

# Don't Bet the Farm on *Desert Palace*



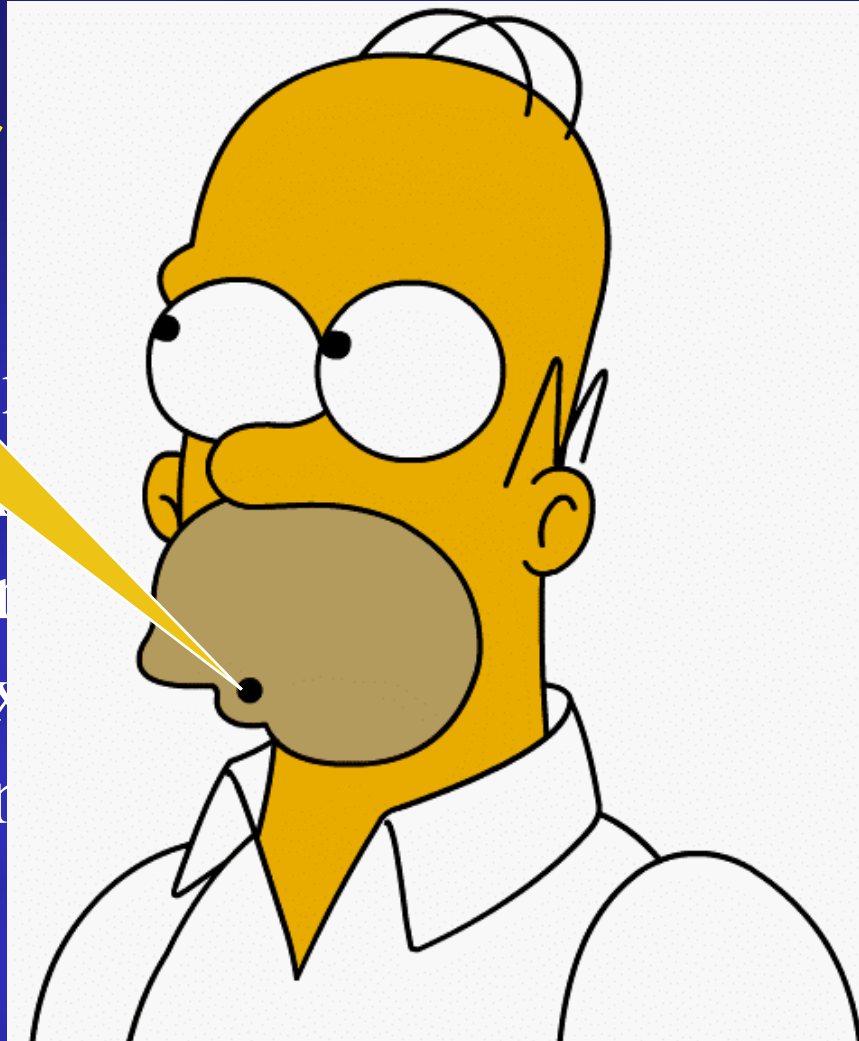


"[D]iscrimination law is entering a new era in which a uniform method of analysis of individual disparate treatment cases will lead to more cases going to juries, more verdicts for plaintiffs and more of those verdicts sustained as against motions for judgment as a matter of law. This is much needed because discrimination remains an all too common feature of our employment landscape and antidiscrimination law needs to do more to attack it."

*Deser*

*y. Costa*

Duh.



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# Calloway's "Basic Assumption"

Discrimination is sufficiently common that it is fair to infer it when a minimally qualified African American is denied a job opportunity, unless defendant offers an alternative explanation.

Even when such an explanation is offered, discrimination is sufficient common that it is fair to infer discrimination if the trier of fact disbelieves defendant's reason.

