Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law

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Legal scholars are becoming increasingly interested in how the literature on implicit bias helps explain illegal discrimination. However, these scholars have not yet mined all of the insights that science on the social brain can offer antidiscrimination law. That science, which researchers refer to as social neuroscience, involves a broadly interdisciplinary approach anchored in experimental natural science methodologies. Social neuroscience shows that the brain tends to evaluate others by distinguishing between “us” versus “them” on the basis of often insignificant characteristics, such as how people dress, sing, joke, or otherwise behave. Subtle behavioral markers signal social identity and group membership, which in turn trigger the brain’s tendency toward us versus them thinking. This research speaks to the considerations underlying antidiscrimination law, and
suggests that social neuroscientists and antidiscrimination theorists should be in conversation.

Indeed, my investigation shows that social neuroscience and legal antidiscrimination theory are reaching a “consilience”—meaning an unlikely agreement in approaches between disparate academic subjects. Both agree on the importance of promoting tolerance for human behavioral difference. The time is ripe to explore this consilience more deeply. I do so preliminarily in this Article, proposing that antidiscrimination law should pay more attention to (1) the ways in which discrimination occurs through decision-makers’ distaste for those who “act differently” (rather than identity status alone), and (2) the need for more theory supporting a general human right to “act differently” within reasonable bounds.

INTRODUCTION .......................................................... 657
I. THE INSIGHTS OF SOCIAL NEUROSCIENCE .................. 670
   A. Social Neuroscience Basics................................. 670
      1. INTELLECTUAL SOURCES .............................. 670
      2. THE ROLE OF THE UNCONSCIOUS IN SOCIAL
         BEHAVIOR.................................................. 672
   B. Underappreciated Social Neuroscience Insights........... 682
      1. DETECTING IMPLICIT BIAS IS NOT (COMPLETELY) A
         BAD THING, AT LEAST AS COMPARED TO THE
         ALTERNATIVE.............................................. 683
      2. RACISM DOES NOT APPEAR TO BE “HARD WIRED”
         INTO THE HUMAN BRAIN............................. 686
   C. The Creation of In- Versus Out-Groups..................... 688
      1. CONFORMITY ............................................... 689
         i. Classic Studies ...................................... 690
         ii. Contemporary Research............................ 696
      2. SOCIAL PAIN ............................................. 698
      3. DEVIANCE.................................................. 701
II. HOW SOCIAL NEUROSCIENCE CAN INFORM
   ANTIDISCRIMINATION LAW...................................... 704
   A. Courts Should Expand Their Appreciation for the
      Complex Ways in Which Discrimination Occurs.......... 706
      1. COURTS SHOULD EXAMINE DISCRIMINATION
B. Policy Influencers Should Press Forward on Recognizing a General Human Right to Act Differently
   1. Recognizing the Harm of “Covering” and Like Violations of the Right to Act Differently ...
   2. Adopting Private Policies Against Expressing Prejudice
   3. Promoting Diversity and Inclusion as Benefits That Transcend the Current Culture Wars
   4. Devoting More Resources to Implicit Bias Interventions

CONCLUSION

INTRODUCTION

In one of many extraordinary moments in the last U.S. presidential campaign, then-candidate Donald Trump mocked the arm movements of a reporter with a condition that causes bent wrists.\(^1\) Holding his hands in a twisted position, Trump proclaimed, “You gotta see this guy,” and flailed his arms to “imitate” the reporter’s disability.\(^2\) This was far from the only time Trump ridiculed or condemned

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\(^2\) Id. (describing Trump’s denial as false and providing a video of Trump’s words and actions). The reporter “speaks with a normal voice and doesn’t flail his arms around.” Id.
others for allegedly acting differently. Trump falsely characterized social groups as acting differently in many ways. His campaign rhetoric included repeated claims that Mexicans commit crime, engage in drug dealing, and commit rapes and murders.\(^3\) Trump characterized Syrian refugees as supporting ISIS, Muslims as supporting terrorism,\(^4\) and African Americans as well as Latinos as committing the “overwhelming amount of violent crime in our major cities.”\(^5\) In all of these and many more instances, Trump linked a social category with allegedly aberrant ways of acting; in other words, he reviled people for acting differently.

Social scientists correlate Trump’s rhetoric with a rise in the social acceptability of expressing prejudiced opinions.\(^6\) Hate-watch groups document a significant uptick in the incidence of hate crimes throughout the United States.\(^7\) Even more disturbingly, Trump’s


rhetoric against those who allegedly act differently may have helped rather than hurt him in the polls in 2016. Something about mocking others based on behavioral stereotypes appealed to many voters.

It comes as no surprise that people may be reviled based on perceived conduct differences. Examples from classic racist, anti-Semitic, and homophobic rhetoric vividly illustrate this. Reconstruction Era racist Ben Davis described the “Jim Crow Negro” as “an abnormal product” who lives “in the realm of the superficial,” lacks good character and respectability, and is an “idle, educated misfit.”

Nazi Reich Minister of Propaganda Joseph Goebbels condemned Jews as “instigators, rabble-rousers and slave drivers,” who are “bloodthirsty and vengeful agitators and political lunatics,” exhibit “rage and deep hatred,” “follow a different moral code,” and engage in “countless crimes.” In 1978, best-selling author Tim LaHaye described gay people’s behavior as angry, obsessively selfish, and exhibiting a “sinful life style that contagiously reaches into the minds of otherwise normal young people,” while California Senator John Briggs argued for firing all gay teachers because “most of them are seducing young boys in toilets.”


Cf. id. (“Both racial resentment and black influence animosity are significant predictors of Trump support among white respondents . . . ”).


bor this disturbing point: “othering”—or rendering subhuman a reviled out-group—often involves characterizing that group’s behavior as abhorrently different.\(^\text{15}\)

Perceived difference in the way people act can trigger ill treatment in several ways. One involves actual differences in human beings’ biological makeup, as in the example involving the reporter Trump mocked for having a physiological difference.\(^\text{16}\) Disability advocates have begun to use the term neurodiversity to capture these biologically based human variations.\(^\text{17}\) I have previously written on discrimination based on neurologically based differences in how people behave socially,\(^\text{18}\) so here I will not focus on that topic—i.e., on discrimination on the basis of acting differently that generally falls within the ambit of disability rights law. My prior analysis in that article, however, provides an important building block for the arguments I present here. It matters not whether behavioral difference arises from an “impairment” or any other source: such difference often constitutes a basis for invidious discrimination.\(^\text{19}\)

The examples of racist, anti-Semitic, and homophobic rhetoric I just offered involve another kind of acting differently. In those examples, hatemongers use allegations that social out-groups act differently as a reason to revile them.\(^\text{20}\) Just as perceptions that someone acts differently can produce discrimination in the disability law

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\(^{15}\) See infra note 148 and accompanying text.
\(^{16}\) See Gathright & Jacobson, supra note 1.
\(^{17}\) See, e.g., THOMAS ARMSTRONG, THE POWER OF NEURODIVERSITY 8 (2011) (defining the concept of neurodiversity and explaining its relationship to disability rights advocacy).
\(^{19}\) See id. at 1170–80.
\(^{20}\) See, e.g., Goebbels, supra note 12.
context, perceptions on the basis of group identity can generate discrimination against any social out-group whose members are perceived as different based on socially constructed meanings attached to perceived behavior.\textsuperscript{21}

A third type of discrimination arises from negative reactions to individuals or groups who act differently as a means of protest. Dissidents exemplify this third kind of \textit{acting differently}; included in this category are whistleblowers, who buck codes of loyalty and secrecy in work groups to expose organizational wrongdoing. In this Article, I argue that retaliation against dissenters involves another form of discrimination based on \textit{acting differently}.\textsuperscript{22}

Antidiscrimination law currently treats acts of discrimination against persons with social disabilities,\textsuperscript{23} members of social out-groups,\textsuperscript{24} and dissenters\textsuperscript{25} largely as separate forms of discrimination. My argument, based on social neuroscience, is that, at bottom, each of these three varieties of illegal discrimination are much the same. All arise from similar, neurally based phenomena. Antidiscrimination law should better recognize this.\textsuperscript{26}

This Article is the last in a series of three I have devoted to the general topic of antidiscrimination law and human beings acting differently.\textsuperscript{27} My prior articles focused primarily on legal doctrine, as well as its development as a matter of civil rights history.\textsuperscript{28} This Article steps away from the details of law and legal history to take a broader, tentative interdisciplinary social science perspective. With the eyes of a neophyte, I explore the insights of experimental science—especially the relatively new interdisciplinary field called social neuroscience, which explores (among many other topics) how

\begin{thebibliography}{9}
\bibitem{21} See infra Section II.A.1.
\bibitem{22} See infra Section II.A.4.
\bibitem{25} See id. § 2000e-3(a).
\bibitem{26} See infra Section II.A.1.
\bibitem{28} See, e.g., Carle, \textit{Angry Employees}, supra note 27; Carle, \textit{Social Impairments}, supra note 18; Susan D. Carle, \textit{Conceptions of Agency in Social Movement Scholarship}, 39 LAW & SOC. INQUIRY 522 (2014) [hereinafter Carle,\textit{ Agency}].
\end{thebibliography}
and why the brain tends unconsciously to discriminate against others perceived to have behavioral differences.\textsuperscript{29}

Legal scholars have long mined the findings of psychology to assist them in constructing legal doctrine.\textsuperscript{30} Over the past few decades, they have begun exploring the research on implicit bias to help explain why illegal discrimination continues to be rampant despite decades of prohibition.\textsuperscript{31} It is important to point out at the outset that implicit bias does not completely explain discrimination.\textsuperscript{32} It does not, for example, capture the many complex historical and structural forces that present “built-in headwinds” for traditionally excluded outsiders.\textsuperscript{33} But the science on implicit bias can provide part of the explanation for the complex phenomenon of persistent discrimination in U.S. society.\textsuperscript{34}

In this Article, I mine social neuroscientists’ work on how and why implicit bias occurs, focusing on the science about how the brain automatically and non-volitionally processes cues that mark persons as in-group versus out-group members.\textsuperscript{35} What often matters to the brain is not status or identity per se, but what the brain perceives about how a person’s behavior reflects identity.\textsuperscript{36} These findings suggest that antidiscrimination law, too, should focus more on the links between perceptions of behavior—or “acting differently,” as I will put it throughout this Article—and discrimination.\textsuperscript{37}


\textsuperscript{31} For a recent summary of the empirical literature showing the continuing persistence of discrimination in U.S. workplaces, see Joseph A. Seiner, The Discrimination Presumption, 94 NOTRE DAME L. REV. 1115, 1128–45 (2019).


