

NOTE

HOW CONGRESS COULD REDUCE JOB DISCRIMINATION BY PROMOTING ANONYMOUS HIRING

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The Supreme Court's recent decision in Wal-Mart Stores, Inc. v. Dukes made clear that Title VII can do little to address the problem of unintentional bias in employment decisions. This Note proposes a new legal solution to that problem: Congress should encourage firms to hire anonymously. The case for anonymous hiring—stripping resumes of all information related to race or sex, and eliminating selection interviews—rests on two lines of psychology research. First, experiments show that unconscious bias infects resume review and selection interviews, causing even well-intentioned employers to discriminate. Second, dozens of psychology studies suggest that interviews are poor tools for predicting job performance. Together, these studies suggest that anonymous hiring should both decrease discrimination and help firms hire more productive workers. This conclusion is counterintuitive, however, and firms need an incentive to hire anonymously. A new statutory defense to Title VII disparate treatment claims would provide that incentive, reducing liability insurance premiums for anonymous hirers. A fraud exception to this defense, together with continued disparate impact liability, would prevent firms from using anonymous hiring as a shelter for discrimination. Furthermore, anonymous hiring could incorporate affirmative action to break ties among similarly qualified applicants. The policy would also reduce hiring discrimination based on weight, size, or attractiveness—without changing federal law to protect those characteristics directly.

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INTRODUCTION

After the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, class action plaintiffs cannot succeed in Title VII disparate treatment claims without evidence of individual intent to discriminate.¹ Unfortunately, most job discrimination is not intentional. Title VII, designed to end the open exclusion of women and minorities from the workplace of the 1960s, is ill-suited to the subtle task of preventing unconscious bias. Yet proposals to modify the law tend to be ambitious and politically infeasible, often suggesting a looser intent requirement or broader rulemaking and injunctive power for the EEOC.² This Note offers a more modest proposal. In one area of employment discrimination—hiring—the law could take account of implicit bias without a large legislative or administrative project.

Employers can only hire on the basis of race or sex if they know the race or sex of the applicants they are considering. Title VII should therefore encourage employers to hire anonymously. Obscuring the identity of applicants, by removing names and addresses from applications and eliminating interviews, would make implicit biases irrelevant. Employers may protest that interviews are necessary for good hiring decisions, but a long, often-ignored line of psychology research has demonstrated the opposite: in-person appraisal is usually worse than statistical or actuarial evaluation at predicting performance. Eliminating interviews would help many firms select better employees.³

1. 131 S. Ct. 2541, 2557 (2011); *see infra* text accompanying notes 19-24.

2. *See infra* text accompanying notes 26-29.

3. Jerry Kang and Mahzarin Banaji have suggested that firms could anonymize resumes and eliminate interviews as a possible alternative or supplement to affirmative action. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1094-95 (2006). This Note takes their suggestion further, working out the details of an anonymous hiring policy and suggesting a statutory incentive for firms to adopt the policy.

Recognizing that a law mandating anonymous hiring would be both overbroad and politically infeasible, I propose a voluntary scheme in which employers could hire anonymously in exchange for immunity from disparate treatment hiring claims. In order to survive a motion to dismiss, a disparate treatment hiring claim against an employer with an anonymous hiring system would have to allege, under a heightened pleading standard, that the decision was not in fact anonymous. Adopting anonymous hiring would therefore reduce firms' liability risk, lowering their premiums on insurance against employment practices liability. At the same time, the continued threat of disparate impact claims would prevent employers from adopting anonymous hiring procedures that systematically exclude minorities. If many hiring discrimination suits are frivolous, as some claim,⁴ an anonymous hiring defense would protect firms from such suits at little cost. And the defense would also protect firms from meritorious hiring discrimination suits—by preventing the discrimination that gives rise to them. Firms should therefore be eager to adopt the defense, regardless of whether anonymous hiring would end unintentional discrimination or merely prevent frivolous litigation. Similarly, workers' rights advocates should support an anonymous hiring defense because it would effectively end unconscious bias in hiring at the firms that adopt it.

In Part I of this Note, I describe the problem of second-generation employment discrimination and briefly outline existing legal remedies for such discrimination, which are more limited than ever after *Dukes*. In Part II, I explain why anonymous hiring would almost certainly reduce hiring discrimination, and summarize the psychology literature demonstrating that job interviews are unnecessary at best. In Part III, I offer a statutory proposal for an anonymous hiring defense to disparate treatment claims, including a fraud exception, and defend the statute as a novel but incremental measure to counter implicit biases without a new and politically contentious regulatory regime. I also describe how the scheme could incorporate affirmative action to break ties in the hiring process. Part IV argues that the proposed immunity could persuade a significant number of firms to adopt an anonymous hiring policy. Part V addresses several objections to the scheme, and contends that it would be less costly than traditional hiring and that adverse selection effects would increase the incentive to participate. Finally, in the Conclusion, I argue that the scheme is politically feasible—or at least more feasible than the broad structural changes that legal scholars have often advocated.

4. See, e.g., Gerald E. Calvasina et al., *Frivolous Employment Discrimination Litigation: Myth or Reality?*, 6 J. LEGAL ETHICAL & REG. ISSUES 27, 28 (2003) (describing complaints of frivolous employment discrimination litigation, and finding that they are likely exaggerated).

I. THE PROBLEM OF IMPLICIT BIAS

Title VII of the Civil Rights Act of 1964,⁵ as interpreted by the Supreme Court, allows both *disparate treatment* and *disparate impact* claims.⁶ A successful disparate treatment claim requires showing *intentional* discrimination on the basis of race, color, religion, sex, or national origin.⁷ Although plaintiffs can successfully bring intentional discrimination claims where an employer acted with “mixed motives”—both a discriminatory and nondiscriminatory purpose—the basic showing of purpose remains necessary.⁸

Disparate impact claims, by contrast, require no showing of intent, but they are also less likely to be lucrative. Only injunctive relief (including back pay) is available, and courts have generally limited disparate impact claims to the narrow area of standardized employment tests.⁹

Although disparate treatment claims are more common and more lucrative, most employment discrimination is likely unintentional. A large literature in sociology and psychology documents the influence of unconscious bias in interpersonal decisions.¹⁰ For example, when experimental subjects are randomly placed in groups, they begin to favor members of their own group and become more inclined to remember negative attributes of members of the out-group.¹¹ Social cognition experiments have also found that subjects evaluate the performance of a person from a minority group more harshly when he or she is the only member of that group present in an interaction.¹² Similarly, subjects more frequently ascribe unusual characteristics to a minority group, even when that

5. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

6. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971) (allowing showing of discrimination based on disparate impact). Although the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, are often considered together with Title VII, I only propose anonymous hiring as a defense to Title VII claims. Anonymous hiring could not realistically counter age discrimination, since work experience listed on resumes is likely to reveal applicants' ages. Similar problems might arise in anonymizing the resumes of disabled applicants.

7. 42 U.S.C. § 2000e-2(a).

8. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (holding that direct evidence is not required for a plaintiff requesting a mixed-motive jury instruction in a Title VII case).

9. See Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (arguing that the disparate impact theory has mainly been applied to written employment tests, and that disparate impact plaintiffs are rarely successful).

10. See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (surveying the literature on implicit bias and proposing changes to the disparate treatment cause of action to make claims of unintentional discrimination easier); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (documenting the problem of unconscious discrimination and proposing a regulatory solution).

