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Disparate Treatment Discrimination

Intent, Bias, and the Burden of Proof

Litigating direct or disparate treatment discrimination cases is often a question of proving what is in the mind of the employer.[1] Although the defendant may openly admit to discriminatory intent, in most cases he or she will attempt to hide the prohibited motive,[2] knowing that the adversary system of proof and, in French law, Article 1315 of the French Civil Code[3] places the responsibility on the plaintiff for bringing evidence to the attention of the court. In European law, discriminatory intent seems to carry an even greater weight and is regarded not just as a factor but as the primary component of establishing a discrimination case, to the extent that the existence of intent alone is sufficient to support a claim of direct discrimination, even without a designated victim.[4]

The prohibition of direct discrimination is a norm that employers in the United States have had to comply with since the 1960s, and it provides for a shifting burden of proof in recognition of the difficulty of obtaining direct evidence to prove discriminatory intent. The idea of burden of proof actually encompasses two burdens: the burden of production and the burden of persuasion.[5] The burden of production first lies with the plaintiff, who must establish a prima facie case by producing evidence from which it can be concluded that there was an intention to discriminate. The evidentiary burden then shifts to the employer to articulate a nondiscriminatory reason for his or her adverse employment action.[6] As Richard Ford later illustrates, one difference between French law and U.S. law involves the type of justification that an employer can give. In France, it must be not only nondiscriminatory but also objective.

A second difference lies in the burden of persuasion.[7] In the United States, the nondiscriminatory justification provided by the employer at the rebuttal stage is

a simple response to the discrimination claim (burden of production): the burden of persuasion remains with the plaintiff, who must convince the judge that the justification is simply a pretext and that unlawful discrimination nevertheless occurred.[8] In France, the burden of proof allocation provided for in Article L. 1134–1 of the French Labor Code states that when the plaintiff establishes facts that show presumed discrimination, the onus is on the defendant to prove that his or her decision was justified by objective elements unrelated to any form of discrimination. The Code goes on to specify that the judge shall make a decision after having ordered any investigative measures he or she deems useful. It would therefore appear that in France, provided that the plaintiff succeeds in the arduous task of presenting elements of fact to allow the presumption of discrimination, then the final burden is on the employer to prove an objective and nondiscriminatory motive.

French law also seems to be more generous toward plaintiffs in discrimination disputes in they are not systematically required to present data on comparably situated persons in order to establish a prima facie case.[9] As the Cour de Cassation reiterated in overturning a Court of Appeals decision on this point, showing the comparability of situations is not an indispensable prerequisite to establishing discrimination.[10] Recently, direct discrimination in collective bargaining agreements were so blatant in the text itself that comparability was not necessary.[11] The HALDE traditionally played a key role in obtaining the data needed to establish the existence of a discrimination, thanks to its power of investigation, which the Defender of Rights (formerly the HALDE) is presumably continuing to exercise.

In the United States, if the employer articulates a legitimate, nondiscriminatory reason, it is ultimately up to the plaintiff to prove that the articulated reason is not credible regarding the job description or required qualifications or is a pretext for discrimination. Certain employers have demonstrated skill in producing nondiscriminatory pretexts or using disparate impact discrimination to achieve their discriminatory goals.[12] Proving discrimination is an immensely difficult task,[13] prompting legal scholars and even judges to explore how social science evidence[14] can be used to identify discrimination[15] in the form of stereotyping. These stereotypes may even be unconscious, or—to use the term Linda Krieger prefers, which she discusses in her interview—implicit. A person with an implicit bias does not necessarily have any conscious desire or intent to discriminate, sometimes making it difficult for judges, who themselves have implicit biases, to recognize them.

In this chapter, Linda Krieger, Richard Ford, Robert Post, Martha Minow, and Christine Jolls comment on the scope and limitations of this social science research. Devah Pager, whose sociological fieldwork has revealed unconscious bias in hiring practices, discusses her findings. Frank Dobbin, a sociologist as well, shares his thoughts on what social psychology research has to offer.

I. STEREOTYPES, IMPLICIT BIAS, AND INTENTIONAL DISCRIMINATION

A considerable amount of American legal scholarship addresses the relationship between conscious and unconscious biases and discriminatory practices, whereas in France, there is practically no debate about this issue. Some American scholars attempt to use cognitive and social sciences to better understand and define the phenomenon of direct discrimination,[16] which is overwhelmingly hidden, while others warn against the possible excesses that these approaches can lead to.[17]

In the following interview extract, Professor Linda Krieger explains the construction of conscious and implicit biases.

MARIE MERCAT-BRUNS: *Shall we start with implicit bias?*

LINDA KRIEGER: Before we talk specifically about implicit bias, we need to back up and talk about the relationship between social science and law, because much of the discussion about implicit bias is actually about the relationship between legal doctrine on the one hand and advances in social science on the other. So I will start there.

In legal analysis, lawyers and judges use two different categories of facts. In U.S. administrative law, they are sometimes referred to as adjudicative facts and legislative facts.

Adjudicative facts are the local facts that characterize a particular dispute. We are dealing with adjudicative facts when we are sifting through particular bits of evidence, attempting to piece them together to figure out what happened at a particular point in time and place. But most of the time, especially when we are dealing with events that we cannot observe directly—such as mental states, for example—we cannot move directly from a particular bit of evidence to a factual conclusion, what we might call an "ultimate fact." To get to those ultimate facts, we have to draw inferences. In order to draw inferences from particular facts, we have to have some sort of theory of reality. In order to arrive at adjudicative facts, facts that together represent what happened at a particular time and place, we have to filter those facts through our taken-for-granted understandings about how things work in the world. These taken-for-granted understandings about how things work in the world are what administrative law scholars have called "legislative facts." These legislative facts tell us how to interpret ambiguous events, what inferences to draw from the evidentiary facts we can actually observe.