\textsuperscript{34} For a discussion of the historical development of the legal concepts of disparate impact and structural discrimination, see Susan D. Carle, A Social Movement History of Title VII Disparate Impact Analysis, 63 FLA. L. REV. 251 (2011).

\textsuperscript{35} See infra Sections I.A.2, I.C.

\textsuperscript{36} See infra Section I.A.2.

\textsuperscript{37} See infra Section II.A.1.
The normative arguments that arise from this focus can produce both modest and more far-reaching proposals. Modest proposals call on judges, lawyers, scholars, legislators and others to focus on how persons may be discriminated against based on how they are perceived to act in relation to their identities. In U.S. law today, statutory prohibitions on discrimination in employment—the area of antidiscrimination law on which I will focus here—are limited to a handful of types of status distinctions. In federal antidiscrimination law, these protected statuses are race and color, sex, national origin, religion, age, and disability. In the eyes of Congress, only discrimination based on these statuses raises sufficient concerns to warrant antidiscrimination protections, usually because of the severity of the nation’s history of mistreatment against these identity groups. Put most simply, it is illegal for an employer to discriminate against persons based on their status as members of traditional outsider categories.

38 See infra Section II.A.1.
39 To keep this project manageable, I focus exclusively on U.S. law, though much could be gained from comparative approaches.
40 I focus on employment law because it is an area both rich in antidiscrimination theory and of large importance to contemporary U.S. society. See generally CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003) (presenting an extended argument about the importance of workplace relations to U.S. society). Many of the points I make in this Article concerning employment antidiscrimination law can easily be extended to other antidiscrimination fields. See Carle, Social Impairments, supra note 18.
41 Some states protect against more types of status discrimination. The District of Columbia, for example, covers all of the statuses listed above, plus “marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, . . . source of income, status as a victim of an intrafamily offense, and place of residence or business.” D.C. CODE § 2-1401.01 (2019).
45 For ease of reference, I refer to these as “traditional outsider” categories.
To be sure, illegal discrimination continues to occur based solely on perceived status, *i.e.*, based on visible markers connecting a person with a traditional outsider group.\(^\text{46}\) However, as many antidiscrimination theorists point out, much of this stark “first-generation” discrimination has gone underground.\(^\text{47}\) In today’s second- (or even third- or fourth-) generation landscape, discrimination often takes place in a manner that is more subtle and complex.\(^\text{48}\)

Social neuroscience adds science-based, empirically derived discoveries about how the brain works, showing that it is often perceptions of behavior—*i.e.*, acting differently—rather than social identity per se, that triggers bias.\(^\text{49}\) These findings lend support to longstanding reform proposals that would turn courts and other policy influencers’ attention toward the performance of identity, rather

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\(^{46}\) For example, in tests involving two candidates with identical resumes, one of whom has a “[w]hite sounding” name and the other a name perceived as likely to be African American, the apparently white candidate is fifty percent (50\%) more likely to be called for an interview than the apparently African American candidate. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 1–3, 10 (Nat’l Bureau of Econ. Res., Working Paper No. 9873, 2003), http://www.nber.org/papers/w9873 (presenting results of a study finding these results at a highly statistically significant level of certainty); see also TELTON E. HENDERSON CTR. FOR SOC. JUSTICE, U.C. BERKELEY SCH. OF LAW, *EQUAL OPPORTUNITY: THE EVIDENCE* 7 (2012), https://www.law.berkeley.edu/files/tcsj/EOTheEvidence.pdf (presenting statistical evidence on employment inequality); Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 187 (2008) (finding that African Americans are more likely to be unemployed and paid less than whites).


\(^{48}\) *Id.* at 468. (“‘[S]econd generation’ most accurately refers to a subtle and complex form of bias[,]” which is “difficult to trace directly to intentional, discrete actions of particular actors.”).

\(^{49}\) See infra Section I.A.1.
than identity per se, in detecting and rectifying illegal discrimination.⁵⁰ These findings suggest some other relatively modest doctrinal reforms as well, as I will discuss in Section II.A.

A more far-reaching proposal would call on policy influencers to embrace a general human right “to act differently.”⁵¹ The broad principle of promoting greater tolerance for human difference emerges as a key point of consilience—meaning “agreement between the approaches to a topic of different academic subjects, especially science and the humanities”⁵²—between social neuroscience and legal theory. Just as this principle emerges from social neuroscience, disparate legal scholars, writing in a variety of subfields spanning antidiscrimination theory to civil rights history, have moved toward such a concept.⁵³ As I will show in Part II, leading scholars in these fields have in recent decades begun to explore the right to act differently, at least in an abstract, aspirational way.⁵⁴

Current U.S. law comes nowhere near supporting such a broad right, however, and it might be unworkable and even counterproductive to try to legislate tolerance in any event.⁵⁵ Recognition of a general human right to act differently thus may not be best achieved through legal prescription. Instead, valuing a general human right to act differently may be an aspirational norm toward which antidiscrimination law can “nudge” society even without a direct, formal, or “hard law” mandate.⁵⁶ The time appears ripe to explore these possibilities arising from the emerging consilience between fields. This Article sets out to do so.

This Article proceeds as follows. After this introduction, Part I lays out the basic social neuroscience findings relevant to my argument. Part II links this social neuroscience to the ongoing conversation among legal antidiscrimination scholars, and traces the insights

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⁵¹ See infra Section II.B.


⁵³ See infra Section II.B.1.

⁵⁴ See infra Section II.B.1 (offering an extended discussion of this literature).

⁵⁵ See infra Section II.B.2.

⁵⁶ See infra Section II.B.2.
that emerge from such a mapping in order to discern fruitful paths forward for antidiscrimination law and policy. Specifically, it recommends (1) expanding recognition of discrimination based not only on protected status but also how persons are perceived as acting differently; and (2) promoting antidiscrimination law’s broad principle—if not, at this point, doctrine itself—recognizing a general right to “act differently” within reasonable bounds.

Before continuing, it will be helpful to address some of the likely objections a law-focused audience may raise to this project. The first obvious question is, why turn to social neuroscience? To be sure, overreliance on social science (or any other discipline), has many dangers: One need only invoke the Nazis’ use of neuroscience to


58 Of course, a reasonableness limit must apply when recognizing a right to act differently. Liberal philosophers propose the limiting principle of not doing harm to others. See generally JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (stating that persons should be permitted to do whatever they want as long as they do not harm others). Although line-drawing is an important issue, it will not be my goal in this Article to take up this matter; instead, my focus is on detecting in both antidiscrimination law and social neuroscience the emergence of a principle supporting an expanded right to act differently.

An illustration of the complexity of determining the bounds of reasonableness in recognizing a right to act differently comes from the literature showing that sometimes even law-breaking behavior improves society. See, e.g., EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP at viii–ix (2010) (summarizing their thesis that violating property laws can lead to positive social change).
horrific ends to win this point.\textsuperscript{59} However, this point does not prove its opposite—\textemdash \textit{i.e.}, that experimental science may not helpfully inform legal theory. The task is a pragmatic one: to use what is useful, always with an appropriate dose of skepticism and detachment from strong conviction; to discard what is not; and, as the proverb goes, wisely to judge the difference. Whether this Article accomplishes that middle way is up to the reader to decide. What I offer is a contribution to a complex collective project of looking for points for joinder across fields of human knowledge (as well as points for interdisciplinary critique) in times that demand fully mining the best ideas we can find.

Science does not answer value questions; it cannot tell us what kind of society we should strive to achieve.\textsuperscript{60} Experimental social science instead adopts a utilitarian moral outlook; it accepts that, from a utilitarian perspective, prejudice is a counter-utilitarian waste of human resources that society could put to higher value use.\textsuperscript{61} With these assumptions in place for purposes of establishing a starting place, this Article explores how social neuroscience might help shape antidiscrimination policy and law.

Other pragmatic considerations motivate this project as well. Current political and social conditions call for modes of discourse anchored in information derived from the use of scientific methodologies. In a world of “alternative facts,”\textsuperscript{62} establishing verifiable

\textsuperscript{59} See Aleksandra Loewenau & Paul J. Windling, \textit{Nazi Medical Research in Neuroscience: Medical Procedures, Victims, and Perpetrators}, 33 CAN. BULL. MED. HIST. 418, 418, 421–25 (2016) (examining unethical Nazi “medical procedures as they relate to the field of neuroscience”).

\textsuperscript{60} \textit{Understanding Science: How Science Really Works}, U.C. BERKELEY, https://undsci.berkeley.edu/article/_0_0/whatisscience_12 (last visited Mar. 23, 2019).


and replicable findings matters far more than it did in the recent past. Whereas two decades ago legal scholars enjoyed exploring postmodern theories on the relativity of truth, today the same scholars find themselves extolling the ideas of the Enlightenment. These ideas include the basic tenets of scientific thinking, which involve generating valid empirical observations, testable hypotheses, and replicable results. Empirically tested, well-documented, peer-reviewed, published, and replicated findings provide an initial groundwork for arguments about policies, principles, and values. They do not end arguments but they should at least figure into the discussion.

Of course, political and ideological predispositions influence experimental social scientists’ (as all scholars’) interests. But the scientific method’s emphases on verification through statistical analysis and replication of findings provides a disciplining check. I therefore rely heavily on leading experts’ syntheses of research findings considered highly respected work in the field. From the cau-

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64 See id. at 612.
67 Id. at 99.
68 In the past two decades, internal critics in the natural sciences have called on researchers, including social psychologists, to adhere to tighter methodological standards and ensure the replicability of their research results. See, e.g., Open Sci. Collaboration, An Open, Large-Scale, Collaborative Effort to Estimate the Reproducibility of Psychological Science, 7 PERSP. ON PSYCHOL. SCI. 657, 657 (2012) (describing “open, large-scale, collaborative effort to systematically examine the rate and predictors of reproducibility in psychological science”); Harold Pashler & Eric-Jan Wagenmakers, Editors’ Introduction to the Special Section on Replicability in Psychological Science: A Crisis of Confidence?, 7 PERSP. ON PSYCHOL. SCI. 528, 528 (2012) (outlining the background of the replication crisis in science generally and introducing a special collection of articles addressing recommended
tious perspective of an interested outsider with an overlapping research agenda, I turn to recognized experts in social neuroscience subfields to build a conversation between social neuroscience and legal antidiscrimination theory.