11. Krieger, *supra* note 10, at 1191-93.

12. *Id.* at 1193.

group is only identified as Group B.¹³ The cumulative effect of in-group bias leads people to adopt inaccurate stereotypes that affect their interaction with others.¹⁴ Such unconscious bias influences hiring, promotion, and dismissal decisions, particularly when employers have discretionary personnel policies.¹⁵

Legal responses to the problem of unconscious discrimination have been few and, by many accounts, inadequate.¹⁶ Since the Civil Rights Act of 1991, which increased the damages available for intentional discrimination and introduced jury trials in Title VII actions,¹⁷ Congress has not altered antidiscrimination law to account for the increasingly well-known consequences of unconscious bias. Although plaintiffs' lawyers have often argued—sometimes with success¹⁸—that evidence of widespread disparities demonstrates discriminatory intent, that argument is now unavailing.

The Supreme Court made clear in *Dukes* that plaintiffs can no longer use disparate treatment claims to attack discretionary employment practices that enable unconscious bias, even if management is aware of the problem. In *Dukes*, the Court reversed the trial court's certification of a class of nearly 1.5 million women who claimed that Wal-Mart's pay and promotion policy intentionally discriminated against women.¹⁹ That policy delegated pay and promotion decisions to local managers, who were generally not required to base their decisions on objective criteria.²⁰ The plaintiffs supported the claim of intentional discrimination by assembling expert testimony on the discriminatory effects of subjective decisionmaking, statistical evidence of women's disadvantage in pay and promotion, and anecdotal evidence of discrimination.²¹ The Court held that the class failed to satisfy the commonality requirement of Federal Rule of Civil Procedure 23(a) because the record, which depended on region-by-region statistical evidence, did not demonstrate that discrimination had occurred in particular stores or had affected all class members in the same manner.²²

13. *Id.* at 1196.

14. *Id.*

15. Sturm, *supra* note 10, at 468-74.

16. The inadequacy of the current legal framework is the starting point for the proposed reforms discussed by Sturm and Krieger, among others. *See infra* text accompanying notes 26-29.

17. Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. § 1981a (2006)).

18. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (holding that statistics may demonstrate a pattern or practice of discrimination in a disparate treatment action); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2563 n.4 (2011) (Ginsburg, J., concurring in part and dissenting in part) (citing *Teamsters*, 431 U.S. at 339, for the proposition that "statistical evidence alone may suffice" in showing discrimination).

19. 131 S. Ct. at 2547, 2556-57.

20. *Id.* at 2547.

21. *Id.* at 2549.

22. *Id.* at 2555.

Although the Court considered only the question of class certification, the opinion acknowledged that “proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.”²³ Addressing that contention, the Court squarely rejected the legal theory that discretionary employment practices, even if linked to discriminatory outcomes, can be the basis of a disparate treatment claim under Title VII: “Merely showing that Wal-Mart’s policy of discretion has produced an overall sex-based disparity does not suffice.”²⁴

Title VII, with its intent requirement, was always an unlikely vehicle for attacking unconscious discrimination, and *Dukes* made clear that what was unlikely is now virtually impossible. David Freeman Engstrom drew out this implication in his commentary on the *Dukes* decision:

Damages suits, some have argued, are particularly ill-suited to remedying “second generation” discrimination in which patterns of inequality result from “implicit” or “subconscious” forms of bias and often cannot be traced to particular decision-making nodes. Indeed, the *Dukes* plaintiffs, by linking local managerial discretion to broader statistical patterns, were part of a wider effort to adapt Title VII to these changing workplace realities.²⁵

The Supreme Court has now decided that this effort will not succeed.

Dukes makes the present a particularly good moment to consider other solutions to the problem of unconscious discrimination. There is no shortage of proposed solutions, but most require large-scale reform. Linda Krieger suggests creating two tiers of disparate treatment claims, one for treatment in which the plaintiff’s “protected group status played a role,” and the second for willful discriminatory treatment.²⁶ David Oppenheimer suggests a negligence standard for discriminatory employment decisions.²⁷ Susan Sturm argues in favor of a “structural” scheme that would depend on cooperative enforcement of antidiscriminatory measures, where lawyers and legal norms would provide parameters within which a range of actors could come up with measures against subtle discrimination.²⁸ Julie Suk suggests granting the EEOC injunctive and rulemaking powers in order to deter discrimination more effectively, moving the focus in employment discrimination law from corrective justice to distributive justice.²⁹

23. *Id.* at 2552.

24. *Id.* at 2556.

25. David Freeman Engstrom, *Civil Rights Rollback: The Significance of Walmart v. Dukes*, BOS. REV. (June 23, 2011), http://www.bostonreview.net/BR36.4/david_freeman_engstrom_walmart_discrimination_supreme_court.php.

26. Krieger, *supra* note 10, at 1242-43.

27. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993).

28. Sturm, *supra* note 10, at 522-30.

29. Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 465-66, 469-73.

The anonymous hiring proposal suggested here is not a substitute for any of the above proposals. Rather, it is a limited measure that could achieve some of these scholars' goals without broad changes either to Title VII or to the powers of the EEOC.

II. WHY ANONYMOUS HIRING?

Getting hired is more difficult for women and racial minorities. In a 2003 study, economists Marianne Bertrand and Sendhil Mullainathan sent fictional resumes in response to help-wanted ads in newspapers in Chicago and Boston, placing typically white names on some and typically black names on others.³⁰ Resumes with typically black names were fifty percent less likely than otherwise similar white-named resumes to lead to an interview request.³¹ Resumes with typically black names also benefited less from higher qualifications than resumes with typically white names.³² The results did not vary across different industries, and they held even for employers with explicit equal opportunity or affirmative action policies.³³

Minority applicants who are lucky enough to receive a callback face additional discrimination when they meet a prospective employer in person: Implicit bias also contaminates selection interviews. When white college students watch recorded excerpts of interviews of black and white candidates with similarly ambiguous credentials for a job, they are more likely to choose the white candidate.³⁴ Interviewers' unconscious bias also affects interviews indirectly by making interactions awkward and leading the interviewee to perform worse.³⁵

Discrimination in resume review and selection interviews leads to other forms of employment discrimination. Firms with more formal personnel policies—unlike the discretionary policies at issue in *Dukes*—are more likely to hire and retain minorities.³⁶ Extended exposure to and cooperation with people from minority groups reduces implicit bias;³⁷ that reduction cannot occur if

30. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991-92 (2004).

31. *Id.* at 992.

32. *Id.*

33. *Id.*

34. Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 377, 383-84 (Laura Beth Nielsen & Robert L. Nelson eds., 2005).

35. Kang & Banaji, *supra* note 3, at 1094-95.

36. Stephen S. Kulis & Heather E. Shaw, *Racial Segregation Among Postsecondary Workers*, 75 SOC. FORCES 575, 577 (1996).

37. *See, e.g.*, Lori Beaman et al., *Powerful Women: Does Exposure Reduce Bias?*, 124 Q.J. ECON. 1497 (2009) (finding that randomly assigned gender quotas in Indian village councils reduced negative attitudes towards women in leadership roles); Samuel L. Gaertner

women and minority applicants are not hired in the first place. If fewer minorities are hired, discriminatory attitudes are more likely to persist.

What to do? The best way to combat implicit biases is to prevent them from operating in the first place. In hiring decisions, that would require not only eliminating race- and sex-identifying information from resumes, but also eliminating in-person and telephone interviews. Both changes are necessary: interviewers' implicit biases at the interview stage would eliminate the advantages of anonymity at the resume stage. This prescription may shock employers who believe that interviews are a valuable means of making hiring decisions, but those employers are almost certainly wrong.

