do that? And, more importantly, where in Title VII, or any of the antidiscrimination laws, do we find a statement that, whenever feasible, the statute should be construed with a primary concern for reducing costs on employers? Such a proposition is not in my copy, and when I look in my normative file, it is not in there either.