Objections to this project can come from the obvious inability of brain-based science to predict individual human behavior, along with the related problems of attempting to use neuroscience evidence in particular legal cases.\(^6^9\) I hasten to point out that these are not the topics of this Article. Nor do I in general venture into the many thorny questions neuroscientists face about what regions of the brain are involved in various neural functions; problems concerning the locations of various brain-based processes do not matter to the questions I investigate here.\(^7^0\)


\(^{70}\) Indeed, as expert neuroscientist Dr. Terry Davidson pointed out in commenting on my Article at a WCL workshop, it is not clear that specific brain regions account for various activities. See Janelle Beadle & Daniel Tranel, *Social Neuroscience: A Neuropsychological Perspective*, in *SOCIAL NEUROSCIENCE HANDBOOK*, supra note 29, at 49, 56–58 (describing difficulties in determining the specific brain areas responsible for cognitive processes).
A final likely objection comes from the historical—and current—association of social neuroscience with a field that scholars now call evolutionary biology. Many progressives oppose evolutionary biology’s claims that human social behavior arises from the dictates of evolution.\textsuperscript{71} It is certainly the case that many experimental social scientists with a natural science orientation are intellectually committed to a wide range of versions of evolutionary biology.\textsuperscript{72} One may reject evolutionary biology—or be agnostic or skeptical (as I am)—and still find the experimentally based, replicated, and statistically significant findings of social neuroscience highly interesting and informative (as I do). In other words, one need not accept all of the intellectual commitments of natural science-based experimental psychology to gain a great deal from an interdisciplinary conversation. With these preliminaries cleared away, I put that conversation in motion below.

I.\hspace{1em}THE INSIGHTS OF SOCIAL NEUROSCIENCE

A. Social Neuroscience Basics

1. INTELLECTUAL SOURCES

Most simply put, social neuroscience studies, from a natural science-based, broadly interdisciplinary perspective, how the “social brain” works.\textsuperscript{73} As an interdisciplinary field,\textsuperscript{74} social neuroscience borrows from many natural science traditions. From medical studies, social neuropsychologists borrow techniques that test what social deficits occur when persons experience brain damage in particular locations of the brain.\textsuperscript{75} Medical investigators have used this...

\textsuperscript{71} For a helpful summary of this critical literature, see Rachel O’Neill, Feminist Encounters with Evolutionary Psychology, 30 AUSTRALIAN FEMINIST STUD. 345, 345–48 (2015) (introducing a multi-perspective symposium on this evolutionary psychology and summarizing existing literature critical of and defending this field).

\textsuperscript{72} See, e.g., GREENE, supra note 61, at 23, 347–48 (expressing a commitment to evolutionary theory).

\textsuperscript{73} Svenja Matusall et al., The Emergence of Social Neuroscience as an Academic Discipline, in SOCIAL NEUROSCIENCE HANDBOOK, supra note 29, at 9, 9.

\textsuperscript{74} Cacioppo & Decety, supra note 29, at 5 (noting that “[s]ocial neuroscience emerged in the early 1990s as a new interdisciplinary academic field”).

\textsuperscript{75} Beadle & Tranel, supra note 70, at 49, 52.
technique, known as brain lesion studies, for centuries. Social neuroscientists also use very new technologies, such as electromagnetic brain mapping, to study how the brain responds to social stimuli. They draw on a multitude of other experimental methodologies to study how the brain performs social behavior as well, including game theory, computer modeling, behavioral economics, epidemiology, animal behavior studies, and experimental social and developmental psychology.

Social neuroscientists accept some of the premises of classic philosophers and social theorists but reject others. Most significantly, they refute the Cartesian division of human consciousness into a non-physical realm of the mind and a tangible, material realm of the corporeal body. Instead, social neuroscientists locate all mental functioning in the physical brain and study it as such. They

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76 Chris Rorden & Hans-Otto Karnath, Opinion, Using Human Brain Lesions to Infer Function: A Relic from a Past Era in the fMRI Age?, 5 Nature Reviews Neuroscience 813, 813 (2004). For example, neuroscientists have determined that persons with damage to the ventromedial prefrontal cortex show a reduced “capacity for social emotions (e.g., compassion, empathy, [and] guilt),” even though their ability to engage in utilitarian reasoning appears unaffected. Beadle & Tranel, supra note 70, at 59.

77 See Cacioppo & Decety, supra note 29, at 6 (noting that social neuroscience draws on the behavioral and social sciences as well as the neurosciences to investigate complex human behavior across multiple levels of analysis); Matusall et al., supra note 73, at 9–10, 17–20 (discussing the contribution to social neuroscience of social psychology as well as brain neuroimaging studies, animal studies, behavioral economics, and psychiatry); infra Section I.A.2.

78 See Julian Paul Keenan et al., An Overview of Self-Awareness and the Brain, in Social Neuroscience Handbook, supra note 29, at 314, 314–15; see also Edward O. Wilson, Consilience: The Unity of Knowledge 96–97 (1998) [hereinafter Wilson, Consilience] (describing philosophers such as Descartes and Kant as having “failed models of the brain” and arguing that “the fundamental explanation of mind is an empirical rather than a philosophical or religious quest”).

80 See Keenan et al., supra note 79, at 315, 319–21. Social neuroscientists even believe that they will soon locate the seat of consciousness, a puzzle that has stymied philosophers for centuries. See Edward O. Wilson, The Social Conquest of Earth 9 (2012) [hereinafter Wilson, Social Conquest] (“Within a generation, we likely will have progressed enough to explain the physical basis of consciousness.”).
acknowledge a debt to Sigmund Freud for proposing that the unconscious plays a large role in human behavior, but view the substance of most of his theories, which lack grounding in controlled experimentation, as wildly off base.\textsuperscript{81} Instead, social neuroscientists trace their conception of the unconscious to the pioneering experimental work of late nineteenth-century psychologists such as William James.\textsuperscript{82} Working in natural science-based, experimental disciplines, a broad range of scientists have come to a consensus, based on a vast amount and variety of data, that powerful unconscious mechanisms operate in the human brain to produce much human behavior, including many aspects social conduct.

2. THE ROLE OF THE UNCONSCIOUS IN SOCIAL BEHAVIOR

Over the past century, experimental findings have led researchers to become increasing convinced of the powerful role of the unconscious in even the most basic aspects of perception.\textsuperscript{83} Unconscious processes organize the unmanageably complex data we receive through our senses—especially through our eyes—so as to allow us to make our surroundings intelligible.\textsuperscript{84} The brain does this so quickly and automatically that we are not aware of all the processing that takes place before we can even start to make sense of our environment, both in its physical and social aspects.\textsuperscript{85}

As most relevant to social behavior, the elegant experimental work of two Israeli-born social psychologists, Dan Kahneman and Amos Tversky, paved the way to the understandings scientists now possess about the social brain.\textsuperscript{86} Their work became popular in legal scholarship when Kahneman won the Nobel Prize for economics and published a best-selling book entitled \textit{Thinking, Fast and Slow}.\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{81} See LEONARD MLODINOW, SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR 16–17, 33, 104 (2012); Keenan et al., \textit{supra} note 79, at 315.
\item \textsuperscript{82} MLODINOW, \textit{supra} note 81, at 31–33.
\item \textsuperscript{83} For a recent accessible introduction into this research, see generally \textit{id}.
\item \textsuperscript{84} \textit{Id.} at 35.
\item \textsuperscript{85} \textit{Id}.
\item \textsuperscript{87} DANIEL KAHNEMAN, \textit{Thinking, Fast and Slow} (2011).
\end{itemize}
after Tversky’s death in 1996.\textsuperscript{88}

Kahneman and Tversky discuss two distinct mental processes that operate in human thought.\textsuperscript{89} One, called “fast thinking,” is rapid, intuitive, and automatic, occurring “with little or no effort” or voluntary control.\textsuperscript{90} Kahneman adopted the label “System One” for this fast, intuitive system.\textsuperscript{91} The other, called “slow thinking,” involves the attentive, deliberative, effortful, rational thought we typically associate with thinking.\textsuperscript{92} For this second, more ponderous and deliberative system, Kahneman adopted the label “System Two.”\textsuperscript{93} Most interesting to Kahneman in the operation of System One are the ways in which it preempts, aids, and often entirely substitutes for System Two.\textsuperscript{94} System One, as Kahneman explains, often performs brilliantly, allowing System Two to persist in its “indolent” ways.\textsuperscript{95}

Kahneman and Tversky persuasively show that System One’s unconscious, automatic, and rapid thought is crucial to human functioning in a host of ways, including social interaction.\textsuperscript{96} Yet, as they further demonstrate, the thought processes of System One are also error-prone and rife with many kinds of systematic biases.\textsuperscript{97} Through a description of a series of simple yet brilliant experiments, Kahneman and Tversky detect System One engaging in a wide range of irrational forms of decision-making.\textsuperscript{98} Just a few of these include “the marvels of priming,” where simply hearing a series of words may change one’s behavior without any awareness.\textsuperscript{99} For example, young adults asked to create sentences from the words “Florida, forgetful, bald, grey or wrinkle,” later walk down a hallway more

\textsuperscript{88} Smith, supra note 86.
\textsuperscript{89} KAHNEMAN, supra note 87, at 20.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id. at 20–21.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 21–28.
\textsuperscript{95} Id. at 417.
\textsuperscript{96} See id. at 21–28.
\textsuperscript{97} Id. at 25–28.
\textsuperscript{98} See id. at 53–54.
\textsuperscript{99} Id.
slowly than members of a control group do.\textsuperscript{100}

In another telling example, experimenters gave subjects the following description of a person named Linda:

Linda is thirty-one years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.\textsuperscript{101}

The experimenters then asked the subjects to rank the probability of a series of eight statements about Linda’s probable vocation, which included the statements, “Linda is a bank teller,” and “Linda is a bank teller and is active in the feminist movement.”\textsuperscript{102}  By surprising margins, subjects ranked the second statement as more probable than the first, even though that decision is necessarily a logical fallacy because a statement with two conditions cannot be more probable than a statement with one.\textsuperscript{103}  This, Kahneman argues, shows how human beings, through the operation of heuristics, privilege “representativeness” over logic.\textsuperscript{104}  Subjects focus intently on

\textsuperscript{100}  *Id.* at 53 (emphasis omitted). Other features of System One thinking include a tendency to associate causal relationships between events that occur randomly, *id.* at 74–77, and to “have intuitive feelings and opinions about almost everything that comes your way,” *id.* at 97. Examples of this latter tendency toward intuitive snap judgments include liking or disliking strangers without knowing why, making predictions of success without analysis, answering questions one does not understand, and relying on evidence one cannot defend. *Id.* Another type involves illusions of memory or confabulation, through which people invent untrue memories to fill in gaps in what they do remember, all with no awareness that they are doing so. See *id.* at 60–61; GREENE, *supra* note 61, at 299–30. Still other examples involve misperceiving risk levels and probabilities, jumping to conclusions based on good stories rather than good evidence, and being wildly overconfident in estimates of one’s abilities and level of control over events. KAHNEMAN, *supra* note 87, at 138, 209, 256. Experimental subjects similarly show irrational aversion to losses and the powerful influence of what psychologists call “the endowment effect,” meaning that they place more value on things they currently own than things they do not yet possess. *Id.* at 292–99.