A long line of psychology studies demonstrates that interviews are less useful than most believe and may actually make hiring decisions worse. In 1939, in one of the first such studies, Theodore Sarbin gathered the academic records of 162 freshmen at the University of Minnesota.³⁸ Using a simple regression equation, he predicted their college grades based on their high school class rank and aptitude test scores. Next, he asked five clinicians to predict the college grades of the same students, giving them access to the same information, as well as "additional tests of aptitude, achievement, vocational interest, and personality; an eight-page individual record form; a preliminary interviewer's form and impressions"—and an in-person interview with the evaluating counselor.³⁹ The regression equation was slightly more accurate in predicting college success than the clinicians, although the difference was not statistically significant.⁴⁰

In 1954, Paul Meehl, a Minnesota psychology professor, published *Clinical Versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence*, arguing that clinical methods of predicting behavior—expert in-person evaluations—were usually inferior to statistical or actuarial ones.⁴¹ At the time, Meehl relied on approximately twenty studies comparing the two methods. Most reached results similar to Sarbin's. One compared the success of prison psychiatrists in predicting prisoners' recidivism to the predictive success of a

et al., *How Does Cooperation Reduce Intergroup Bias?*, 59 J. PERSONALITY & SOC. PSYCHOL. 692, 692-93 (1990) (citing studies demonstrating that cooperation reduces intergroup bias, and attempting to identify the psychological mechanism at work).

38. Theodore R. Sarbin, *A Contribution to the Study of Actuarial and Individual Methods of Prediction*, 48 AM. J. SOC. 593, 594 (1943).

39. *Id.*

40. *Id.*

41. See PAUL E. MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE* (1954); see also William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 293-94 (1996) (describing the history of the controversy and mentioning Meehl's original book).

crude actuarial model.⁴² The psychiatrists were slightly better than the model at predicting parole success, but much worse than the model at predicting recidivism.⁴³ Another study compared clinical and actuarial predictions of successful completion of electroshock therapy, with even stronger results for the actuarial method.⁴⁴

Meehl's book created a controversy among psychologists, who conducted 136 studies over the next four decades on the topic, nearly all confirming Meehl's results.⁴⁵ Despite this frequent confirmation, however, interviewers and clinicians continue to ignore those results. Reassessing the debate in 1996, Grove and Meehl made their frustration clear:

We know of no social science controversy for which the empirical studies are so numerous, varied, and consistent as this one. Antistatistical clinicians persist in making what Dawes calls the "vacuum argument," in which (imagined, hoped for) supportive evidence is simply hypothesized, whereas negative evidence that has actually been collected is ignored. For example, "But clinicians differ; some are better than others." Reply: "True, but even the best ones don't excel the equation." "But even the best ones were naive; they should have feedback so as to improve their performance." Reply: "The effectiveness of feedback is not a robust finding and is small." "But they were not given the right kind of feedback," and so forth. . . . When we have 136 interpretable studies with only 5% deviant, ranging over a wide diversity of predictands (e.g., winning football games, business failures, response to shock therapy, parole violation, success in military training), it is time to draw a conclusion "until further notice," the more so as the facts are in accord with strong theoretical expectations.⁴⁶

Grove and Meehl are not alone in their frustration, and their results have held up just as well for job interviews as for parole success and university admissions. A much-cited 1982 article reviewing recent research, for example,

42. See *id.* at 293 (citing E.W. Burgess, *Factors Determining Success or Failure on Parole*, in *THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS* 205 (A.A. Bruce ed., 1928)).

43. *Id.*

44. *Id.* at 294 (citing M.P. Wittman, *A Scale for Measuring Prognosis in Schizophrenic Patients*, in 4 *ELGIN PAPERS* 20 (1941)).

45. William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 *PSYCHOL. ASSESSMENT* 19, 21-24 (2000) (conducting meta-analysis of 136 studies and finding that, on average, actuarial methods were about ten percent more accurate than clinical methods, with no variation for type of task or type of clinician); see, e.g., James O. Mitchel, *Assessment Center Validity: A Longitudinal Study*, 60 *J. APPLIED PSYCHOL.* 573 (1975) (finding that clinical assessors were no more or less successful than actuarial models at predicting managers' future earnings); W. Stephen Royce & Robert L. Weiss, *Behavioral Cues in the Judgment of Marital Satisfaction: A Linear Regression Analysis*, 43 *J. CONSULTING & CLINICAL PSYCHOL.* 816, 817, 821 (1975) (finding that a linear regression model based on behavioral cues picked up in a married couple's conversation was more accurate than college students' judgments based on those cues, likely because the students did not optimally weigh the cues).

46. Grove & Meehl, *supra* note 41, at 318-19 (citation omitted).

concluded by asking “why use of the [employment] interview persists in view of evidence of its relatively low validity, reliability, and its susceptibility to bias and distortion.”⁴⁷

Part of the answer lies in the “illusion of validity,” identified by psychologists Daniel Kahneman and Amos Tversky in a now-canonical 1973 article:

Like other perceptual and judgmental errors, the illusion of validity often persists even when its illusory character is recognized. When interviewing a candidate, for example, many of us have experienced great confidence in our prediction of his future performance, despite our knowledge that interviews are notoriously fallible.⁴⁸

Accepting the evidence of implicit biases in hiring and of the uselessness of interviews, a policy prescription emerges: employers should anonymize hiring and eliminate interviews.⁴⁹ Like affirmative action, anonymous hiring should help minority candidates get hired. But unlike affirmative action, which accepts a tradeoff between qualifications and diversity in hiring, anonymous hiring should yield better-qualified employees.

This prediction has proven correct in perhaps the only industry that already hires anonymously: symphony orchestras. Before the 1970s, orchestras openly discriminated on the basis of sex. Zubin Mehta, the conductor of the New York Philharmonic from 1978 to 1990, once said, “I just don’t think women should be in an orchestra,”⁵⁰ and the Vienna Philharmonic only began accepting women as full members in 1997.⁵¹ In 1965, women accounted for less than ten percent of the membership of America’s five best-known orchestras.⁵² In the 1970s and 1980s, however, orchestras introduced blind auditions, in which applicants played behind screens shielding them from the view of evaluators. In some cases, hiring committees even provided rugs to mask the clicking of women’s high heels.⁵³

Orchestras implemented blind audition policies at different times, and in the 1970s and 1980s, the same applicants often auditioned for several orches-

47. Richard D. Arvey & James E. Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 PERSONNEL PSYCHOL. 281, 314 (1982).

48. Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 249 (1973).

49. In theory, employers could simply shift the moment of their discrimination and disproportionately fire minorities. This would be a costly practice, however, since both hiring and firing are expensive. *See infra* Part V.C.

50. Jonathan Marshall, “Blind” Auditions Putting Discrimination on Center Stage, S.F. CHRON., Feb. 10, 1997, at B1.

51. *Vienna Philharmonic Names 1st Female Concertmaster*, CBC NEWS (Mar. 20, 2010), <http://www.cbc.ca/news/arts/music/story/2010/03/20/vienna-philharmonic-concertmaster.html>.

52. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of “Blind” Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 718 (2000) (showing the proportion of women over time in the major orchestras in Chicago, Cleveland, New York, Boston, and Philadelphia).

53. *See* Marshall, *supra* note 50.

tras with varying policies. Exploiting this variation in audition policies over a common applicant pool, economists Claudia Goldin and Cecilia Rouse quantified the antidiscrimination effect of anonymous hiring. They concluded that women were fifty percent more likely to advance to the second round in blind than in nonblind auditions.⁵⁴ And since screens allowed hiring committees to hire purely based on quality, anonymous hiring raised standards at the same time as it improved prospects for women.

Unfortunately, there are relatively few other real-world examples of anonymous hiring. Devotion to selection interviews—and to clinical evaluation more generally—remains alive and well, despite Paul Meehl's persuasive studies. Anonymous review does exist in at least two other areas, however.