These legislative facts are constantly operating in the cognitive background. So whether we are thinking about social science or not, we are constantly using social science, or I should say, social pseudo-science, to interpret ambiguous information or to draw inferences from observed events. It is unavoidable that judges, lawyers, and jurors will apply taken-for-granted assumptions about how things work in the world when they are reasoning inferentially in

deciding legal disputes. These taken-for-granted theories about how things work in the world are what I mean by legislative facts.

If one looks, one can see legislative facts reflected in judicial decisions; one can see them in the arguments of advocates. When you read a lawyer's closing argument after a trial, you will see not just reference to specific bits of testimony in the record; you will also see the lawyers trying to interpret those bits of testimony, using legislative facts to suggest what those bits of testimony should be taken to mean about the ultimate facts of the case.

An example of this: When we speak of intent to discriminate in a disparate treatment discrimination case, we all bring to the resolution of a dispute understandings about how people go about making decisions about other people. What is the extent to which perceptions of other people are necessarily subjective or objective? What are the different ways in which social perceptions and judgments can be distorted? Are those distortions random, or do they tend to fall into certain patterns? Are those patterns easily influenced by the particular context in which the perceiver is situated, or do they remain relatively constant over time, like preferences for things like iced cream flavors? Are people consciously aware of the various influences that are operating on their preferences or their judgments at a given moment in time? If so, to what extent and under what circumstances are they more or less likely to have that awareness? When we are talking about implicit bias, what we are really talking about is whose understanding of the taken-for-granted background knowledge of how people go about forming judgments and making decisions about other people are we going to apply in antidiscrimination adjudications? These understandings, these beliefs about how social perception and judgment works become legislative facts that control the development of antidiscrimination jurisprudence as a whole and shape the adjudication of particular cases. This is unavoidable.

What empirical social scientists who study intergroup perception and judgment and their allies in the legal academy are saying is that the "common sense" understandings of how people react to, make judgments about, and behave toward stereotyped groups are not accurate. And there now exists a virtual mountain of solid, scientific evidence backing them up as they make this claim. The intuitive social science currently underpinning antidiscrimination law is junk science. But it is deeply embedded in antidiscrimination jurisprudence and is proving very difficult to displace.

Antidiscrimination jurisprudence will always incorporate and reflect a set of legislative facts about the nature of intergroup perception and judgment. Unfortunately, what is happening now in the United States is that it is incorporating and reflecting theories that have been definitively disconfirmed by many decades of research in cognitive social psychology and, more recently, cognitive neuroscience.

We are now, as always, applying someone's taken-for-granted understanding of how the world works when we adjudicate discrimination cases. Unfortunately, we tend to apply the understanding of whatever ethnic, racial, socioeconomic class, to the development of the law and the adjudication of disputes. That is not a neutral or heterogeneous group of people. It is a homogeneous group of people, and they tend to share a particular, self-serving set of ideological understandings about how the world works, including understandings that are informed by their own privileged position in society.

In antidiscrimination adjudications as elsewhere in public life, those who control the discourse and the outcomes bring to their activities particular understandings of how things work in the world. They call it "common sense." This is one of the great contributions of empirical psychological research—it often shows us that the common sense is wrong. People, it turns out, often don't know what factors are affecting their judgments about other people. People often don't know that they are biased. Economic decision makers do not always behave as rational maximizers of utility. The list goes on and on. The question is, how do we update legal doctrines, which are by nature backward looking, to incorporate advances in the empirical social sciences, which roll forward?

Stanford law professor Richard Ford responds to Krieger's explanations with his views on the challenges of implicit bias thinking.

RICHARD FORD: The social science [about implicit bias], from what I understand, is a bit more ambiguous than is often suggested. That is one thing.

I think that matters because, if you hang your legal argument on social science, then your legal argument is only as strong as the social science. And particularly when you are also dealing with an issue that is salient in the popular culture and about which ultimately you need to persuade people, you can find yourself worse off than if you had not relied on a social science argument. So that's a risk, I think, because the popular uptake of the implicit bias literature is "you can take a test and it tells you whether you have unconscious bias," but the people working in the field say, "Well, it does not quite prove that; what it really proves is that a group of people in a large statistical sample have some sort of implicit association which may or may not be bias." Already, the conservatives are making these kinds of attacks. For instance, there is a professor at Berkeley, Philip Tetlock, who is on the attack against implicit bias. So you are not going to get a free pass.[18]

But I think the larger question for me as a legal scholar and as someone interested in social theory is this: We, in the modern, technologically advanced societies of the West—and certainly in the United States—tend to put a lot of stock in technical, empirical studies, even when the question that we are ultimately trying to resolve isn't an empirical question. That concerns me. The implicit bias literature feeds into a fetish of social science.

In a sense, the implicit bias theories argue that if the Implicit Association Test shows that the decision maker is "biased," we can conclude that she has made an objectively incorrect decision—as opposed to a normatively repugnant decision. The idea is that the decision maker doesn't know her own mind—she is objectively incorrect about her own subjective preferences—because her decisions are being distorted by biases that she herself is not aware are at work. The false hope is that then I can prove that her decisions are invalid—not just objectionable or socially deleterious but invalid, in the way a rigged election is invalid. If that were true, then there would be no normative conflict involved at all—antidiscrimination laws would not involve contested political issues—instead they would involve only the technical question of how to make sure decision makers make the objectively valid decision and avoid the "biased" decision.