\textsuperscript{101}  *Id.* at 156.

\textsuperscript{102}  *Id.* at 156–57.

\textsuperscript{103}  *Id.* at 157–58. The percentage of University of California undergraduate students who committed this error was eighty-nine percent (89%). *Id.* at 158.

\textsuperscript{104}  See *id.* at 158–60.
the imagined whole of a person’s social identity based on just a few factual clues and assume that one fact about a person’s characteristics necessarily predicts others, even though this logically is not true.\textsuperscript{105}

The force of Kahneman and Tversky’s work leaves little room for denying that illogical stereotypes and other faulty heuristics operate frequently in human social thinking. Their work opened the way for much more experimentation on the nature of System One thought.\textsuperscript{106} At this point, the great weight of evidence, gathered through numerous scientific approaches, has confirmed the existence of fully unconscious, often illogically biased, System One processes in social behavior.\textsuperscript{107} A host of studies from a wide variety of disciplines prove this fact.\textsuperscript{108}

Studies show that the human brain processes huge amounts of social information about human faces within milliseconds, even be-

\begin{itemize}
\item \textsuperscript{105} See \textit{id.} at 157–58.
\item \textsuperscript{106} See Smith, \textit{supra} note 86.
\item \textsuperscript{107} See Ezequiel Morsella & John A. Bargh, \textit{Unconscious Action Tendencies: Sources of “Un-Integrated” Action, in Social Neuroscience Handbook, supra} note 29, at 335, 336–41. Some experiments testing for the existence of fully unconscious processes have produced astounding results. Neuroscientists have discovered, for example, that persons with damaged optic nerves that render them unable to see can still accurately reach for objects placed before them. \textit{Id.} at 337. Human beings who lack sight can categorize, at a statistically significant level of success, images of human faces that researchers put before them, even though they cannot see those images. See Mlodinow, \textit{supra} note 81, at 40. Researchers “theorize” (in other words, speculate based on the available evidence) that even though the optic nerves of these subjects are not functioning, other parts of the social brain can still sense social identity. See \textit{id.} at 40–41 (explaining this phenomenon of “blindsight”).

Experiments have also studied the way the social brain works unconsciously in more expectable ways. For example, human subjects can distinguish between the natural versus consciously induced smiles of strangers. Wilson, \textit{Consilience, supra} note 79, at 112. They can detect, without being able to say why, that someone is “untrustworthy,” which allows them to “avoid that person in future situations without needing to [constantly] re-evaluate all of our previous interactions with the individual.” See William A. Cunningham et al., \textit{Attitudes, in Social Neuroscience Handbook, supra} note 29, at 212, 212.

\item \textsuperscript{108} See, \textit{e.g.}, Mlodinow, \textit{supra} note 81, at 40; Wilson, \textit{Consilience, supra} note 79, at 112.
\end{itemize}
fore experimental subjects are aware that they are looking at a hu-
man face. As another example, the processes by which human be-
ings quickly and intuitively grasp what other human beings are
thinking, which researchers often refer to as “theory of mind,” ap-
pears to be substantially non-volitional and unconscious as well.

Similarly, the brain rapidly and automatically decides, prior to
deliberative judgment, who is similar to oneself and who is not. An
eormous amount of research has documented that this uncon-
scious social brain makes automatic and non-volitional positive as-
sociations with persons perceived to be similar to the subject, based
on even trivial similarities. To take another example, people reg-
ularly prefer other individuals who share their same birthday or first
name. Researchers have found that people in most professions
like members of their own profession significantly more than mem-
bers of other professions.

Well-replicated experiments in development psychology reveal
that infants show a marked preference for their in-group members
even in the first months of life, with babies looking preferentially—or for a longer time—at persons who speak their native language
well before they understand words. Another finding comes from
the “ultimatum game” in experimental behavioral economics. This
classic experiment involves giving one player, called the pro-
poser, a sum of money, and then asking the proposer to offer to di-

109 See Robert M. Sapolsky, Behave: The Biology of Humans at Our
Best and Worst 85 (2017); see also Alexander Todorv, Evaluating Faces on
Social Dimensions, in Social Neuroscience: Toward Understanding the
Underpinnings of the Social Mind 54, 54 (Alexander Todorov et al. eds.,
2011).
110 Mlodinow, supra note 81, at 86.
111 See id. at 86, 167–75.
112 Id. at 168.
113 See Jonathan Haidt, The Righteous Mind: Why Good People Are
Divided by Politics and Religion 239 (2012).
114 See Mlodinow, supra note 81, at 167. The only exception are lawyers,
who rate members of all professions at the same level of average likeability. Id.
115 Wilson, Social Conquest, supra note 80, at 60.
116 Saaid A. Mendoza et al., For Members Only: Ingroup Punishment of Fair-
ness Norm Violations in the Ultimatum Game, 5 Soc. Psychol. & Personality
Sci. 662, 663 (2014).
provide that sum between herself and another player, called the responder.\textsuperscript{117} The responder then chooses whether to accept or reject the proposal.\textsuperscript{118} If the responder accepts, the players split the money according to the proposer’s offer.\textsuperscript{119} If the responder rejects the proposal, neither player receives any money.\textsuperscript{120} Experiments repeatedly find that proposers reward more money to responders who are arbitrarily designated as fellow in-group members than to responders who are identified as out-group members—even when an option is to award the money so that both groups end up with more.\textsuperscript{121} In other words, human focus on in-group likeness is so strong that it outweighs the classic economic assumption that individuals act to maximize self-interest.\textsuperscript{122}

Experiments in political science have similarly shown the effects of group identity on human judgment and political views.\textsuperscript{123} Experiments have even shown that people perceive facts about the actions

\begin{footnotes}
\item[117] Id.
\item[118] Id.
\item[119] Id.
\item[120] Id.
\item[121] Pascal Molenberghs, The Neuroscience of In-Group Bias, 37 Neuroscience & Biobehavioral Reviews 1530, 1531 (2013) (citing Henri Tajfel et al., Social Categorization and Intergroup Behaviour, 1 EUR. J. SOC. PSYCHOL. 149, 173 (1971)).
\item[122] See id.
\item[123] See, e.g., JONAH BERGER, INVISIBLE INFLUENCE: THE HIDDEN FORCES THAT SHAPE BEHAVIOR 105–07 (2016). In one experiment, researchers showed subjects who identified as liberal Democrats a social policy that imposed stringent restrictions on welfare benefits. Id. at 106. These subjects liked the policy far more if experimenters told them that other Democrats liked it than they did if they did not have information about other Democrats’ views. Id. If the researchers told the subjects that Republicans liked the policy, the Democrats staunchly opposed it. Id. Conversely, Republicans liked generous welfare policies if told that other Republicans liked them. Id. at 105. When asked why they held such views, both groups failed to recognize the influence of the members of their fellow in-groups—i.e., those with the same political party affiliations. Id. at 106. Instead, they attributed their views to their own deliberative processes, thus demonstrating that one can be completely unconscious of the powerful effects of social influences. Id.
\item Professor Berger further describes the ways in which product marketing takes advantage of people’s unconscious desires to use their product and lifestyle choices to signal their identity as members of particular kinds of groups. See id. at 122 (noting that some product choices, such as cars, signal identity more than
\end{footnotes}
of political in-group members differently than facts about out-group members. In one classic experiment, researchers showed a video recording of a controversial, roughly played football game between Princeton and Dartmouth Universities to students from the two schools. Students from Princeton counted Dartmouth players as having committed more fouls, whereas students from Dartmouth viewed the number of fouls committed by the two teams as equal. In effect, the researchers explained, the two groups of students had viewed “a totally different game.”

Yale Law Professor Dan Kahan and his colleagues conducted a similar experiment where they tested how subjects viewed video clips of anti-abortion protests at clinics. The experiment found that subjects holding anti-abortion views saw protestors commit
do others, such as choice of paper towels).


So too, policy makers have sought to use these research insights to encourage socially beneficial conduct. See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 68 (2008). For example, researchers found that informing people that their neighbors were conserving energy caused them to use less energy themselves. Id. at 68–69 (noting, additionally, that when households were informed that they were using less energy than their neighbors, they increased their energy use). Nobel laureate behavioral economist Richard Thaler and Cass Sunstein, a law professor who worked on these ideas as Administrator of the White House Office of Information and Regulatory Affairs under President Obama, utilized these insights in the writing of Nudge: Improving Decisions About Health, Wealth, and Happiness. Cass R. Sunstein, HARV. L. SCH., https://hls.harvard.edu/faculty/directory/10871/Sunstein (last visited Mar. 23, 2019); Richard H. Thaler, U. CHIC. BOOTH SCH. BUS., https://www.chicagobooth.edu/faculty/directory/t/richard-h-thaler (last visited Mar. 23, 2019).


Id. at 130, 132.

Molenberghs, supra note 121, at 1532 (citing Hastorf & Cantril, supra note 124, at 132).

fewer illegal acts than did subjects who favored access to abortion.\textsuperscript{128}

These effects occur even when groups are newly created. In another example, experimenters randomly divided participants into a “red” group and a “blue” group and then asked them to watch video clips to determine which team’s members pushed a button faster.\textsuperscript{129} The experimenters had constructed the video clips so that the two groups were exactly equivalent on this measure.\textsuperscript{130} Each team, however, judged members of their own team as faster.\textsuperscript{131} Another experiment found that people are more willing to donate money to in-group members as opposed to out-group members who are in distress.\textsuperscript{132}

Neuroscientists have sought to study the brain processes involved favoring in-group members through brain imaging studies.\textsuperscript{133} They found that people’s brains are more active when they perceive members of their in-group being subjected to painful stimuli.\textsuperscript{134} Images of in-group members suffering pain activate the parts of the brain that appear to be associated with feeling empathy, whereas images of out-group members’ suffering can trigger areas that appear to be connected with pleasure and schadenfreude.\textsuperscript{135} In these studies of empathic response, “ethnic identification was the largest predictor for in-group favoritism.”\textsuperscript{136}

Neuroscientists currently believe that the brain processes involved in in-group versus out-group categorization are related to the parts of the brain that process self-identity.\textsuperscript{137} Along with other psychologists, neuroscientists theorize that people assign more positive feelings and higher social status to in-group members than to out-

\begin{itemize}
\item \textsuperscript{128} See id. at 884 (finding that individuals who saw an identical video of abortion protesters reached different conclusions about what they saw based on their cultural values).
\item \textsuperscript{129} Molenberghs, supra note 121, at 1532.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id. at 1533.
\item \textsuperscript{133} See, e.g., id. at 1532–33.
\item \textsuperscript{134} Id. at 1533.
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Id. at 1531–32; Samantha Morrison et al., The Neuroscience of Group Membership, 50 NEUROPSYCHOLOGIA 2114, 2115 (2012).
\end{itemize}
group members. Individuals produce positive self-esteem by assigning high social status to themselves and their identity group. In other words, a process of distinguishing “us” from “them” appears to create both self-identity and self-esteem. Researchers term this concept Social Identity Theory.