First, submissions to academic journals—including the *Stanford Law Review*—are often evaluated anonymously. Anonymous review is intended to assure selection based on the merits of a submission, but it has an added benefit: it reduces discrimination against women.⁵⁵ In a 2008 study, a group of ecologists examined the effect on women's publication success of an ecology journal's switch to an anonymous system of review.⁵⁶ After the switch, the journal's proportion of articles written by women increased by 7.9%.⁵⁷ Over the same time period, a similar ecology journal that had maintained a consistent anonymous review policy showed no increase in the proportion of articles written by women, suggesting that the policy switch at the first journal caused the change.⁵⁸

Second, professional baseball teams have recently begun to rely more on data and less on physical appearance to choose players. In the early 2000s, Billy Beane made the Oakland A's one of the best teams in baseball with one of the smallest budgets.⁵⁹ He did it by paying less attention to players' appearances—how they looked when they ran, or the speed of their fastball—and more attention to “sabermetrics,” the numbers that predicted a player's value to a team.⁶⁰ For example, Beane and his coworkers discovered that “the number of walks a hitter drew was the best indicator of whether he understood how to control the strike zone,” and that “the ability to control the strike zone was the greatest indicator of future success.”⁶¹

54. Goldin & Rouse, *supra* note 52, at 738.

55. See Amber E. Budden et al., *Double-Blind Review Favours Increased Representation of Female Authors*, 23 *TRENDS ECOLOGY & EVOLUTION* 4, 4 (2008).

56. *Id.*

57. *Id.* at 5.

58. *Id.*

59. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME*, at xi-xiv (2003).

60. *Id.* at 33 (“[F]oot speed, fielding ability, even raw power tended to be dramatically overpriced.”).

61. *Id.*

Crucially, trusting the data meant mistrusting scouts' first impressions—the baseball equivalent of job interviews:

It was one of the most bizarre sights any of them ever had seen on a pitcher's mound. When the kid drew back his left arm to throw, his left hand flopped and twirled maniacally. His wrist might as well not exist: at any moment, it seemed, his hand might disengage itself and fly away. The kid was double-jointed, maybe even crippled. At that moment, David Beck ceased to be known to the scouts as David Beck and became, simply, "The Creature." . . .

Whereupon The Creature went out and dominated the Arizona rookie league. He and his Halloween hand and his 84-mph fastball shut down the opposition so completely that the opposition never knew what happened.⁶²

Reflecting on the team's success, Michael Lewis concludes that "[m]any of the players drafted or acquired by the Oakland A's had been victims of an unthinking prejudice rooted in baseball's traditions."⁶³ Like race or sex discrimination, this irrational prejudice prevented teams from making the best hires. (Unlike race or sex discrimination, of course, the practice did not contribute to systematic social disadvantage.) What's more, statistical analysis achieved something similar to anonymity. Faceless data allowed recruiters to look past their first impressions of candidates and choose the ones with empirically demonstrated records of success. The method has since spread throughout professional baseball, and on to football and basketball.⁶⁴

There is no reason that anonymous selection should work only for orchestras, academic journals, and athletic teams. Although companies may be hesitant to eliminate interviews for positions where interpersonal skills are important, the evidence suggests that interviews are ineffective even for gauging personal qualities such as leadership potential.⁶⁵

62. *Id.* at 20-21.

63. *Id.* at xiv.

64. Jake Simpson et al., *The "Moneyball" Effect: Are Sabermetrics Good for Sports?*, ATLANTIC (Sept. 2, 2011), <http://www.theatlantic.com/entertainment/archive/2011/09/the-moneyball-effect-are-sabermetrics-good-for-sports/244453>.

65. The psychologist Daniel Kahneman illustrates this point with an anecdote from his experience evaluating candidates for officer training in the Israeli military. The evaluation, which required candidates to complete group exercises that required cooperation, should have yielded at least as much information about leadership as a traditional interview:

After watching the candidates go through several such tests, we had to summarize our impressions of the soldiers' leadership abilities with a grade and determine who would be eligible for officer training. We spent some time discussing each case and reviewing our impressions. The task was not difficult, because we had already seen each of these soldiers' leadership skills. . . .

Because our impressions of how well each soldier performed were generally coherent and clear, our formal predictions were just as definite. We rarely experienced doubt or conflicting impressions. We were quite willing to declare: "This one will never make it," "That fellow is rather mediocre, but should do O.K." or "He will be a star." We felt no need to question our forecasts, moderate them or equivocate. . . .

. . . [D]espite our certainty about the potential of individual candidates, our forecasts were largely useless. The evidence was overwhelming. Every few months we had a feedback session in which we could compare our evaluations of future cadets with the judgments of their commanders at the officer-training school. The story was always the same: our ability to

Of course, sabermetric data are not available for most job candidates, but testing is often possible. Although employment tests have sometimes raised concerns about disparate impact, a recent study of a large retail chain that moved from interviews to employment tests found that the switch had no adverse effect on minorities, but did result in hiring more productive workers.⁶⁶ Further, disparate impact law remains in place to deter the adoption of tests that harm minority candidates. Where testing is impractical or harmful to minorities, grades, resumes, and letters of recommendation remain available. Although these criteria are less objective than baseball statistics or musical auditions, they can still help employers avoid the false influence of first impressions—while also preventing unconscious discrimination.

III. THE ANONYMOUS HIRING DEFENSE AGAINST DISPARATE TREATMENT CLAIMS

Employers, like the rest of us, are vulnerable to cognitive biases and may not readily accept evidence of the benefits of anonymous hiring. The law should give them an economic incentive to do so.

Congress can encourage firms to hire anonymously by creating a voluntary defense to disparate treatment hiring discrimination claims under Title VII. Hiring anonymously is likely already a substantive defense to disparate treatment claims, because one cannot intentionally discriminate on the basis of race or sex without knowing the race or sex of an applicant. This proposal, however, would provide an additional procedural layer of protection to anonymous hirers, saving legal fees. In other words, the anonymity defense would be a form of hiring discrimination liability insurance, lowering employment practices liability insurance premiums. A fraud exception to the defense, together with disparate impact claims, would prevent the anonymous hiring defense from becoming a shelter for discrimination. Finally, the EEOC could issue detailed guidelines on the preservation of anonymity in hiring, much as it already issues guidelines for the validation of employment tests; compliance with the validation guidelines is already a defense in disparate impact cases.

The proposal has five subparts. First, an anonymity defense would cut off the three-step process, set out in *McDonnell Douglas Corp. v. Green*,⁶⁷ for es-

predict performance at the school was negligible. Our forecasts were better than blind guesses, but not by much.

Daniel Kahneman, *The Surety of Fools*, N.Y. TIMES MAG., Oct. 23, 2011, at 30-31; see also Don Moore, *Stop Being Deceived by Interviews When You're Hiring*, BERKELEY BLOG (Feb. 13, 2012), <http://blogs.berkeley.edu/2012/02/13/stop-being-deceived-by-interviews-when-youre-hiring> (describing an informal experiment in which business school students, after interviewing classmates, were barely more successful than a coin flip at predicting each other's performance in a leadership course).

66. David H. Autor & David Scarborough, *Does Job Testing Harm Minority Workers? Evidence from Retail Establishments*, 123 Q.J. ECON. 219 (2008).

67. See 411 U.S. 792, 802, 804 (1973).

tablishing a disparate treatment hiring claim. Second, regulations issued by the EEOC would prescribe practical procedures for anonymity in hiring in many sectors. Good faith anonymous hiring, combined with validation of employment tests, would provide full immunity from hiring-related employment discrimination claims. Third, a fraud exception to disparate treatment immunity, with a heightened pleading standard, would deter employers from failing to comply. Fourth, anonymous hiring could incorporate affirmative action to break ties among applicants. Finally, anonymous hiring would also prevent discrimination on the basis of size, weight, or attractiveness.