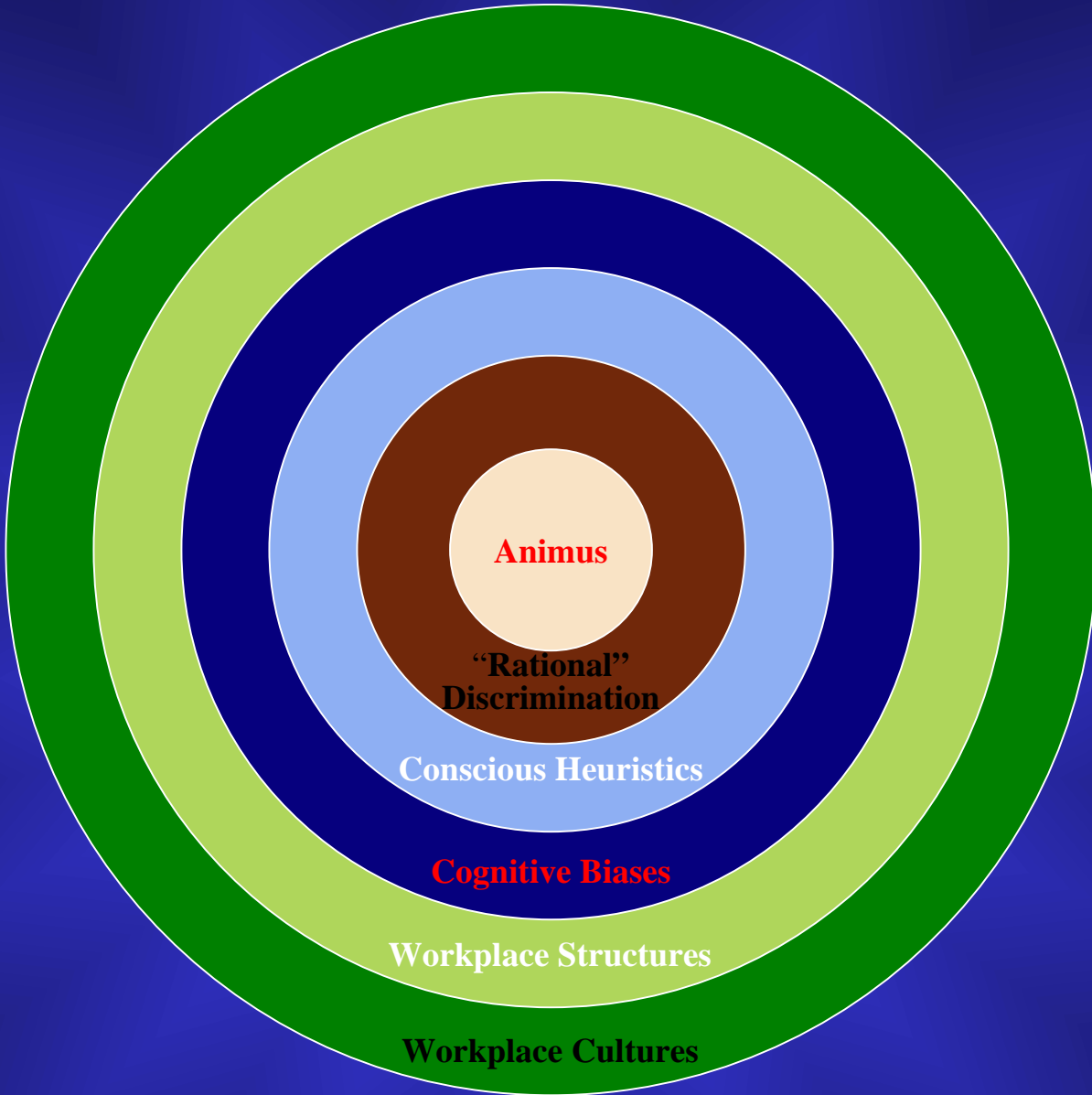
# Decline of the Basic Assumption

Decisions disadvantaging minorities result from

- Differing Judgments About Merit
- Cronyism
- Personal Animosity
- Random Unfairness