The powerful non-volitional processes of constructing and locating one’s self-identity in relation to in-groups and out-groups has important functions in social behavior. Evolutionary biologists postulate that these processes offered important evolutionary advantages, leading persons to be on guard against the potential dangers outsiders might pose. But one need not subscribe to evolution-based theories to accept the robust findings that humans do indeed categorize others into identity groups. From a functionalist social science viewpoint too, powerful, automatic, and non-volitional feelings of loyalty toward fellow in-group members produce the benefits of in-group coherence and cooperation, as well as competitive fever to excel and win. From this perspective, the social brain’s differentiation between in-groups and out-groups has important advantages, facilitating humans working in groups and thereby developing cultures and other collective achievements.

These same unconscious and non-volitional processes also have

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138 See Molenberghs, supra note 121, at 1532.
139 Id.
140 See id.
141 Morrison et al., supra note 137, at 2115. Social identity theory proposes that individuals take on the positive identifications associated with the groups to which they belong and that this process is important to positive self-development. See Dominic Abrams & Michael A. Hogg, Social Identification, Self-Categorization and Social Influence, 1 EUR. REV. SOC. PSYCHOL. 195, 196 (1990) (discussing social identity and self-categorization theory and tracing its intellectual roots to Tajfel and other classic social psychologists).
142 See HAIDT, supra note 113, at 238.
143 Cf. MLODINOW, supra note 81, at 172 (noting that companies such as Disney, Apple, and Google strive to create a strong corporate culture but recognizing that problems can arise when a company’s internal departments develop strong group identities that cause in-group favoritism and out-group discrimination).
144 See HAIDT, supra note 113, at 204, 233.
suboptimal side effects in contemporary conditions of social pluralism.\textsuperscript{145} In modern societies, fighting among social groups is often counterproductive.\textsuperscript{146} Indeed, when protected characteristics are at issue, such as race, gender, national origin, religion, disability, and age—all characteristics that tend to be salient to individuals’ social identity today—favoring one’s in-group and disfavoring the contrasting out-group constitutes the very definition of unlawful discrimination.\textsuperscript{147}

At the extreme, the social construction of out-groups leads to dehumanization\textsuperscript{148}—in other words, the construction of human beings as less than human.\textsuperscript{149} As social psychologists have documented, this type of process occurred in the world’s many incidents of mass atrocities and genocide, where members of some groups murder members of other groups as a result of constructing their group identity in hostile opposition to that of the out-group. Examples include the Rwandan genocide,\textsuperscript{150} the genocide in Darfur,\textsuperscript{151} the Nazi Holocaust,\textsuperscript{152} and Cambodia’s killing fields,\textsuperscript{153} to name just a few. Social neuroscientists have begun to study the neural processes involved in these atrocities.\textsuperscript{154} Researchers have found that when

\begin{footnotes}
\textsuperscript{145} In Greene, supra note 61, at 19–27, Joshua Greene makes this point powerfully.
\textsuperscript{146} See id.
\textsuperscript{147} See supra notes 41–44.
\textsuperscript{149} In Spanish, the term for dehumanization is cosificación. As the Spanish word for “thing” is cosa, cosificación literally translates to “turning into a thing.” See Cosaficar, Collins Dictionary: Español – Inglés English – Spanish (4th ed. 2002).
\textsuperscript{150} Sapolsky, supra note 109, at 571–72 (discussing the Hutu genocide of Tutsis in Rwanda from the perspective of a social neuroscientist).
\textsuperscript{151} See Rebecca Hamilton, Fighting for Darfur: Public Action and the Struggle to Stop Genocide 16–25 (2011) (discussing the genocide in Darfur and the failure of international activists’ efforts to halt it).
\textsuperscript{153} See Craig Etcheson, After the Killing Fields: Lessons from the Cambodian Genocide (2005) (detailing the atrocities committed by the Khmer Rouge).
\textsuperscript{154} See, e.g., Harris & Fiske, supra note 148, at 848.
\end{footnotes}
subjects are shown images of extreme outgroups—such as drug addicts and homeless people—the parts of the brain that trigger thinking about other human beings are not triggered at all. Instead, when experimenters showed images of members of these groups to experimental subjects, the images activated regions of the brain associated with disgust. These findings support other evidence that humans sometimes perceive out-group members as less than human, corresponding with Erving Goffman’s classic and influential work on stigma and dehumanization, which I will discuss further in Section I.C.3 below. In sum, the automatic neural processes that produce in- versus out-group thinking have benefits and pitfalls. The same processes that produce human sociability, including group loyalty, cohesion, and the desire to pitch in and help, also produce the downsides of out-group hostility and derogation.

This Part has surveyed experimental research from a variety of disciplines, including not only behavioral economics but also political science, social psychology, game theory, and similar fields. Yet even though the underlying processes of the unconscious social brain are essentially the same across the realms of politics, economics, and social relations, scholars allied with different disciplines sometimes fail to appreciate that their work flows from the same fundamental discovery of the unconscious social brain. Conservative legal scholars who enthusiastically appreciate Kahneman and Tversky’s work, for example, tend to dismiss the research on implicit bias, even though it all flows from the same foundation. This Article stands as a call for scholars to abandon these disciplinary and political silos—which are, after all, just another type of us versus them thinking.

B. Underappreciated Social Neuroscience Insights

With a short introduction to the social neuroscience study of the

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155 Id. at 847-48.
156 Id. at 850.
neural workings of in-group favoritism now out of the way, we are ready to turn to this interdisciplinary field’s most well-known findings as relevant to antidiscrimination law—namely, the multitude of studies on unconscious bias. Social scientists widely accept the science underlying implicit bias testing (or implicit association testing, “IAT”), which they have replicated across many studies, disciplines, nations, and group conditions. Antidiscrimination theorists have recognized that these studies have much to offer legal theorists’ understanding of discrimination. But the uncontestable facts about the existence of unconscious bias only scratch the surface of what social neuroscience can teach legal antidiscrimination theorists. Below, I present two examples of insights from implicit bias studies that legal theorists should further pursue.

1. DETECTING IMPLICIT BIAS IS NOT (COMPLETELY) A BAD THING, AT LEAST AS COMPARED TO THE ALTERNATIVE

To study the phenomenon of bias that arises from the brain’s processes of social categorization, researchers have developed methods for measuring degrees of bias. Researchers have used a method that incorporates the “Stroop task.” The Stroop task most often consists of requiring participants to name the ink color of a written color word. The task is most mentally taxing when the ink color of the word is different from the color the word spells out, for example, requiring the participant to identify that the word “pink” is in the ink color “blue.” The method measures bias by calling on participants to perform the Stroop task after a task that activates the

159 See Russell H. Fazio & Michael A. Olson, Implicit Measures in Social Cognition Research: Their Meaning and Use, 54 ANN. REV. PSYCHOL. 297, 298–99 (2003) (recognizing that there has been a surge of interest in the use of implicit bias tests in social psychology research).


161 See, e.g., Cunningham et al., supra note 107, at 219–20.


163 See Cunningham et al., supra note 107, at 220.

164 Id.
automatic neural systems involved in out-group prejudice, such as viewing faces of individuals of different races.\(^\text{165}\) Studies consistently show that participants take longer to perform the Stroop task when their mental processes are dealing with the burden of trying to counter their implicit biases.\(^\text{166}\) The longer the delay, scientists assume, the greater the force of the automatic processes involved in implicit bias that the subject is working to suppress.\(^\text{167}\)

Results show that most experimental subjects have a statistically significant slower response time when asked to associate positive ideas or words with words, images, or faces associated with out-groups.\(^\text{168}\) In the United States, for example, subjects show slower response times in connecting positive associations with persons belonging to racial minorities.\(^\text{169}\) Members of racial minority groups on average show some bias against other members of their own groups, although this negative bias toward fellow minorities is typically less severe for members asked to rate members of their own groups than for dominant race persons asked to rate members of other groups.\(^\text{170}\) Among the dominant racial group—\(i.e.\), in the United States, among whites—a wide range of implicit bias scores exists.\(^\text{171}\) Average scores vary by region of the country as well as other variables.\(^\text{172}\)

Reaction time testing is most often aimed at measuring bias

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\(^{165}\) See id.

\(^{166}\) See, \(e.g.\), id. (describing multiple studies using the Stroop task).

\(^{167}\) See id.


\(^{169}\) See, \(e.g.\), Anthony G. Greenwald et al., Measuring Individual Differences in Implicit Cognition: The Implicit Association Test, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1473–76 (1998) (finding that whites respond more slowly to “pro-Black” examples).

\(^{170}\) See, \(e.g.\), David S. March & Reiko Graham, Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics, 18 GROUP PROCESSES & INTERGROUP RELATIONS 89, 95–100 (2014).


\(^{172}\) See id. (providing a regional map showing states with different measured levels of implicit bias).
based on race and ethnicity (and gender, though gender will not be my focus here).\textsuperscript{173} Many legal scholars have pointed to implicit bias research to explain why decision-makers take adverse employment actions against traditionally excluded outsiders despite their conscious efforts to act with good will and without prejudice.\textsuperscript{174} IAT thus helps explain the statistics showing that employment discrimination persists despite a half-century’s prohibition.\textsuperscript{175} However, IAT solely proves the existence of unconscious bias; it does not in itself explain why such bias occurs.\textsuperscript{176}

Researchers have sought to explain the processes in the brain that account for IAT results.\textsuperscript{177} What seems important, according to a group of experts who recently summarized this literature, is that subjects have formed the goal of avoiding racial or other bias in their decision-making.\textsuperscript{178} This is because the IAT measures the efforts of the brain to suppress prejudiced thoughts that the subject \textit{does not want to have}.\textsuperscript{179} The delay in response time reflects the brain’s effortful work to suppress stereotypes and prejudicial attitudes—what

\begin{itemize}
\item \textsuperscript{173} See, e.g., Hernández, supra note 160, at 322.
\item \textsuperscript{174} See, e.g., Russell G. Pearce et al., \textit{Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships}, 83 FORDHAM L. REV. 2407, 2407–08, 2422–25 (2015) (describing a study that found that elite law firm partners gave significantly higher evaluations to identical memoranda when they were told they had been drafted by white associates than when they were told that the associates were black, despite their firms’ generally good intentions to promote equity and inclusion for people outside the dominant racial group).
\item \textsuperscript{175} See, e.g., Leora F. Eisenstadt & Jeffrey R. Boles, \textit{Intent and Liability in Employment Discrimination}, 53 AM. BUS. L.J. 607, 608–10 (2016) (applying the lessons of implicit association testing to analyze the state of employment discrimination law); Hernández, supra note 160, at 310–12 (arguing that courts and legislatures should consider implicit bias a reason for reforming doctrinal standards); Pearce et al., supra note 174, at 2441 (finding that lawyers bring their implicit biases to their work). In 1964, Congress enacted Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.
\item \textsuperscript{176} Hernández, supra note 160, at 321–22.
\item \textsuperscript{177} See Dylan D. Wagner et al., \textit{Staying in Control: The Neural Basis of Self-Regulation and Its Failure}, in \textit{SOCIAL NEUROSCIENCE HANDBOOK}, supra note 29, at 360, 369.
\item \textsuperscript{178} See id. at 369; Cunningham et al., supra note 107, at 220.
\item \textsuperscript{179} See Wagner et al., supra note 177, at 369.
\end{itemize}
neuroscientists call “cognitive control.” The IAT measures how much cognitive control subjects are exerting. Subjects with a high drive not to be, or at least appear, prejudiced engage in cognitive control to suppress prejudiced thoughts, and because they are doing so, their response times are slower.