A. *A Defense That Prevents Discovery*

An anonymous hiring defense can attract employers by lowering legal costs. The best way to reduce those costs is to prevent claims from proceeding to discovery. Under *McDonnell Douglas*, a hiring discrimination complaint is adequate if the complainant alleges:

(i) that [the job applicant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁶⁸

Once an applicant has made these allegations, the burden of production shifts to the defendant, who must give "a legitimate, nondiscriminatory reason for the employee's rejection."⁶⁹ Finally, the burden shifts back to the plaintiff to demonstrate that the reason is mere pretext for intentional discrimination.⁷⁰ The plaintiff shoulders the burden of persuasion throughout, but because the defendant bears the burden of production before the plaintiff has demonstrated intentional discrimination, a plaintiff can impose substantial discovery costs on a defendant without alleging more than that he or she was passed over in favor of someone with similar qualifications but not from a protected class. These pleading requirements are notably easy to satisfy: "I was turned down for a job because of my race" is all a complaint has to say" to state a claim.⁷¹ This likely remains true after *Bell Atlantic Corp. v. Twombly*;⁷² the new requirement that

68. *Id.* at 802.

69. *Id.*

70. *Id.* at 804.

71. See *Bennett v. Schmidt*, 153 F.3d 516, 518-19 (7th Cir. 1998) (reversing the district court's grant of a motion to dismiss a repetitious employment discrimination complaint that pled intent only generally).

72. See 550 U.S. 544, 556 (2007) (heightening the pleading standard in civil suits by holding that complaints in antitrust suits under section 1 of the Sherman Act must allege "enough factual matter (taken as true) to suggest that an agreement was made").

complaints be plausible does not alter the basic *McDonnell Douglas* framework.⁷³

An anonymous hiring defense would offer immunity from suits alleging disparate treatment in hiring to firms complying with EEOC guidelines. This provision would necessarily preempt enforcement of applicable state employment discrimination law, including both litigation-based enforcement modeled on Title VII, such as California's Fair Employment and Housing Act,⁷⁴ and administrative enforcement by agencies such as California's Department of Fair Employment and Housing.⁷⁵ The provision would not entail any *substantive* change in federal disparate treatment law: if hiring practices are truly anonymous, discriminatory intent cannot account for a firm's failure to hire an applicant. Under the current state of the law, however, hiring anonymously offers scant *procedural* protection to a nondiscriminating firm, because a plaintiff can reach discovery merely by alleging that he or she was passed over in favor of a nonminority applicant. An anonymous hiring defense would protect firms from these discovery costs; an answer to a *McDonnell Douglas* hiring discrimination complaint would merely need to note the employer's compliance with anonymous hiring guidelines for the complaint to be dismissed. Plaintiffs' lawyers would quickly find that they had little to gain from filing such complaints without further allegations.

Immunity from baseless suits would likely be attractive to employers, many of whom are convinced that they face a high risk of frivolous litigation. The prevalence of frivolous employment discrimination suits is difficult to quantify, but employers' beliefs about such suits are well known.⁷⁶ In a 1998

73. See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1043-47 (arguing that even after *Twombly*, an employment discrimination plaintiff need only identify the victim, timing, protected characteristic, nature of the discrimination, and fact that the discrimination was based on the protected characteristic).

74. CAL. GOV'T CODE §§ 12900-12906 (West 2012).

75. See GARY BLASI & JOSEPH W. DOHERTY, UCLA-RAND CTR. FOR LAW & PUB. POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50, at 2 (2010), available at http://cdn.law.ucla.edu/SiteCollectionDocuments/Centers%20and%20Programs/FEHA%20Study_Final_v3.pdf (offering a detailed empirical account of the interaction of federal and state employment discrimination law in California).

76. See Calvasina et al., *supra* note 4, at 28 ("While there is little empirical support for the existence of a plethora of frivolous lawsuits, the perception that it is a problem is wide spread."); see also Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 527-28 (1997) (noting that empirical work on the issue is difficult because frivolousness is difficult to define, and data on settled lawsuits are generally unavailable). Several prominent employment discrimination suits have been explicitly judged frivolous by courts, though they have not always resulted in awards of attorneys' fees for defendants. Compare *Arnold v. Burger King Corp.*, 719 F.2d 63, 69 (4th Cir. 1983) (affirming district court's award of fees and stating that the plaintiff's "insistent prosecution of the claim tested the borders of subjective bad faith"), with *Evans v. Port Auth.*, No. 00 Civ. 5753(LAK), 2003 WL 1842876, at *1 (S.D.N.Y. Apr. 1, 2003) (denying defendants' motion for attorneys' fees despite holding that

survey of business executives, for example, seventy percent contended that more than half of all lawsuits filed against businesses were frivolous.⁷⁷ Of course, the anonymous hiring defense would also decrease the number of meritorious lawsuits by preventing the injury—hiring discrimination—that gives rise to them in the first instance. The key point is that the defense would prevent litigation of all kinds. Plaintiffs and defendants could argue over the hypothetical merits of the prevented litigation, but the argument would be an academic one. Either way, the anonymous hiring defense would reduce companies' liability exposure.

With a short and simple amendment to Title VII, Congress could expressly immunize anonymous hirers from hiring disparate treatment suits, and then call upon the EEOC to issue guidelines on anonymous hiring. The EEOC lacks binding rulemaking power,⁷⁸ but it has the authority to issue guidelines to which courts give some deference.⁷⁹ Its Uniform Guidelines on Employee Selection Procedures,⁸⁰ for example, offer employers detailed guidance on how to comply with the “business necessity” or “manifest relationship” standards for employment tests that have a disparate impact on minority applicants.⁸¹ Courts have treated the guidelines with varying degrees of deference,⁸² but usually as a ceiling rather than a floor: compliance has generally been an adequate defense to disparate impact claims.⁸³ Courts would likely adopt a similar approach to anonymous hiring guidelines, deferring to the EEOC's judgment but refining the guidelines as necessary in each case in order to decide whether a company's anonymity process qualified for protection from disparate treatment hiring claims.

B. EEOC Guidelines: Practical Details

Detailed guidelines, whether enacted by the EEOC or created by the courts, would be essential to the success of anonymous hiring. Practical difficulties

“insofar as this action was brought against the individual defendants under Title VII, it was frivolous from the outset”).

77. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 26 (1998).

78. *Guardians Ass'n of the N.Y.C. Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79, 91 (2d Cir. 1980); Suk, *supra* note 29, at 441.

79. See George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1318 (1987) (describing the Supreme Court's varying degrees of deference to EEOC validation guidelines in different cases).

80. 29 C.F.R. § 1607 (2011).

81. See Rutherglen, *supra* note 79, at 1319-20.

82. See Rutherglen, *supra* note 79, at 1319 (“The circuit courts have generally accepted the guidelines as expert advice on technical issues, but not as binding authority on questions of statutory interpretation.”).

83. See, e.g., *Guardians Ass'n*, 630 F.2d at 91 (“[I]t is not at all clear that *Griggs* requires observance of all the intricate details of the Guidelines.”).

stand in the way of anonymous hiring in many sectors, and for some jobs, anonymous hiring may be nearly impossible. It is unlikely, for example, that theaters or television stations will hire actors or anchors anonymously, no matter how much it lowers their liability insurance premiums. Because the policy would be voluntary, however, firms could sort themselves based on how much they value knowing the identity of job applicants.

An anonymous hiring procedure would begin by separating the intake of applications from their review and evaluation. Such separation is already common in anonymous evaluation procedures. For example, law school registrars facilitate anonymous grading of exams by assigning students anonymous grading numbers, and matching numbers to names only after professors finish grading. Second, anonymous selection would require the elimination of all in-person interviews, including informational interviews in which applicants might reveal information that could link them to their resumes.