But in fact, what we actually are dealing with here is a normative issue: how should we balance the freedom of the individual to hire who he or she wants, rent to the person he or she wants to rent to, and so forth against the social need for integration and diversity? I don't think that this normative question can be resolved by social science. I just don't think that this is going to resolve the question. I don't think it will resolve the question in individual cases, and I don't think it is going to resolve the broader policy question.

In the 1970s, when the first iteration of the unconscious bias argument was articulated by Charles Lawrence in an article called "The Id, the Ego and Equal Protection,"[19] Lawrence was trying to make an argument for a disparate impact theory in equal protection jurisprudence. The idea was that unconscious bias could be identified only indirectly—through unexplained or unjustified statistical imbalance. But disparate impact theory is not a part of constitutional law and it is under sustained attack in the areas where it exists.

Ever since, people have been trying to develop arguments that ultimately go to that question—the question of disparate impact theory—and I think this is just the latest iteration of it. This is the latest version of trying to make an argument for introducing disparate impact on the equal protection side in constitutional law and for a beefed-up disparate impact in Title VII.

The implicit bias theory is basically an argument in favor of disparate impact, an argument to make it stronger—and it is also an argument for changing the way we distribute the burden of proof in intentional discrimination cases, making the law more friendly to plaintiffs. In both cases, the idea is that implicit biases can't be captured with existing evidentiary standards for proof of intentional discrimination.

Now, all of these are good projects as a matter of law and policy, and I am on Linda Krieger's side of every one of them, but I don't think the social sciences justify it. I think the argument is the same without the social science. It's a normative argument: we should do more to promote inclusion and diversity

at the expense of the freedom of employers and other decision makers. That is where my hesitation about the social science justification comes in.

This argument almost makes bias into a medical condition, a kind of mental illness. You hear arguments like that. It medicalizes the issue, and I think the medicalization of social problems is a real pathology in our society. (M. Foucault would have a lot of interesting things to say about that.) This is another aspect of the implicit bias argument that worries me.

A last thing: This project constructs bias in a very broad way. It is not just sexism or racism but bias—when something is cut on the bias, it is "against the weave." There is the idea that a "weave" is straight and narrow, that there is an objectively right way to go about making decisions. So through social sciences and technical means, we can kind of move people to make the "right decisions." That is the line in management sciences, technophilia in general, and, to some extent, the trend toward medicalization of social issues I just mentioned. Management sciences is in the background here in a big way. That is why implicit bias research has caught on so easily in the corporate sector in the United States: a group not really happy to have its biases pointed out, not happy about more government regulation, but implicit bias fits in nicely with the management science paradigm. I don't think it is healthy. I am with Vicki Schultz [who wrote about the risks of a "sanitized workplace"] on this.[20]

For all those reasons, I have misgivings; I don't want to say I am against it in all contexts. I do think that this research, viewed appropriately, provides valuable insights; I am not against the research, but it presents some dangers.

Linda Krieger claims that the courts are ignorant of unconscious biases and that is why the cases are coming out the way they are. But actually the law as it is can easily take into account of unconscious bias.

MARIE MERCAT-BRUNS: *Curiously, some courts mention her work.*

RF: That is not inconsistent with what I am saying: the judges that find it convincing may well say, "We ought to put the burden of proof on the defendant; we ought to think of the evidence in a different way because of unconscious bias." As a matter of evidence, that makes sense.

But I am not convinced that the doctrine is written in such a way that it can't take account of, or necessarily ignores, unconscious bias. When you look at the way the proof structure works in Title VII cases, most discrimination is proven by inference. So there is never a moment where the court is saying, "Now we are going to look into the mind of the defendant to see what he is thinking." Instead, the question is, Did the defendant have a good reason to hire this person over that one? What is the reason he has actually offered? Is that reason convincing? If not, we can infer another motivation. It doesn't matter if the motivation is conscious or unconscious. The courts are quite aware of the fact it is very difficult to actually read state of mind. Some courts have even

said things like "direct evidence of state of mind is impossible." In a sense, there can be no direct evidence. The cases are all about indirect evidence. In view of the importance of inference and indirect evidence, the distinction between conscious and unconscious motivation goes away; it just does not matter.

If you are thinking more generally about the design of the law, that is where the social science is useful. It does not get you anywhere in litigation, but it may well be important for policy.

Linda Krieger responds to Ford's critique.

LINDA KREIGER: I can see what Professor Ford is saying about the problematics of "pathologizing" discriminators, but on the other hand, we are influenced by our environments. If we live in an environment that is permeated with toxins of various kinds, those toxins will eventually affect our biochemistry. If we are living in a society in which we are surrounded by ideological toxins or by schematic toxins, those toxins will influence the implicit schematic structures through which we observe other people, through which we encode their behavior, interpret their ambiguous behavior, store memories about their behavior, retrieve those memories from our minds, and combine the information retrieved from memory to make social judgments about these people.[21]

I actually think that a public health model of equality is not a bad model, because it focuses attention on the environment in which people develop, judge, and act. It speaks to the need to change environments as a whole rather than to blame individual people or individual outcomes. This is a more systemic way of thinking about social problems as such, but also social problems influence individual judgments. So this is a place where I think my work and, for example, Susan Sturm's work, speak very productively to each other. Professor Sturm is really talking about the need to look at whole environments rather than attempting to identify some sort of invidious discriminatory animus that resides inside some isolated wrongdoer and then affects, on an individual level, his or her employment decisions. No, that's really not how inequality is structured within a society. That is the main insight of the work I am trying to do—take the focus off the individual decision maker and place that focus on the environment in which that decision maker is developing schematic associations, is interpreting behavior, is encoding behavior, and then is using behavior in judgment and choice.