But, people who do not have a high drive to appear non-prejudiced—in other words, people who feel free to feel and express negative stereotypes about out-groups—engage in less cognitive control. Read this way, the oft-replicated results of IAT testing are actually something of a good sign. This is because the only alternative to finding evidence of effortful cognitive control to resist implicit bias in judgments about out-groups is less effort at cognitive control, which corresponds to less of a goal-directed drive to avoid being prejudiced. Put more plainly, a person who demonstrates implicit bias is better than a blatant bigot. As I will discuss further in Part II below, these conclusions lead to important doctrinal and policy insights.

2. RACISM DOES NOT APPEAR TO BE “HARD WIRED” INTO THE HUMAN BRAIN

A conclusion people may reach when they learn about implicit bias testing is that racism must be “hard wired” into the brain. However, this is a misconception. As leading evolutionary biologists point out, the notion that racism arose as a byproduct of human evolution rests on a logical and scientific fallacy. What human

180 Id. at 368–69.
181 Id. at 369.
brains are sensitive to and prone to hostility about is not skin color or facial features per se, but any relevant socially constructed difference.\textsuperscript{185} According to evolutionary biologists, it makes no logical sense to propose that evolution hard wired the human brain to respond negatively to phenotypic differences because, during the vast span of humans’ evolutionary history, during which group survival influenced the evolution of the human brain, our ancient ancestors typically would not have encountered persons of different races.\textsuperscript{186} This relevant period, natural scientists point out, stretches back more than 60,000 years.\textsuperscript{187} The differences that were salient to group survival in this very long-ago evolutionary past involved linguistic and other cultural differences among neighboring groups that were phenotypically very similar.\textsuperscript{188}

To evolutionary biologists, this typical lack of interaction with people of different races in the long arc of evolutionary history suggests why human brains are so extremely sensitive in noticing any socially salient difference.\textsuperscript{189} What differences are relevant depends on socially constructed meanings that vary widely across time and place.\textsuperscript{190} On this theory, System One processes in the brain notice and react to subtle social differences that, in very old evolutionary

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{185} Cf. Haidt, \textit{supra} note 113, at 239 (arguing that to create a cohesive group one should make racial differences less relevant by highlighting other similarities in the group).
\item \textsuperscript{186} See Greene, \textit{supra} note 61, at 52 (“[O]ne would expect the human mind’s social sorting system . . . [to sort] people based on culturally acquired characteristics, such as language and clothing, rather than genetically inherited physical features.”); Haidt, \textit{supra} note 113, at 239 (“There’s nothing special about race.”); Sapolsky, \textit{supra} note 109, at 407 (pointing out that “there is no evolutionary legacy of humans encountering people of markedly different skin color”).
\item \textsuperscript{187} See Mark Pagel, \textit{Wired for Culture: Origins of the Human Social Mind} 48 (2012) (explaining that modern humans left Africa 60,000 to 70,000 years ago and spread far apart). Of course, the timeline for evolution of Homo sapiens stretches back far longer, as predecessor hominid species evolved to produce Homo sapiens.
\item \textsuperscript{188} Id. at 49–54 (discussing the great density of language differences among pre-modern societies); Greene, \textit{supra} note 61, at 52.
\item \textsuperscript{189} See, e.g., Pagel, \textit{supra} note 187, at 57.
\item \textsuperscript{190} See Biondi & Rickards, \textit{supra} note 184, at 374–78.
\end{enumerate}
\end{footnotesize}
terms, allowed group members to make quick determinations imperative to their survival.\footnote{Michael J. Manfredo et al., Considerations in Representing Human Individuals in Social-Ecological Models, in UNDERSTANDING SOCIETY AND NATURAL RESOURCES: FORGING NEW STRANDS OF INTEGRATION ACROSS THE SOCIAL SCIENCES 137, 140 (Michael J. Manfredo et al. eds., 2014).} System One decides whether other people’s behavior exhibits markers that they are probably safe as fellow in-group members or, in the alternative, may be potentially dangerous members of an out-group.\footnote{See id.}

Experimental psychology research supports evolutionary biologists’ view. For example, experiments have shown that subjects stop noticing race (but not gender)\footnote{Evolutionary biologists argue that the brain continues to notice gender because gender had an important role in evolution. See, e.g., GREENE, supra note 61, at 53 (discussing Robert Kurzban et al., Can Race Be Erased? Coalitional Computation and Social Categorization, 98 PROC. NAT’L ACAD. SCI. 15,387 (2001)); see also WILSON, CONSIDIENCE, supra note 79, at 170 (“The optimum sexual instinct of men . . . is to be assertive and rutish, while that of women is to be coy and selective.”). Evolutionary biologists provoke feminists’ ire (including mine) when they assert the naturalness of sex-based differences, but this topic is too complex to take on in the limited space of this Article.} when they are told that a characteristic other than race is the important marker differentiating members of their in-group from an out-group.\footnote{Kurzban et al., supra note 193, at 15,391; see also GREENE, supra note 61, at 53 (discussing Kurzban et al., supra note 193, and other studies).} Thus, subjects shown a series of photos and asked to remember faces noticed race when not given another classification criteria.\footnote{Kurzban et al., supra note 193, at 15,388–89.} When researchers gave a different group the same set of photos and told them that the players wearing gray were the members of their team and the players wearing yellow were the members of the opposing team, these subjects remembered the color of players’ uniforms rather than their race.\footnote{Id. at 15,389.}

C. The Creation of In- Versus Out-Groups

The research I have described thus far examines the evidence that the social brain has unconscious tendencies to construct inferior “others” and engage in discrimination against them. This Section delves more deeply into what empirical researchers (as opposed to speculative evolutionary psychologists) currently understand about
why such “us versus them” thinking takes place.

Humans show an immense capacity to work cooperatively, on one hand, yet view some people as outsiders with whom they do not want to cooperate, on the other. Social scientists believe that these two tendencies are flip sides of the same coin: Defining some persons as outsiders helps one to construct a group of insiders—i.e., people one trusts and wants to cooperate with to accomplish collective ends. Psychologists further believe that preferring one’s fellow in-group members helps cement one’s grasp of the social and behavioral norms one should strive to apply to oneself. Group members want to be like, or conform to, others in their in-group. An important part of social psychologists’ study of social behavior has involved investigating the neural underpinnings of this desire to conform.

1. Conformity

We see humans’ desire to conform to the expectations of their in-groups every day in social settings.\textsuperscript{197} We experience it within ourselves on a constant basis.\textsuperscript{198} Yet social neuroscience discovered how this tendency to imitate others occurs at a neural level only fairly recently, and then by accident.\textsuperscript{199} According to the oft-told story,\textsuperscript{200} this discovery occurred as Italian neurologists were conducting brain scans on macaque monkeys.\textsuperscript{201} A graduate student entered the room eating an ice cream cone.\textsuperscript{202} To the scientists’ surprise, parts of the monkey’s brain that activate for planning and initiating its own movement started firing as the monkey watched the graduate student eat.\textsuperscript{203} Investigating further, the scientists discovered that the same parts of the monkey’s brain activated when it watched somebody pick up a banana and when it picked up a banana itself.\textsuperscript{204} These observations led the scientists to propose the existence of what have come to be popularly termed “mirror neurons,”
which encourage the brain to perform behaviors it sees others doing.\textsuperscript{205}

After first discovering mirror neurons in monkey brains, neuroscientists found something like them in human brains as well.\textsuperscript{206} Today, research documents that human brains, like those of nonhuman primates, “automatically imitate the postures, facial expressions, emotional expressions, and speaking styles of others.”\textsuperscript{207}

Experiments in social psychology and behavioral economics have shown that the tendencies to imitate others facilitate cooperation; for example, behavioral mimicry greatly increases the chance that people in negotiations will reach a deal.\textsuperscript{208} Scientists thus believe that the unconscious System One tendency of primate brains toward imitation “increase[s] liking and bonding between the individuals—serving as a kind of natural ‘social glue.’”\textsuperscript{209} Imitation is an automatic process of the social brain that signals likeness, \textit{i.e.}, the fact that I act like you shows “that we have things in common or are part of the same tribe,”\textsuperscript{210} which in turn facilitates cooperation and agreement.

The study of group conformity has long roots in the intellectual history of experimental social psychology. A bit of backtracking will pay off in illuminating the basis for more contemporary work. The reader already familiar with or less interested in this intellectual history can skip ahead to Section I.C.1.ii.

\textbf{i. Classic Studies}

Turkish-born social psychologist Muzaffer Sherif conducted some of the first experiments on group conformity.\textsuperscript{211} Known for his ingenious experimental designs, Sherif completed his dissertation, entitled \textit{Some Social Factors in Perception}, at Columbia University.

\begin{thebibliography}{9}
\bibitem{205} \textit{Id.} at 35.
\bibitem{206} \textit{Id.}
\bibitem{207} Morsella & Bargh, \textit{supra} note 107, at 341.
\bibitem{208} \textit{BERGER, supra} note 123, at 40–41.
\bibitem{209} Morsella & Bargh, \textit{supra} note 107, at 341.
\bibitem{210} \textit{BERGER, supra} note 123, at 41.
\end{thebibliography}
in 1935. A key experiment involved bringing subjects in groups of two or three into a darkened room, where they together watched a small dot of light shining on a wall. The light remained stationary, but continuing to stare at the light made it appear to move, a phenomenon known as the auto-kinetic effect. The experimenter instructed the participants to estimate aloud how far the light was moving. Sherif showed that with repeated trials the subjects converged on similar estimates about the distance covered by the motion of the light. Between groups, the estimates varied widely, but within groups they became very similar over repetitions. This, Sherif proposed, reflected the development of a social norm—i.e., a shared intra-group understanding of facts about the world—even though these agreed-upon “facts” had no actual basis in the physical world.