The largest problems arise in deciding which information must be stripped from resumes and applications. Names should clearly be removed; they convey information about sex, and often minority status, but are not related to qualifications. Similarly, the applicant's address is often a marker of race and class but provides no indication of qualifications; it has no place on an anonymous application.

Education, work experience, and outside interests are more difficult. In many areas of the United States, an applicant's high school is a good indicator of race.⁸⁴ This is mostly a problem for firms hiring locally; firms with centralized human resources departments are unlikely to know the racial makeup of faraway schools. It is also only a problem for positions that do not require a college degree: if a position requires a college degree, the name of an applicant's university offers enough information that reasonable EEOC guidelines could require that high schools be struck from resumes. Universities are less problematic than high schools: apart from a few historically black colleges, universities do not provide a reliable signal of an applicant's race.⁸⁵

This leaves a set of employers that require high school diplomas, hire locally, and would like to know which high schools applicants attended—

84. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 806 (2007) (Breyer, J., dissenting) (“[M]ore than one in six black children attend a school that is 99%-100% minority.”). An applicant's high school is usually not, however, an indicator of sex. See Diana Jean Schemo, *Change in Federal Rules Backs Single-Sex Public Education*, N.Y. TIMES, Oct. 25, 2006, at A1 (noting that although the number of single-sex public schools increased from three in 1995 to 241 in 2006, single-sex schools continued to account for a tiny proportion of the 93,000 public schools in the United States).

85. See YOUNG M. KIM, AM. COUNCIL ON EDUC., MINORITIES IN HIGHER EDUCATION: TWENTY-FOURTH STATUS REPORT 11 tbl.6 (Supp. 2011) (reporting enrollment numbers showing that minorities made up 5,195,780 of 16,365,738 U.S. undergraduates in fall 2008). Since minorities are less likely to attend universities, a university attendance requirement is likely to have a disparate impact. If the requirement is unnecessary to the job, however, disparate impact claims should deter it.

presumably because local high schools vary in their levels of achievement. EEOC guidelines could recommend that such firms use one of several available indices of high school quality to weight the applicant's GPA or class rank.⁸⁶ Of course, the use of such an indicator could give rise to disparate impact claims. The threat of such claims would serve a useful purpose, however, sorting employers who actually need to hire employees with good high school records from employers who use high school names to discriminate. In sum, the name of an applicant's high school is rarely a useful qualification, but where it is, employers could use an index to approximate it.

Work experience is usually crucial to an applicant's qualifications, and it is unlikely to be a marker of minority status. In theory, though, an anonymous hirer could depend on the nonanonymous hiring of other firms as a discriminatory presorting mechanism. The threat of disparate impact claims might deter some of this behavior, and the possibility of fraud claims—in which a plaintiff would allege that an employer was not truly hiring anonymously—would further deter the practice. EEOC guidelines should therefore allow work experience to play a role in the decisions of anonymous hirers. Of course, employers get hints about applicants' race or sex from other parts of job applications as well. Black male applicants, for example, are more likely than others to have criminal records, particularly in some Southern states.⁸⁷ Employers are, however, legally permitted to discriminate on this basis, and are likely to do so whether or not they hire anonymously.

Further, phone calls to an applicant's references would likely reveal the applicant's sex and possibly race. EEOC guidelines should therefore instruct anonymous hirers to submit questions to references in writing, and instruct intake divisions of hiring firms to remove pronouns, names, and other indications of the applicant's race or gender from the response. Of course, some clues might remain—for instance, if a reference notes that an applicant frequently knits in his or her free time, an employer might come to a probabilistic conclusion about the applicant's sex. This is an imperfection one would simply have to accept, just as law schools must accept that professors occasionally may recognize students' style or handwriting on anonymously graded exams.

In sum, I propose that EEOC guidelines require:

86. See, e.g., Mo-Yin S. Tam & Uday Sukhatme, *The Importance of High School Quality in University Admissions Decisions*, 78 C. & U. 3, 8 (2003) (finding that high school performance weighted by high school quality is the best available predictor of university performance, and noting available sources of data on high school quality).

87. See, e.g., JAMIE FELLNER & MARC MAUER, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* 8 (1998), available at http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf (finding that in 1996, "in Alabama and Florida, 31 percent of black men [were] permanently disenfranchised" as a result of past criminal convictions).

- (1) Full separation of intake and evaluation sections in hiring. Firms could either designate a part of their human resources division for intake and identity removal, or contract this function out to a separate company specializing in anonymizing applications.
- (2) The removal of all names and addresses from written materials submitted as part of job applications.
- (3) The removal of the name of the applicant's high school from all written materials. Where necessary, the name could be replaced with a standardized indicator of the school's quality.
- (4) The removal of race-, religion-, or gender-identifying information from all letters of recommendation.
- (5) The elimination of all in-person and telephone interviews.
- (6) The elimination of telephone calls to references, to be replaced by written questions.
- (7) The elimination of informal referrals and headhunting.⁸⁸

This is no doubt an incomplete list of employer actions necessary for anonymity, but it suggests that the practical difficulties of anonymous hiring, while significant, are not insuperable. The EEOC would develop more detailed guidelines and change them over time, in much the same way that it has altered its employment test validation guidelines to reflect employer experience.⁸⁹ The courts, in turn, would further interpret the guidelines when considering cases brought under the fraud exception proposed below.

C. *A Fraud Exception*

The threat of legal action should persist for firms that claim to hire anonymously but fail to do so in practice. Devising such an exception poses a dilemma: a narrow exception could fail to deter fraud, but a broad exception might defeat the purpose of the anonymous hiring defense, allowing plaintiffs with frivolous claims to reach discovery and run up legal costs for defendants acting in good faith. Many scholars have considered a similar problem in the context of a possible FDA regulatory compliance defense to pharmaceutical product liability claims.⁹⁰ Following Peter Schuck's proposed solution to that problem,

88. These guidelines are more realistic for large firms. Title VII applies to any firm with fifteen or more employees. 42 U.S.C. § 2000e(b) (2006). It is possible that only significantly larger firms would choose to engage in anonymous hiring.

89. See Rutherglen, *supra* note 79, at 1316-18 (describing revision of guidelines to reduce cost of test validation procedures).

90. See, e.g., Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73, 76-84 (2008) (describing the debate over whether FDA regulations should preempt state tort law, and if so, how a fraud-on-the-agency exception should be designed).

I argue that complaints alleging fraudulent or negligent failure to hire anonymously should face a heightened pleading standard.⁹¹

Schuck proposes what he calls a “hyper-heightened” pleading standard to prevent plaintiffs from alleging fraud in every case.⁹² He models his proposal on the pleading standard established by the Private Securities Litigation Act of 1995,⁹³ which requires plaintiffs accusing defendants of making false statements to “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”⁹⁴ A similar standard for alleging fraudulent or negligent noncompliance with anonymous hiring regulations would require a plaintiff to specify how the defendant breached anonymity guidelines, and to provide particular facts that support the assertion of fraud. Reaching discovery under that pleading standard would be far more difficult than under the traditional *McDonnell Douglas* framework. Alleging fraud to get around the new anonymous hiring defense would not be a realistic option.

D. *Incorporating Affirmative Action*

Anonymous hiring need not rule out affirmative action. The intake section of a firm’s hiring division could take race into account to break ties between candidates whom the evaluation section deemed equally qualified. The degree of minority preference would depend on the interpretation of a “tie” in qualifications: the larger the range of qualifications deemed a tie, the more candidates would be tied, and therefore the more latitude the intake section would have to award positions to minority candidates.