MARIE MERCAT-BRUNS: *What I find fascinating is that you are talking about the systemic dimension of discrimination, whereas in your work on implicit bias you seemed to focus on the individual level of discrimination, the person and the testing. But this analysis is also systemic and takes the environment into account.*

LK: Let me speak a little more about that, if I may. The basic idea in the implicit bias approach to discrimination and nondiscrimination is that all perception

and all judgment is mediated by schemas. Schematic frameworks that we absorb from our social environments structure perception, judgment, and memory. Where does schematic content come from? We are not born with certain schematic structures. They come from our cultural and intellectual environments. So you can think of the development of schematic structures almost like a marinade in which some sort of food item is soaking. The food can't help but absorb what is in the environment.

So, if it is bias that is produced through the mediation of schematic frameworks that are built through exposure to discursive, cultural, experiential contexts, then of course implicit bias is going to be a story about social context. It is a story about culture. It is a story about discourse. I think people have misunderstood this.

In the discrimination context, be it in the United States or in France, if there is a dispute, there is going to have been a decision made—did discrimination occur in this particular case or did it not? To answer this question, we often have to examine one particular decision that was made by one particular decision maker. So of course we have to look at the decision-making process of that one decision maker in that one decision context. My work on cognitive bias comes out of my work as a plaintiff-side antidiscrimination lawyer. I want my work to influence what I see as conceptual flaws in individual disparate treatment doctrine as it has developed in the U.S. legal system. I think is why people tend to look at the implicit bias work as being about individuals. But once you move back and understand that, at its core, the work on implicit bias is really about the effects of schematic information processing more broadly, then the link with culture, the link with context, becomes very clear.

MM-B: *If we come back to the European context, we could apply this analysis of implicit bias and schematic information processing, but do you think we would obtain different results because of cultural differences? Would it be more difficult to apply this analysis and promote systemic change in countries where labeling is more common and categorizing people is not only an intrinsic part of social behavior but also provides a basis for the delivery of benefits in a welfare state?*

LK: What you are describing is a process by which individuals are assigned trait labels very rapidly and then trait labels are used to interpret subsequent behavior, are used to place people in fixed, social roles from which it is very difficult to move once assigned. I assume that you would be arguing that those trait labels are used as ways to understand ambiguous behavior and to predict future behavior?

MM-B: *Yes, some categories that correspond to legal statuses are used to accrue benefits in European welfare states. For example, in France, people who received a minimum income allocation known as the "RMI" came to be called something like "RMI-ers."*

LK: I think you are suggesting that the traits along which people are stereotyped would vary from country to country, that if, for example, receiving the RMI is a salient event in France, that those persons who are labeled "RMI-ers" would more readily be stereotyped, whereas a person, say, one who is of African ethnic descent, would not be as readily stereotyped as "black" as a similar person would be stereotyped in the United States than would people who are not labeled.

That is a testable claim, and it has strong public policy consequence if it is true. But again, it is an empirical question. Are blacks in France *really* less likely to be stereotyped and treated differently because of that stereotype than are RMI-ers? It would not be terribly difficult to design studies to test this hypothesis in a variety of contexts and with various different populations.

What I am arguing is that before France decides whether it wants to structure its antidiscrimination law differently or allocate its antidiscrimination law enforcement resources differently in cases of discrimination based on, say, income source as opposed to ethnicity, it would be good to know whether the theory you posit is correct. Without that research, one can speculate about the question, you can theorize it as much as you want. Anthropologists or sociologists, critical theorists, and economists can debate it, but you are not really going to know if is true.

MM-B: *But once you know it's true, what happens?*

LK: You shape policy around it. To the extent that public policy is driven by instrumentalist goals, you want to make sure that the truth claims on which the policy is built are correct in the particular place where the policy is implemented.

Here is an example. In the United States, we arguably focus too much on incentivizing individuals as individuals. Our focus on the individual as the locus of behavioral "choice" is based on something that our social psychologists have called the "fundamental attribution error." Interestingly, the fundamental attribution error—which is that we overattribute individual internal traits rather than environmental contexts—as it turns out, is not so fundamental after all. In Asia, for example, it has been found that Asians and Indians (not Native Americans) tend not to overattribute to internal dispositional traits but attribute more to environmental factors. So there are cross-cultural differences at play any time you are dealing with social psychology. You can't take an insight from one culture, universalize it, use it to shape policy in another culture, and expect the same policy outputs. We just don't know if, for example, white French are different from white Americans in their tendencies to spontaneously categorize by race. I would sure like to see some of those studies done in France.

In turn, Dean Robert Post discusses the scope and limitations of implicit bias approaches.

MARIE MERCAT-BRUNS: *What do you think of all the work that is done on implicit bias and the tests? Do you think it is useful? Is this an instrumentalization of law? Do you think it can have a transformative effect because people realize they have biases?*

ROBERT POST: I think it prejudges the question to call it prejudice or bias. I think what the tests are showing are interesting facts about the way we classify the world, respond to the world based on views of race and gender, and so it would be missing if we didn't. But again, I think it prejudges the question to call it prejudice or bias. These are reflections of natural classifications; how they affect behavior, I don't know what the work shows.

It is plain that on any of these issues, it make sense to use the law. We have a long way to go: we have structures which enforce these in ways that, when brought to consciousness, would probably say much. I would want to use the law to restructure forms of employment to make them more structurally accessible. I would use this implicit bias stuff in the political efforts to do that. Whether it has immediate legal application is a different question that I am not so clear about.