To further test whether differential group norms would endure outside the pressure of being in a group, Sherif invited his subjects back on another day to repeat the experiment. This time he put each participant in the darkened room alone to watch the dot of light. Sherif found that members of groups that had estimated short distances for the light’s movement continued to estimate short distances when watching the light alone, and members of groups that had previously estimated longer distances continued to estimate longer distances, even though they were now outside the influence of their groups. Sherif thus proposed that individuals retain group perceptions even when they are no longer with the group.

Another important early social psychologist, Solomon Asch, ascribed his interest in social conformity to his personal connections...
to the Holocaust as a Polish Jew. Asch took Sherif’s inquiry further. The auto-kinetic effect involved an ambiguous phenomenon, but Asch wanted to investigate group influence on matters of observable fact that were unambiguously true or false. To do this, Asch asked small groups of experimental subjects to match lines of varying lengths. All of the members of the group, except one, were in league with the experimenter and had been instructed to state incorrectly which lines corresponded in length. In the groups, each participant was instructed to state his answer aloud and the “naïve” subject (i.e., the one who was not conspiring with the experimenter) was always asked to give his answer last.

Asch found that over repeated trials approximately one third of the naïve subjects conformed their answers to the incorrect answers given by the others in the group. Approximately three quarters of the participants conformed incorrectly at least once (meaning that one fourth never conformed). In contrast, in a control group, in which different participants were asked to judge individually which lengths of lines matched, only five percent (5%) ever got the answers wrong.

Asch’s experiment showed that people conform to group ideas even when they contradict objective facts. Subsequent experiments modelled after Asch’s added new neuroscience technologies to measure participants’ conformity to wrong group answers on a task that involved mentally manipulating a three-dimensional image. These experiments produced the same results: a substantial percentage of the subjects (though not all) conformed to objectively wrong answers at least some of the time.

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223 GREGORY BERNS, ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY 92 (2008).
224 See id. at 89–91.
225 Id. at 89–90.
226 Id. at 89.
227 See id. 89–91.
228 Id. at 91.
229 Id.
230 Id.
231 Id. at 93–94.
232 Id. at 96 (discussing Asch’s and more contemporary experiments).
By the 1960s, experimental psychologists had entered into a period in which their research preoccupations and experimental methodologies had changed considerably from the dominant styles of the 1950s. Rather than continuing to test perceptions of the physical world, some social psychologists turned their attention to testing group conformity in situations raising moral imperatives.

Stanley Milgram of Yale University conducted the most famous of these experiments, in work that continues to be taught in ethics and psychology classes to this day.

Like Asch, Milgram came from an American Jewish family and attributed his interest in group influence to having met relatives who suffered in Nazi death camps. While investigating group conformity, Milgram discovered that individuals obeyed authority even when they were not in a group. In the summer of 1960, during the trial of Nazi war criminal Adolf Eichmann in Jerusalem, Milgram developed an experimental design that he hoped would test the extent to which ordinary people would obey commands from an authority to do something as morally wrong as inflicting severe pain on other people simply because they were ordered to do so.

The results of the Milgram experiment have been replicated many times in many settings around the world. In Milgram’s experiment, test subjects designated as “teachers” followed the experimenters’ instructions to deliver to a person cast as a “learner” what

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234 Id. at 42–43, 62, 118–20.
236 See Blass, supra note 233, at 62.
237 See id.
238 Id. at 63 (suggesting that it is “certainly possible that this was the event that crystallized the obedience research in Milgram’s mind”); see also Nestar John Charles Russell, Milgram’s Obedience to Authority Experiments: Origins and Early Evolution, 50 Brit. J. Soc. Psychol. 140, 157 (2011) (quoting Milgram’s correspondence to a graduate assistant referring to Eichmann).
239 Researchers have replicated the Milgram experiment through multiple studies in Europe, Asia, and Africa. See Philip Zimbardo, The Lucifer Effect: Understanding How Good People Turn Evil 275 (2007).
appeared to be increasingly severe electric shocks. Sixty-five percent (65%) of the “teachers” continued to increase the shock dial far beyond the level marked as painful or dangerous, turning the dial all the way up to the top voltage possible, before which point the learner’s screams of pain had been replaced with ominous silence. Many “teachers” protested and complained or expressed extreme discomfort in obeying the experimenters’ commands to keep going, but followed the instructions nevertheless. All teachers administered some level of shocks to the learners, but thirty-five percent (35%) refused to continue at some point in the experiment.

When Milgram varied the conditions of his experiment, he found that moving it from the campus of Yale to a run-down office building in Bridgeport, Connecticut, and casting it as an experiment of a private research firm lowered the rate of compliance somewhat, but not to a statistically significant degree. A key variable that lowered rates of compliance was the presence of other subjects who refused to deliver the shocks. The presence of two dissenters lowered compliance rates to ten percent (10%).

Milgram’s experiment remains the best-known and most vivid

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240 ZIMBARDO, supra note 239, at 271.
242 ZIMBARDO, supra note 239, at 271.
243 Milgram, supra note 241, at 377 (detailing at what voltage levels these subjects refused to continue).
244 ZIMBARDO, supra note 239, at 272.
246 Id. at 116–19. Testers also refused more often when they were physically closer to the learner. Id. at 34–36; see also ZIMBARDO, supra note 239, at 272 (discussing these variable results). Gender did not affect outcome. Female subjects were more likely to express distress in administering the shocks but did not refuse to do so at a statistically significant different rate than males, a finding that researchers have replicated in other study variations. MILGRAM, supra note 245, at 62–63 (“The level of obedience was virtually identical to the performance of men; however, the level of conflict experienced by the women was on the whole higher than that felt by our male subjects.”); ZIMBARDO, supra note 239, at 276 (noting that the typical finding is that “there are no male-female gender differences in obedience”)

demonstration of humans’ tendency to go along with others, but it is not the only one.247 Other examples, too, demonstrate the strong effects of what has come to be called “groupthink,” as I discuss further below.248

247 Other experiments found that pilots and nurses followed obviously incorrect instructions at shockingly high rates, pointing to significant public safety concerns. See Zimbardo, supra note 239, at 277–78 (describing studies of pilots and nurses).

248 In 1954, Sherif conducted his own research on the effect of group processes on moral behavior, using a project design he called the robber’s cave. See Muzaf fer Sherif, The Robbers Cave Experiment: Intergroup Conflict and Cooperation 22–23 (1988). The robber’s cave involved twenty-four white, Protestant, eleven-year-old boys from two-parent families who had been screened for any symptoms of mental illness or other signs that they were “isolates” or otherwise not “normal.” Id. at 34, 54. Sherif randomly divided them into two matched groups and transported them to a Boy Scout camp at Robbers Cave State Park in Oklahoma. Id. at 59. None of the boys knew each other before the experiment but they quickly bonded as groups, naming themselves the Eagles and the Rattlers. See id. at 53, 84–85. For the first week, the researchers kept the two groups apart from each other and led them in activities that required them to work cooperatively and form common goals with their own groups. Id. at 36, 68–85. The researchers then placed the two groups in a series of situations in which they had to compete against the other group for scarce resources. See id. at 62. Intergroup friction immediately broke out, at first through name-calling and taunts but continuing through acts of vandalism and even violence; the two groups set fires, ransacked the other group’s cabin, and stole each other’s property. See id. at 109–17, 150. Interviews and surveys showed that the boys had very favorable views of members of their own group and very unfavorable attitudes about the respective out-group. See id. at 189, 195–96.

The experimenters, who became dismayed at the extent of the intergroup hostility they had engineered, then involved the two groups in new activities that required cooperation rather than competition between the groups. See id. at 150. They told both groups, for example, that the vehicle they needed for transportation had broken down and everyone’s help was needed to fix it. Id. at 171–72. Only after these activities did the boys’ animosity toward members of their respective out-groups somewhat subside. Id. at 188.

Another classic field experiment designed to trigger the negative features of human group identification involved social psychologist Phillip Zimbardo’s 1971 Stanford Prison Experiment. See Setting Up, STAN. PRISON EXPERIMENT, http://www.prisonexp.org/setting-up (last visited Feb. 13, 2019) (presenting a website about this experiment). Zimbardo recruited two dozen Stanford college students for a week-long residential experiment acting in the roles of guards and prisoners and found that the “guards” quickly began engaging in abusive behavior
Today no research review board would permit experiments on human subjects as intense as the Milgram experiment.\textsuperscript{249} His work raises too many ethical issues, especially in causing trauma to unwitting participants asked to engage in morally problematic conduct.\textsuperscript{250} Experimenter's no longer can so easily explore ordinary people's capacity for conforming to immoral directives, but research on conformity continues, using the research methods of a different era.

Studies in business and social psychology, for example, document how conformity and a desire for interpersonal harmony can cause groups to make suboptimal decisions.\textsuperscript{251} Asch discovered this phenomenon decades ago when he showed that people tend to conform to the views first expressed in a group, even when those views are objectively wrong.\textsuperscript{252} The contemporary literature emphasizes that organizations and groups tend to reach better results if they encourage dissent and independent thinking and oppose “groupthink” dynamics.\textsuperscript{253}

The following example is representative of the results of many
experiments: When individuals in a group are each asked independently to guess the number of objects in a jar, the average of all their guesses will be more accurate than that of ninety-seven percent (97%) of the individuals guessing separately.254 This holds true only if the individuals are not influenced by others’ guesses, however; if participants have been influenced by learning what others think, they will tend toward the group consensus and the improved accuracy will be lost255 (consistent with Sherif’s early experiments discussed in Section I.C.1.i above). The expertise and intelligence of the individuals in the group are not what matters; the independent diversity of their opinions is what does.256

Social neuroscience adds another layer to this knowledge. In a version of the image rotation experiment described in Section I.C.1.i above, researcher Gregory Berns brought naïve participants into contact with the experiment’s “confederates” in a waiting room.257 The experimenters encouraged the participants to bond by playing computer games together and taking photos of each other.258 The experimenters then chose naïve participants and confederates to look together at images of rotated 3D objects to determine whether they were the same or different.259 The confederates were instructed to give wrong answers in some trials and correct answers in others.260 The researchers found that the naïve participants were far more likely to give wrong answers after they heard other people give wrong answers.261

Research on this phenomenon of groupthink underlies the call in organizational management literature for diversity—not only on race, national origin, gender and other social identity lines, but also

255 See id.
256 SUROWIECKI, supra note 252, at 31, 36–37.
257 Gregory S. Berns et al., Neurobiological Correlates of Social Conformity and Independence During Mental Rotation, 58 BIOLOGICAL PSYCHIATRY 245, 246 (2005). Here, confederates refers to the actors that the experimenters hired who were in cahoots with the experimenters’ ruse. Id.
258 Id.; see also ZIMBARDO, supra note 239, at 264–65.
259 Berns et al., supra note 257, at 246.
260 Id. at 248.
261 Id.
in a host of ways that allow groups to benefit from the wide variation in human abilities, perspectives, personalities and experiences. The cumulative weight of this research offers one of many sources of experimental data that supports recognizing a human right to act differently, as I will discuss further in Section II.B below.\textsuperscript{262}

The research on groupthink further shows that the tendency to conform comes not only from the automatic brain processes that positively encourage imitation and a desire to please others, but also from powerful negative influences on the brain. These negative effects involve the brain’s reaction to the experience of social rejection. This phenomenon of “social pain” has been the subject of a growing literature that deserves more attention in the legal literature, as I discuss below.