This form of affirmative action would enjoy two significant advantages over that currently in use by many employers. First, it would likely work better at selecting minorities. The federal contractors included in the resume-naming study discussed above were under pressure to select minority candidates, but nonetheless were fifty percent more likely to call equally qualified white candidates back for interviews.⁹⁵ This is a reminder that affirmative action frequently fails to counteract the full effect of discrimination. With anonymous hiring procedures validated to rule out a disparate impact, discrimination would not

91. *Id.* at 104-06 (proposing a fraud-on-the-agency exception with a heightened pleading standard).

92. See Schuck, *supra* note 90, at 106.

93. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

94. Schuck, *supra* note 90, at 106-07 & n.128 (quoting 15 U.S.C. § 78u-4(b)(1) (2006)).

95. Bertrand & Mullainathan, *supra* note 30, at 992.

occur in the first place, and minority preferences would not be fighting an uphill battle.

Second, the use of affirmative action for tiebreaking would be less vulnerable to the criticism that it “stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies.”⁹⁶ If two candidates are equally qualified, and an employer uses race or sex to choose whom to hire, the minority candidate is not being hired despite worse qualifications: he or she is simply consistently winning the coin toss that inevitably plays a role in most hiring decisions. Tiebreaking affirmative action would eliminate the perceived tradeoff between minority preferences and merit-based selection.

E. *Positive Externalities: Reducing Weight and Attractiveness Discrimination*

Although anonymous hiring guidelines would only aim to cloak protected characteristics—particularly race, sex, and disability—any anonymous hiring program would have the effect of masking applicants’ weight, attractiveness, and size. These physical characteristics have a large impact on employment success. Highly obese people are forty to fifty percent more likely than others to report that they have suffered discrimination,⁹⁷ and overweight and obese women earn \$6700 less per year, on average, than their nonobese peers.⁹⁸ An attractive photo makes a woman’s resume with mediocre qualifications more likely to pass muster,⁹⁹ and an increase in male height in the United States from the twenty-fifth to the seventy-fifth percentile is associated with 9.2% higher pay.¹⁰⁰ Although the causation is murky—low income likely contributes to obesity, for example—it is reasonable to infer that some portion of these disparities is traceable to implicit bias in hiring.

Size and attractiveness are not protected characteristics under Title VII or the Americans with Disabilities Act,¹⁰¹ and under the anonymous hiring proposal, employers would be free to ask for an applicant’s body mass index or for

96. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment).

97. R.M. Puhl et al., *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, 32 INT’L J. OBESITY 992, 992-93 (2008).

98. *Fact Sheet: Size Discrimination*, NAT’L ORG. FOR WOMEN, <http://loveyourbody.nowfoundation.org/factsheet4.html> (last visited May 11, 2012).

99. Lucy M. Watkins & Lucy Johnston, *Screening Job Applicants: The Impact of Physical Attractiveness and Application Quality*, 8 INT’L J. SELECTION & ASSESSMENT 76 (2000).

100. Anne Case & Christina Paxson, *Stature and Status: Height, Ability, and Labor Market Outcomes*, 116 J. POL. ECON. 499, 500 (2008).

101. The well-known employment discrimination cases against airlines in the 1960s and 1970s raised issues of attractiveness, but were litigated on the basis of sex discrimination. See Deborah L. Rhode, *Don’t Hate Me Because I’m Beautiful. Just Promote Me.*, WASH. POST, May 23, 2010, at B1.

some measure of the applicant's attractiveness.¹⁰² Few employers, however, would add application blanks for these characteristics—for obvious reasons. Anonymous hiring would therefore act as a “nudge,”¹⁰³ pushing employers away from size and attractiveness discrimination without applying legal force.

IV. INCENTIVES TO PARTICIPATE

Immunity from hiring disparate treatment claims would offer three forms of encouragement to firms to hire anonymously. First, and most importantly, anonymous hiring would act as a form of liability insurance, reducing premiums for employment practices liability insurance, which became “the hottest selling, most talked about insurance product” in the 1990s¹⁰⁴ after the passage of the Civil Rights Act of 1991.¹⁰⁵ Second, immunity would make anonymous hiring an attractive remedial option in settlement negotiations for firms facing large class actions and seeking liability guarantees. Finally, legal immunity would give insurance companies, plaintiffs' lawyers, and the EEOC an incentive to provide free publicity for the counterintuitive advantages of hiring anonymously. In this Part, I consider the strength of each of these incentives in turn.

Although a relatively small proportion of disparate treatment claims concerns hiring, the absolute number is large enough that immunity from such suits could change firms' behavior. Between 1987 and 2003, just under ten percent of employment discrimination lawsuits concerned a hiring discrimination claim.¹⁰⁶ Over the same period, approximately four percent of all employment discrimination claims were disparate impact claims.¹⁰⁷ Given that many or most disparate impact claims concern employment tests, one should assume that many disparate impact claims are hiring claims. That leaves ambiguity about the proportion of disparate treatment claims concerning hiring, but even if *all* disparate impact claims concerned hiring, these numbers imply that dis-

102. These requests would be permissible as long as the measures were gender neutral.

103. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 8 (2008) (noting that selecting a good default option enlists “the gentle power of nudges”—policies that change behavior without legal coercion).

104. Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 323 (1999).

105. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2, 29, & 42 U.S.C.). One effect of the 1991 Act was its alteration of Title VII to allow for punitive damages and jury trials in disparate treatment cases. See 42 U.S.C. § 1981a (2006).

106. LAURA BETH NIELSEN ET AL., AM. BAR FOUND., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003*, at 6 fig.2.5, 17 fig.3.2, 45 fig.6.2 (2008), available at http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf. Some suits contain more than one issue. *Id.* at 6, 10.

107. *Id.* at 11 fig.2.12.

parate treatment hiring claims would still make up approximately five percent of all employment discrimination claims. In 2009, plaintiffs brought 13,523 employment discrimination suits in federal court;¹⁰⁸ of those, perhaps 650 (about five percent) were disparate treatment hiring claims. However, that estimated figure likely understates the number of disparate treatment hiring claims, and their deterrent effect, because it leaves out state claims and fails to distinguish between individual claims and class actions.

Nearly all states have employment discrimination legislation in some form.¹⁰⁹ Most states provide for private enforcement, and most also have administrative agencies with more authority than the EEOC.¹¹⁰ Many such agencies have the power to adjudicate claims, issue injunctions, and require payment of damages.¹¹¹ State administrative and private enforcement schemes matter. In California, for example, approximately seventy-five percent of all employment discrimination claims are filed with the state Department of Fair Employment and Housing.¹¹² Although the influence of state enforcement mechanisms varies by state, many offer a substantial deterrent in addition to federal law. Because the anonymous hiring defense would preempt state law claims, state enforcement would offer firms an additional incentive to consider hiring anonymously.

A defense for anonymous hirers could also make anonymous hiring programs a topic of negotiations in class action settlements. When large employment discrimination class action suits settle, court-sanctioned agreements often include not only injunctive relief and damages for class members, but also remedial measures intended to encourage hiring and promoting minorities within the defendant firm. When a large class action against Texaco settled in 1996, for example, the company agreed to finance a seven-person “diversity task force” for five years, to offer bonuses to managers for reaching diversity goals, and to provide “diversity training” to all of its employees.¹¹³ Similarly, and more recently, the consent decree in a large sex and race discrimination class action against Abercrombie & Fitch required both diversity training and substantive changes to the company’s hiring procedures.¹¹⁴ The settlement obliged

108. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2009, at tbl.C-2 (2009), available at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx>.

109. Stephen B. Burbank et al., *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)* 62-63 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-08, 2011), available at <http://ssrn.com/abstract=1781047>.

110. *Id.* at 63.

111. *Id.* at 62-63.

112. BLASI & DOHERTY, *supra* note 75, at 11.

113. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1274-75 (2003).