MM-B: *Some people think that this overutilization of science to help antidiscrimination law can in fact tend to control people. What do you think about voluntary compliance? The way Foucault would look at law in terms of power plays? It would mean that we could put everyone in a box and put a label on each behavior. You seem to be saying the same thing in that sense.*

RP: What I am saying is that this stuff is best used it as an educational tool. Whether it is a legal tool I don't see yet, because that would make legal tools depend upon scientific facts which may be pervasive. It would be out of anyone's control, and it would dehumanize things considerably. So I would be careful about using it as a legal tool.

But certainly it is an educational tool. People really believe they are gender-blind or color-blind and it turns out they are not: they should think about the way it influences their perception of the world. Maybe they would become more open to the ways in which things are happening. That is the way I think about it.

Dean Martha Minow shares some interesting research in the United States on implicit bias, stereotypes, and religion, a subject that is not well developed in France or in Europe in general, outside of the United Kingdom.

MARTHA MINOW: Mahzarin Banaji, a social psychologist who teaches at Harvard, and others have worked on implicit bias. They suggest that bias operates preconsciously, before the rational mind kicks in. But research also suggests that the biases are somewhat malleable; they are affected by context and exposure. Showing white people photographs of highly admired black people (such as Martin Luther King, Jr., and Denzel Washington) can at least

briefly reduce anti-black bias that shows up in unconscious ways. It is a hopeful thought that people's unconscious biases can actually be influenced by positive encounters.

Christine Jolls, a pioneer in the field of behavioral law and economics[22] and an employment law scholar, describes the impact of stereotypes and the implicit-association test.

MARIE MERCAT-BRUNS: *In addition to the labor market factors that discourage employment of older individuals, are negative views of older workers' attributes and abilities a factor?*

CHRISTINE JOLLS: There may well be conscious forms of bias against older individuals notwithstanding the fact that most individuals do not consciously revile older workers in the way that some white Americans consciously reviled black Americans a generation ago. But more important are implicit, or subconscious, forms of bias that have recently been rigorously studied using new advances in social psychology. Unlike conscious bias, such implicit bias cannot be captured simply by asking people direct questions about their views or attitudes.

In the context of age, a well-known study using a famous test called the Implicit Association Test (IAT) showed that people have a much harder time making positive associations with older individuals than with younger individuals. The IAT asks people to categorize a series of words or pictures into groups. Two of the groups are "young" and "old," and two of the groups are the categories "pleasant" and "unpleasant." Respondents are asked to press one key on the computer for either "old" or "unpleasant" words or pictures and a different key for either "young" or "pleasant" words or pictures (a stereotype-consistent pairing); in a separate round of the test, respondents are asked to press one key on the computer for either "old" or "pleasant" words or pictures and a different key for either "young" or "unpleasant" words or pictures (a stereotype-inconsistent pairing). Implicit bias against older individuals is defined as significantly faster responses when the "old" and "unpleasant" categories are paired than when the "old" and "pleasant" categories are paired. The IAT is rooted in the very simple hypothesis that people who are biased (perhaps subconsciously) against older individuals will find it easier to associate pleasant words with young faces than with old faces. In fact, implicit age bias as measured by the IAT proves to be substantial. Thus, negative attitudes about older individuals, even among those not conscious of holding such attitudes, may affect behavior by employers.

MM-B: *Do people show implicit bias on the basis of race?*

CJ: Absolutely. IAT results show that white Americans are much quicker at associating pleasant words with white faces (or white-sounding names) and unpleasant words with black faces (or black-sounding names) than the reverse.

Black Americans either show a milder form of implicit bias against their own group or, in some studies, show no implicit racial bias in either direction.[23]

Implicit racial bias bears a direct and important relationship with the earlier topic of disparate impact liability. Even if an employer does not consciously select a hiring measure, such as a no-beard rule, with the explicit desire of reducing the hiring of members of a particular group, it is possible that implicit bias explains why the hiring measure is chosen and, perhaps, why, in the absence of disparate impact liability, it may be retained even when its racial consequences become clear. Implicit bias may explain why a measure that needlessly screens out black Americans may be less likely to be abandoned than a measure that needlessly screens out white Americans.

A more comprehensive understanding of implicit bias can be gained by reading an important article co-authored by Christine Jolls and Cass Sunstein[24] and various analyses published by European and U.S. economists on discrimination.[25]

Testing and Implicit Bias

Devah Pager conducted a groundbreaking field experiment on racial discrimination in hiring. She discusses the role of unconscious bias and how discrimination is less overt today.

DEVAH PAGER: In the past, it was easy to observe discrimination based on overt rejections or hostility on the basis of race, ethnicity, gender, and so on. Today, however, because of laws barring discrimination and social norms that frown upon such behavior, discrimination, to the extent that it continues to take place, is much more difficult to observe.

The method of field experiments provides an opportunity to directly measure discrimination in action by investigating how employers (or other gatekeepers) respond to applicants who are identical apart from their race. This way, even if the discrimination is subtle, or unconscious, we can identify to what extent opportunities are shaped by a single status characteristic.

MARIE MERCAT-BRUNS: *Can you explain how you conduct your field experiments?*

DP: Sure. To conduct my field experiments of employment discrimination, I hire groups of young men to pose as job applicants. These young men (called testers) are carefully selected and matched on the basis of their age, height, weight, physical attractiveness, and interpersonal skills. They are then assigned matched fictitious résumés that present identical levels of education and work experience. Finally, the young men are put through an intensive training program to learn the details of their assumed profile and to practice interacting with employers in comparable ways. We want to make sure that the testers present themselves to employers as truly comparable applicants, apart from their race.