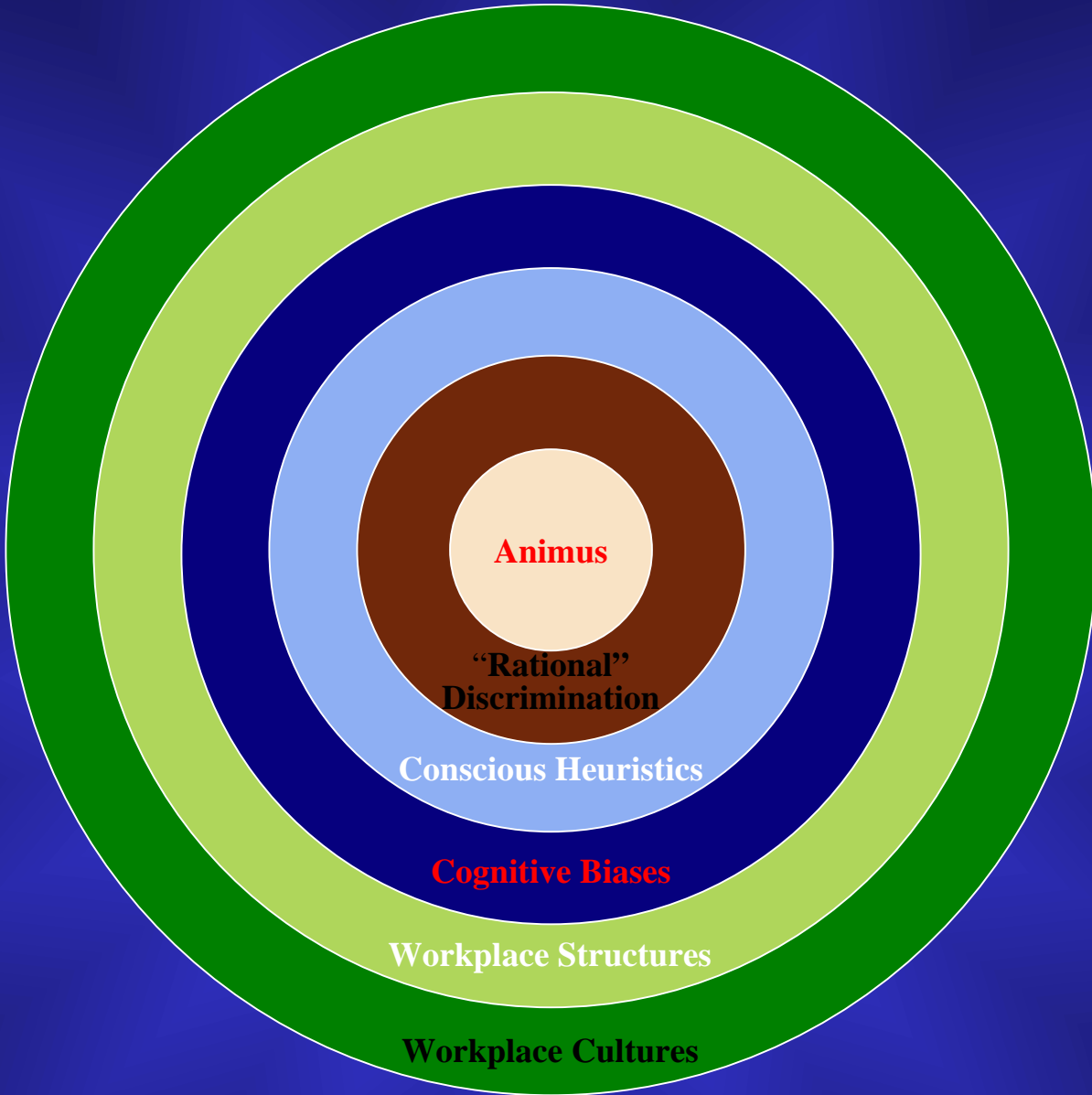
Not from “racism”





# The Ultimate Conclusion....





# Era of the Expert?



Educating Courts and Juries

- ❖ *Daubert* -- & Dr. Fiske
- ❖ Accrediting the Expert
- ❖ Enhancing the Jury's Understanding
- ❖ Overcoming Juror Resistance
- ❖ Employer experts

# Decline, Fall, Rise, Decline

## Disparate Impact Discrimination

- born in 1971 in *Griggs v. Duke Power Co.*
- eviscerated by *Wards Cove Packing Co. v. Antonio* in 1989
- resurrected by the Civil Rights Act of 1991
- rarely heard from again

# Advantages of Disparate Impact

- † Shifts focus from intent to cause
- † Juries are not necessarily good things as public views have shifted
  - † Defendant need not be found a bad person
- † Expert testimony is more likely to be admitted when a jury is not involved and judges are more likely to be persuaded about systemic problems
- † Limited remedies make a finding of liability less dramatic



# *Watson v. Fort Worth Bank & Trust*

[D]isparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. [Not only may particular supervisors act with discriminatory intent but] even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain.