114. See Consent Decree at 23-25, 29-31, *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, No. 03-2817 SI (N.D. Cal. Apr. 14, 2005).

the company not only to conduct diversity training for all human resources personnel, but also to hire fifteen dedicated diversity recruiters, employ an industrial organizational psychologist, and “affirmatively seek out applications from qualified African Americans, Asian Americans, and Latinos of both genders.”¹¹⁵ Such changes are costly. Anonymous hiring, by contrast, might save money by cutting out the interview stage of the application process, which often requires dedicated human resources personnel and costly reimbursement of travel costs. If the proposed legal defense were available, plaintiffs could push for firms to adopt it both as an antidiscrimination tool and as insurance against future claims.

Finally, the proposed defense would not only create a material incentive to hire anonymously, but would also be a form of advertisement, communicating the advantages of anonymous hiring both for avoiding discrimination and for effectively choosing staff. The EEOC guidelines would create reasons for lawyers, insurance agents, and human resources consultants to talk about the advantages of anonymity. Risk-averse defense lawyers and in-house counsel might recommend the policy as a way of lowering liability risk; liability insurance companies might promote it as a way of lowering rates, just as car insurance companies offer incentives to high school students to do well in school; and finally, employment discrimination consultancies could recommend anonymous hiring as one method of combating implicit bias. Some companies might adopt the policy even if the financial incentives were small. Many firms that currently discriminate would rather not do so, but their good intentions are thwarted by implicit bias.

Some realism is in order. These incentives are likely not strong enough to persuade the majority of firms to give up selection interviews, which are deeply rooted in our hiring culture. That reality is not fatal to this proposal, however. Adoption by even a small percentage of firms could have a large impact in absolute numbers. The ultimate goal, of course, is not to change employment discrimination law, but to persuade firms to alter hiring practices.

For many positions, interviews serve little predictive purpose, even intuitively. Interview performance is not plausibly correlated with quick and reliable work on an assembly line, competent computer programming, dishwashing, or even effective adherence to a script as a telemarketer. Since anonymous hiring is unknown outside symphony orchestras, I cannot predict which firms and sectors would be amenable to the practice. Such prediction is unnecessary, however, given that the policy would remain voluntary: firms that are most attached to interviews as a selection method could simply retain them.

115. *Id.* at 28-31.

V. OBJECTIONS

If one accepts the conclusions of this Note so far—that an anonymous hiring defense would be practically workable, would successfully reduce implicit bias in hiring, and would be adopted by a substantial if proportionally small number of firms—several possible objections remain. First, an anonymous hiring defense as liability insurance might lead to adverse selection, with the largest payoff for the firms that are currently most likely to discriminate. Alternatively, the policy might suffer from the opposite problem: it might be most attractive to firms with diverse workplaces, where anonymous hiring would have little impact. Second, anonymous hiring procedures would cost money, reducing the incentive to adopt them. Finally, ending hiring discrimination could lead firms to substitute away from hiring discrimination and toward greater discrimination in promotion and firing. None of these objections offers convincing grounds for rejecting an anonymous hiring defense.

A. *Adverse Selection*

A traditional adverse selection problem is not possible with an anonymous hiring defense. If the companies most likely to discriminate and to be sued were to adopt the policy, premiums would not go up—there are no premiums in the scheme. Instead, those firms would be required, by hiring anonymously, to change the behavior that would otherwise lead to high premiums in a traditional insurance scheme.

An anonymous hiring defense would not be subject to harmful adverse selection, but it could lead to a virtuous cycle in the employment discrimination liability insurance market. Insurance companies might understand anonymous hiring both as a guarantee of immunity and as a signal of the firms' willingness to end discrimination in hiring. That signal could lead insurance companies not only to lower rates for anonymous hirers, but also to raise them for companies that refused to hire anonymously. The rising difference in premiums would increase the incentive to hire anonymously.

Conversely, anonymous hiring might be most attractive to firms that already avoid discriminating. For those firms, adopting an anonymous hiring policy would offer immunity without increasing minority hiring. In other words, the policy would have little antidiscrimination effect for those firms. However, this is actually a positive: firms that have already overcome unconscious bias in hiring should not be liable for discriminatory hiring. Further, many firms claim that they face frivolous discrimination lawsuits¹¹⁶; an anonymous hiring defense would either protect them or call their bluff. Finally, such firms could reap efficiency benefits from anonymous hiring, demonstrating the benefits of the policy to less enlightened firms.

116. See Calvasina et al., *supra* note 4, at 27-28.

B. *Cost*

Firms would need to spend money to establish an intake division, remove identifying information from resumes, and devise selection procedures to replace interviews. However, these costs would likely be smaller than the costs of interviews. Removing names, addresses, and high schools from resumes is a quick and mechanical task, and assigning applications an anonymous selection number is a straightforward process, as any law school registrar can affirm. Paying for candidates to travel for in-person interviews, on the other hand, is expensive, as is the staff time devoted to those interviews, even if they take place by phone. Furthermore, interviews carry hidden costs because they often lead to the selection of less productive employees. Finally, an anonymous hiring defense would create a niche for companies specializing in removing identifying information from resumes, and these companies would have an incentive to minimize the costs of the procedure. Perhaps a few firms would find that anonymous procedures were more expensive than interviews, but as a general matter, anonymity should be not only fairer but also cheaper.

C. *Substitution Effects*

If firms adopt anonymous hiring and hire more minority candidates, perhaps they will simply fire those candidates or fail to promote them, achieving the same end result without discrimination during hiring. In the most extreme version of this scenario, firms might eliminate interviews but fire new minority hires after only a day or two at work. More plausibly, unconscious bias could subtly affect promotion and firing decisions, gradually canceling out the increased hiring of minorities.

This is a serious objection, but its force fades on closer inspection. First, discrimination in hiring and discrimination in promotion or firing might be complements rather than substitutes: reducing one might reduce the other. Exposure to minorities in the workplace may change discriminatory attitudes.¹¹⁷ In other words, anonymous hiring could lead to gradual socialization of nonminority employees, decreasing unconscious bias.

Even if hiring and firing discrimination turn out to be substitutes, they cannot be perfect substitutes: since firing and rehiring is costly, discriminatory promotion and firing would not erode all of the impact of more equal hiring.

CONCLUSION: POLITICAL FEASIBILITY

This Note began with a well-known problem: intent-based employment discrimination law is an inadequate tool for combating subtle, unconscious bias. Commonly proposed solutions have problems of their own. Most require

117. See note 37 above and accompanying text.

significant changes to existing employment discrimination law, and a larger role for administrative enforcement. An anonymous hiring defense, on the other hand, could incorporate some of the insights of the literature on unconscious bias without large changes to the structure of employment discrimination law. Unconscious bias cannot easily affect the reading of an anonymous resume. Mobilizing the incentives that already exist in the liability insurance market, an anonymous hiring defense could change employers' behavior with only minor changes to Title VII.

Although more limited than other second-generation employment discrimination proposals, an anonymous hiring defense is also more feasible politically. Since the defense would be voluntary, employers would have no incentive to oppose its passage. Liability insurance companies might have fewer customers to insure against claims of disparate treatment in hiring, but the adoption of the defense would also give them information about which clients were likely to discriminate. The plaintiffs' bar would have the most to lose from the defense, but given that claims of disparate treatment in hiring make up only a small percentage of employment discrimination claims, the stakes are relatively low. Further, the proposal might enlist the political support of civil rights groups, who are typically allied with the plaintiffs' bar and might neutralize its opposition. Finally, other lobbying groups, such as the Obesity Action Coalition, might also lend the plan their support. Efforts to pass anonymous hiring legislation, even if they failed, might encourage some firms to adopt the practice voluntarily—in order not only to help minority candidates, but also to hire more productive employees.