MM-B: *To your knowledge, is this the same testing that has been done in France, by Jean-François Amadieu, for example?*[26]

DP: It's similar. Although my sense is that more of the testing that has taken place in France has used paper applications (e.g., résumés sent by mail) rather than in-person applications. This is a method that's appropriate for some types of employment, but not the low-wage jobs I'm interested in, in the United States.

MM-B: *Your first comment about the overtness of discrimination seems to suggest that employment discrimination law is counterproductive if tends to make discrimination invisible or concealed.*

DP: Overall I think employment discrimination law has been incredibly helpful. But I do think there may be some perverse incentives. In fact, in interviews with employers, some mentioned that because of the risks of being sued for discrimination, they have become wary of hiring blacks at all. This is quite perverse: out of fear of being sued for discrimination, they become all the more likely to discriminate!

MM-B: *Why are you interested in low-skilled rather than high-skilled jobs? Does discrimination take a different form? Is it stronger, or is it easier to identify?*

DP: In the United States, it's in the low-wage labor market where we've seen the most persistent (and on some dimensions, increasing) racial disparities in employment. There's no doubt that discrimination exists in higher levels of employment as well, but these audit methods are less well suited to examining it. Discrimination in access to the networks that affect job placement, mentorship, informal opportunities for advancement, and the allocation of work responsibilities and opportunities within firms all show some evidence of discrimination, but these internal firm dynamics must be studied using different approaches.

MM-B: *Is discrimination hard to grasp?*

DP: One of the limitations of contemporary antidiscrimination law is that it relies on the victims of discrimination being aware that discrimination has taken place and being able to document proof. Given the subtlety of contemporary forms of discrimination, though, many (maybe most) individuals who experience discrimination have no idea that it has taken place. Most of my testers felt they were treated very well by employers, felt they were given serious consideration for the job. But, as it turned out, the black testers were only half as likely to receive a callback or job offer as an equally qualified white applicant. If these individuals had been real job seekers experiencing discrimination, there would have been very little recourse for them under the law.

MM-B: *I was also referring to the fact that the decision-making process might be more complex than just one decision or selection process. You mention this is in your articles.*[27] *Is that true today, or has it always been true?*

DP: Yes, that's true too. Because much of the discrimination taking place seems to be unconscious even to the employer, it's not just a matter of thinking, "He's black so I won't hire him." It's more complicated than that. There is a long sequence of interactions and evaluations which may be subtly colored by race. The rapport may be a little less natural, the skills indicated by the résumé may appear slightly less strong . . . lots of little things that cumulate to an eventual disqualification for the minority applicant.

MM-B: *So it's not because several different individuals interview the applicant.*

DP: In most of the jobs I studied, there was a single employer in charge of hiring. They relied a lot on what they referred to as their "gut instinct" about an applicant, which is the type of assessment that's easily influenced by unconscious bias.

MM-B: *So the way organizations are structured does not influence the decision-making process? In other words, doesn't it seem as though sometimes there might not be just one person responsible for the discrimination, because management and recruitment work is performed by teams?*

DP: I think the way organizations are structured has a huge influence on the decision-making process. Firms that have more formal, systematic hiring protocols in place often do a better job focusing on the more objective, job-relevant characteristics and are less distracted by extraneous characteristics that may affect rapport in an interview, even if irrelevant to the actual job. Organizational reform could do a lot to reduce hiring discrimination, in my opinion.

MM-B: *Do you think your testing methods could be used to test other employment decisions (access to training, promotions)?*

DP: I think this would be difficult, as it would be hard to randomly assign testers to positions within the firm. Without random assignment, it's hard to know whether the unequal outcomes are the result of discrimination or differences in the abilities of the various workers.

MM-B: *I would still like to understand how recruitment processes are interactive, contextual, and very much dependent on interpersonal relations.*

DP: Particularly in these jobs in which hiring is based on an unstructured interview, with employers looking for a "gut feeling" about a candidate, there is much about the decision-making process that gets actively shaped in the course of interaction. As we talked about, very few employers would reject any black candidate outright. But there are subtle ways in which the objective characteristics of a candidate (e.g., their qualifications and experience) takes on different meaning and significance depending on other characteristics of the applicant, the employer, and the job in question. Job experience presented by a white applicant may be viewed and interpreted differently than the exact same type of experience presented by a black applicant. We saw this repeatedly in the experiment. Employers interpreted the qualifications of our

applicants differently on the basis of their race, even though their résumés were explicitly constructed to reflect identical skills and experience.

MM-B: *What did you learn about unconscious bias during your studies outside of the influence of a "gut feeling"?*

DP: I've conducted a large number of interviews with employers, and I've come to believe that the vast majority of them really believe they are simply looking for the best person for the job, irrespective of race. They have experience working in diverse groups and don't have any conscious opposition to hiring workers of different races.

Because they believe they're nonbiased, it's even harder for them to recognize the ways that various informal aspects of the evaluation process favor whites and disadvantage minorities.

MM-B: *Have you shared your results with law professors or testified at trials?*

DP: I've presented my research at several law schools (Yale, Stanford, Chicago, UVA . . .) and have testified at hearings before the Equal Employment Opportunity Commission, among others.

Comparative Perspectives

Pager begins by admitting that discrimination is largely hidden or unconscious in the United States today: it is seldom overtly expressed as it was in the past, due to the country's long history battling to eliminate discrimination in social and employment practices. Her comments explain how unconscious bias can pervade the decision-making process and how disparities are not only based on protected traits but also depend on the worker's level of skill, since discrimination seems to be more prevalent among low-skilled jobs. Testing for discrimination in employment practices such as promotions and dismissals is difficult to do, unless the company chooses to organize the testing itself. This practice is currently gaining ground in France.[28] An additional difficulty with implicit bias is the fact that victims of discrimination are themselves often unaware of the bias operating against them, which can explain the lack of litigation or civil suits brought against employers.

Social Science and Bias

Frank Dobbin talks about the role of social science in law.

MARIE MERCAT-BRUNS: *Social framework evidence is becoming a source of expertise in employment discrimination litigation (see* Duke v. Wal-Mart*). What are your thoughts on this role of social science in law? Prevention with respect to enforcement of antidiscrimination law: is it just another way of combating discrimination?*

FRANK DOBBIN: I don't know enough about the law to say whether social framework evidence is the best way for plaintiffs to proceed. In American case law in this area, the courts early on made a distinction between disparate

treatment and disparate impact. Disparate treatment occurs when an employer visibly treats one group differently from another—tells African Americans that they are not eligible for management jobs. We see much less of that now in discrimination cases, and much more "disparate impact" in which employer practices or customs or bias lead to different outcomes for two groups: for men and women, or for blacks and whites. Social framework evidence is often used in such cases, where there is evidence that an employer promotes blacks at a lower rate than whites to management jobs, but no evidence of the precise mechanism that leads to the difference. Social framework analysis identifies how bias can be inscribed in the culture and practice of a firm. It is typically used to describe a context in which discrimination can occur.

I would hope that the courts would begin to take more seriously the growing body of evidence about the efficacy of different personnel and diversity practices for promoting equality of opportunity. For instance, there are now quite a few studies showing that antidiscrimination training does not reduce bias (a recent review by Paluck and Green of hundreds of studies in the *Annual Review of Psychology* confirms this).[29] And there are now quite a few studies showing that formal performance evaluations probably introduce bias into the promotion and salary-setting process, because they typically favor white men. Courts still seem to give credit to firms for diversity training and performance evaluation programs.

Our research shows that certain other programs actually have helped firms to improve opportunity for women and minorities. I would hope that firms, and the courts, would begin to recognize the efficacy of these programs.

Comparative Perspectives

In the comments by Linda Krieger and Richard Ford, two different perspectives on the benefits and drawbacks of implicit bias theory can be heard.[30] In France, antidiscrimination law is not deeply anchored in the eradication of bias or in the social sciences; its logic is more closely aligned with that of negligence or tort, as will be mentioned later by David Oppenheimer.

Bias is strongly normative and engenders discriminatory practices. This is a point that has been established beyond doubt and is upheld in the language of several Europe-wide employment promotion policies.[31]

The different viewpoints of the scholars interviewed are enlightening. Krieger sees research on stereotypes as at least a way to move forward in the litigation of individual claims of discrimination,[32] which does not completely contradict what Ford says. He points out the risk involved for the legitimacy of laws based on social science if there is a possibility that the social science can be subsequently called into question. The situation is exactly the opposite in France, where as a principle, legal scholars and practitioners shy away from the other disciplines to

emphasize "legal technique" and where even statistical evidence of discrimination is not mandatory.

More globally, Krieger also studies the sources of implicit discrimination found in the work environment where they emerge. She also investigates systemic forms of discrimination in companies that are not just the result of one individual's biased decision making. It is possible to apply the research on stereotypes in social psychology to institutional discrimination.[33] Institutions can promote the creation of stereotypes through mechanisms that appear neutral but produce discriminatory effects. But Ford worries that the recognition of stereotypes will encourage the corporate sector and other stakeholders to instrumentalize antidiscrimination law to promote the management sciences and business goals, straying from the true aim of antidiscrimination. Its goal is to detect and remedy inherent workplace inequality, which is exacerbated by discriminatory practices. This argument has also been advanced in the context of diversity initiatives in France, by those who highlight the ambivalence of these initiatives and the accompanying soft law.[34] In the comments by Post, one can sense a certain skepticism regarding the exploration of bias as a means of fighting discrimination, considering that bias is omnipresent in individuals and does not resolve the systemic causes of discrimination.

Other authors, both sociologists and law professors, such as Minow, Jolls, Pager, and Dobbin, also assess the relevance of social framework evidence[35] gathered from sociology and social psychology findings through the lens of their work. They subscribe to the validity of certain surveys and tests that take implicit bias into account. Monitoring individual bias in an organization seems to be one way to reduce the risk of class action litigation due to an error propagated through uniform human resources management. Such bias can permeate skills assessments at a management level in different branches of a company,[36] as has been observed in France.[37]

All of this seems to indicate a need to achieve that elusive balance between law that remains impermeable to the social sciences and what they can offer in terms of uncovering the bias that causes individual and systemic discrimination, and law that relies too heavily on these social sciences, jeopardizing its stability. How can we reconcile the idea of sanctioning discrimination knowing that some discrimination is unconscious? Inescapably, we come back to the intentional nature of the discriminatory practice.

II. DISCRIMINATION AND TORT

In contrast to the United States, antidiscrimination legislation in France provides for criminal sanctions.[38] How is this divergence reflected in the logic of antidiscrimination law and its relationship with tort law?

In the following interview, David Oppenheimer reacts to Linda Krieger's stance that it does not help people to impose criminal sanctions when there might not be conscious intent.

DAVID OPPENHEIMER: I think [she] is right. The question is, if we made discrimination a crime, would it have the effect of dissuading people from discriminating? I think Linda is correct: most people who make discriminatory decisions do so not with the intent to discriminate but for reasons of unconscious bias. I wrote a piece on this in 1993 called "Negligent Discrimination," in which I argued that most discrimination results from unconscious bias and should be treated as a form of negligence.[39]

MARIE MERCAT-BRUNS: *So we could treat discrimination as a tort? Do you think that employment discrimination law is a liability issue like a tort? For example, you've committed a fault, there is a causal effect, there are damages, and then there's remedy. Are we witnessing the same type of mechanism here?*

This is an interesting question in a comparative perspective with France, because common law has already had an undeniable influence on the legal framework in European employment discrimination law, and it might be easier to understand if tort is at the foundation of the employment discrimination model in the United States.

DO: That is the American model. The American model is to treat employment discrimination as an intentional tort, to treat it like an assault. We look at a decision and ask, Would the employer have made the same decision if the applicant had been white or male or straight or young? We therefore compare the protected characteristic of the plaintiff with a hypothetical majority group member (or alternatively with actual majority group members), and we ask whether we can determine if they had been treated differently because of race or sex or some other prohibited category. If the answer is yes, we ask what damages did that cause.

I have proposed we adopt the negligence model in analyzing discrimination. For example, you drive a car faster than you should, and as a result you cause an accident. Did you have a malicious intent? Absolutely not. Did you intend to drive into the other car? Absolutely not. Did you intend to cause an accident? Absolutely not. Did you intend to hurt somebody? No. Did you intend to hurt their car? No. Did you intend to hurt yourself? No. Are you responsible? Yes.

Why are you responsible? Because you have to drive with particular care in order to avoid accidents. That's why we have speed limits. It's also why we have laws against discrimination. As an employer, you are supposed to pay attention to things like race and gender in order to avoid discriminating. So when you get a batch of résumés, if you hire the good-looking white guy, you should say before you make that commitment, Why am I picking the good-looking white guy? Should I be concerned that every time I get to hire somebody I pick the good-looking white guy? Should I have looked a little more carefully at the résumés of the black man or black woman?

MM-B: *Is it a duty to act?*

DO: Yes, like the duty to drive carefully.

MM-B: *But a duty to act, like reasonable accommodation?*

DO: No, it is a duty to not treat people differently. It is not like reasonable accommodation, which can require a preference. It is a duty to not treat people differently because of race.

Comparative Perspectives

A central theme that seems to emerge from studying antidiscrimination norms is the parallel between the development of this law and that of tort: it is clear that the direct discrimination framework is designed to identify the party guilty of a discriminatory act that has caused harm to the victim of the discrimination. In order to establish direct discrimination, certain elements are required from the start, and these elements are equivalent to the prerequisites for establishing tort, as defined in Article 1382 of the French Civil Code: a wrongdoing—that is, the difference in treatment based a prohibited trait; damage—that is, the disadvantage (a harmful act) suffered by the victim of the discrimination; and the causal effect—that is, the proof that the discriminatory motive was the cause of the discriminatory act. In the same vein, Oppenheimer proposes to draw an analogy with no-fault offenses or strict liability as per Article 1383 of the Civil Code, due to the barrier posed by the difficulty of proving discriminatory intent.[40]

Oppenheimer's reasoning can be extended further. In France, tort law has shifted its focus from finding the fault of the person causing the harm to providing a remedy even where no fault has been committed.[41] It is therefore possible for antidiscrimination law to evolve from a law requiring courts to determine whether a fault has been committed in the form of intentional, direct discrimination to a law whose effective enforcement depends on the judge's ability to detect unconscious, indirect discrimination, even where there is no fault but only a discriminatory impact. This comparison with no-fault strict liability is important because it strengthens the legitimacy of the indirect discrimination mechanism in countries where civil-law tradition is firmly rooted. It can help the judges in these countries understand indirect discrimination because they are familiar with strict liability cases, in which the resulting harm and impact on the victim are also key issues. The development of tort law and that of antidiscrimination law can be said to emerge from the very same foundation: "the rule of the majority and the aspiration of equality that characterize the democratic regime, which naturally provoked a response to the difficulties of remedy: a protective response."[42]

In both cases, the question is, who will bear the liability for the risk? Who would be responsible for systemic discrimination related to an apparently neutral practice? The risk theory of liability is a well-known concept.[43] It seems that in France, when the foundations of tort law and antidiscrimination law are compared, it is easy to comprehend a certain similarity of purpose[44] above and beyond the legal mechanisms involved. The same preventive search for liability—this new

function of tort law to "preserve the well-being of future generations"[45]—can be seen in efforts to prevent discrimination and aligns with the diversity discourse found in collective bargaining and social responsibility norms. This precautionary principle is clearly oriented toward proactively managing differences and emerging risks rather than simply offering remedies for past harms[46] and tends to be instrumentalized, along with diversity and corporate social responsibility initiatives. A major stumbling block exists in both tort and antidiscrimination law,[47] revealing yet another similarity in their underlying logic: the proof of causation, which is a prerequisite in both types of disputes. In antidiscrimination law as in tort law, there may be several causes contributing to the injury, and a combination of legitimate and discriminatory reasons can be found for the challenged practice. When multiple correlations exist, how can the causal connection with the final injury be defined? Extensive U.S. case law and research have focused on the challenge of discrimination based on mixed motive (discriminatory and nondiscriminatory motives). The current U.S. standard is to find out whether the ground was a motivating factor,[48] except in age discrimination or retaliation cases.[49] France has not yet debated this issue in discrimination cases, outside the realm of unjust dismissal.