2. SOCIAL PAIN

In brief, neuroscience shows that humans experience social rejection and exclusion as profoundly painful, even when it is relatively minor in scope or consequence to the individual affected.\textsuperscript{263} Public health studies, as well as the field of epigenetics, are only now beginning to understand the full scope of the pain caused by systemic oppression based on factors such as race and economic class.\textsuperscript{264}

\textsuperscript{262} Of course, one might still argue for a right to act differently on dignitary grounds, even if the groupthink research did not support utilitarian justifications for recognizing such a right. My point is not that recognizing this right is only appropriate because (\textit{i.e.}, if) it is supported by utilitarian justifications. Rather, my point is that this research provides an additional utilitarian justification to bolster arguments political and legal theorists have also made on other moral grounds.

\textsuperscript{263} See Richard S. Pond, Jr. et al., \textit{Social Pain and the Brain: How Insights from Neuroimaging Advance the Study of Social Rejection and Variants of Normal}, in \textit{ADVANCED BRAIN NEUROIMAGING TOPICS IN HEALTH AND DISEASE - METHODS AND APPLICATIONS} 619, 620–21, 630 (Dorina Papageorgiou et al. eds., 2014) (summarizing numerous studies on the brain effects of social exclusion); Kipling D. Williams, \textit{Ostracism}, 58 \textit{ANN. REV. PSYCHOL.} 425, 444 (2007) (“[E]ven for very brief episodes that have minimal mundane realism, ostracism plunges individuals into a temporary state of abject misery . . . .”).

\textsuperscript{264} See Pond, Jr. et al., \textit{supra} note 263, at 619 (summarizing numerous studies on the brain effects of social exclusion).
Experiments involving small-stakes games capture the phenomenon of social pain. In one experiment, participants take part in a computer game in which experimenters tell them that they are playing a ball-tossing exercise with other people who are playing on other computers located elsewhere. In reality, the experimental subjects are playing a game with a computer program. At first, the ball comes to the experimental subject along with all the other apparent “participants.” After a while, however, the ball does not come to the experimental subject anymore. She suddenly finds herself excluded from the game, while neuroimaging records her brain’s response. The results show strong activation of parts of the brain involved in experiencing pain, starting once the subject starts being excluded and increasing as the exclusion continues.

Social neuroscientists have established that when human beings experience social pain, it registers as an intense experience. The long-term effects of social pain are also striking. Psychologists have found that, at one of the first stages of social exclusion, some people try desperately to regain acceptance, even in ways that may be harmful to them. Researchers theorize that these findings reflect the importance of social attachments to human beings’ ability to survive, so that humans are “wired” to feel social rejection as a terrible problem and to do whatever they think may help them to regain entry into the group.

At another stage individuals may accept their exclusion and move away from the group, finding another source of acceptance if

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265 Id. at 630.
266 Id.
267 Id.
268 Id.
269 Id.
270 Id.
271 Id.; see Williams, supra note 263, at 444; see also EMPIRISOFT, http://www.empirisoft.com/cyberball.aspx (last visited Apr. 2, 2019) (providing a downloadable link to this game); see generally Terry K. Borsook & Geoff MacDonald, Social Pain, in THE OXFORD HANDBOOK OF SOCIAL EXCLUSION 163, 166–67 (C. Nathan DeWall ed., 2013).
272 Williams, supra note 263, at 444.
273 Id.
274 Id. at 432, 439.
275 Id. at 429–30, 439.
possible.\textsuperscript{276} Individuals who do not find alternative sources of acceptance go through another phase in which the pain of social rejection leads to resignation and then to a host of negative physical and social reactions, which can include anger and possible violence.\textsuperscript{277} It thus comes as no surprise, as studies have shown, that many of the perpetrators of tragic mass shootings in past decades were social outcasts during their youth.\textsuperscript{278} Of course, these are a tiny subset of all those who have experienced prolonged social rejection, but it might behoove policymakers to work on programs aimed at ameliorating social isolation among young people with the goal of helping to prevent the long-term harms social isolation causes.

Other evidence on social pain draws on epidemiological data. A large literature documents the connections between racism and adverse health consequences, including depression, anxiety, psychological stress, cardiac disease, and hypertension.\textsuperscript{279} Exciting new discoveries about epigenetics help explain this intergenerational transfer of adverse consequences from trauma. Epigenetics involves the study of the heritable transfer of switches that turn genes on and off.\textsuperscript{280} In one key study, scientists examined the descendants of members of a Dutch community that suffered through five years of starvation during World War II.\textsuperscript{281} They found that even several generations later, epigenetic effects continued.\textsuperscript{282} The researchers documented the transfer of a host of adverse health effects caused

\begin{footnotesize}
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\item[276] Id. at 442.
\item[277] Id. at 442–44.
\item[281] Id. at 393–94 (describing a study of a community in the Netherlands that suffered from a five-year famine during World War II, which found that, several generations later, the descendants of the individuals who lived through this famine had statistically significant higher rates of the same health conditions caused by famine as their ancestors had).
\item[282] MUKHERJEE, supra note 280, at 394.
\end{itemize}
\end{footnotesize}
by famine to the descendants of the famine survivors. Researchers are now investigating the epigenetics of racism—in other words, how the health effects of racism are passed down from one generation to the next through the heritable switching on and off of genes.

This growing body of knowledge about social pain leads to the following question: If the human brain is more or less “programmed” to conform, and if the penalties for failing to do so include the profound trauma of social pain, why is it that some people do not go along with social norms? After all, in all studies on group conformity discussed above, a significant minority of subjects did not conform—i.e., some participants did not give wrong answers in Asch’s experiments or turn the shock dial up to levels marked as dangerous in Milgram’s experiment. The question thus arises: what caused them not to go along? These questions are covered in the study of deviance.

3. Deviance

In the 1960s and 1970s, social scientists including Howard Becker and Erving Goffman pioneered the study of deviance. Becker, the father of contemporary approaches to the study of deviance, wrote a now-classic book titled Outsiders, in which he posited that so-called deviants are socially constructed as such by an audience with the power to do so. As one contemporary expert explains, “[D]eviance . . . [is] any behavior that violates societal norms.

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283 Id.


286 HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 8–9 (1997). Social psychologists call this approach constructivist or labelling theory—i.e., deviants become constructed as such because others label them so. See Amanda Michiko Shigihara, Restaurants and Deviance: Theft in Professional Back Places, in ROUTLEDGE HANDBOOK ON DEVIANCE 506, 506 (Stephen E. Brown & Ophir Sefiha eds., 2018) [hereinafter DEVIANCE HANDBOOK] (defining constructivist or labelling theory).
and rules and therefore is met with negative reactions or sanctions.”\(^{287}\) In other words, persons labeled as deviant possess no inherent quality that makes them deviant; they simply act or appear to act differently in a socially salient way. Thus, deviance signals a reaction to difference or diversity; difference becomes deviance when some range of human difference is condemned.\(^{288}\) Put otherwise, in-groups with the power to do so define some individuals as “deviant” according to some measure the in-group chooses to use. These measures typically comprise social norms important to the group.\(^{289}\)

This understanding of deviance as violations of a group’s norms in a manner a group dislikes allows researchers to avoid any normative judgment.\(^{290}\) Deviance can include many forms of conduct, some of which most people would view negatively, such as criminal conduct causing harm to others as well as violations of moral codes against cheating, telling untruths, shirking, free-riding, and the like.\(^{291}\) Some deviance is morally neutral, such as “acting differently” in ways individuals cannot control.\(^{292}\) These are the characteristics to which antidiscrimination law tends to apply, because persons are being treated negatively for irrational reasons.\(^{293}\) A third category involves deviance that is morally admirable, at least in the eyes of some people.\(^{294}\) This category involves individuals who deviate from social norms in positive ways and has come to be termed

\(^{287}\) Søren Kristiansen, *Studying Deviance*, in *DEVIANCE HANDBOOK*, supra note 286, at 13. “[D]eviance is *not* a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions . . . .” BECKER, supra note 286, at 9.

\(^{288}\) See generally Pat Lauderdale, *The Definitions of Deviance*, in *DEVIANCE HANDBOOK*, supra note 286, at 3 (discussing examples of when people may or may not be labeled deviant depending on the observer’s point of view).

\(^{289}\) See BECKER, supra note 286, at 8–9.


\(^{291}\) See BECKER, supra note 286, at 8–9; Lauderdale, supra note 288, at 3.

\(^{292}\) See BECKER, supra note 286, at 9; ANDREW SOLOMON, FAR FROM THE TREE 170–73, 407–09, 417–19 (2012).

\(^{293}\) See supra notes 41–44 and accompanying text (discussing characteristics antidiscrimination law protects).

\(^{294}\) See Shoenberger, supra note 290, at 25.
“positive deviance.”

The study of positive deviance is fairly new, but can offer much to an inquiry into the social neuroscience of acting differently. Those who study positive deviance investigate heroes and other persons of particularly high moral courage, iconoclasts, whistle-blowers, and “moral entrepreneurs.” Research shows that contestation around whether particular forms of deviance are positive or negative can drive social and cultural change. One researcher, for example, studied the French Impressionists in historical context as a case study demonstrating the potential “relativity” of positive versus negative deviance.

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295 For a general introduction, see Shoenberger, supra note 290, at 24. See also SOLOMON, supra note 292, at 170–73, 407–09, 417–19 (investigating many examples of positive and stigmatized deviance, including geniuses, child musical prodigies, and persons with cognitive disabilities, and the like).

296 Phillip Zimbardo, the instigator of the Stanford Prison Experiment, in more recent years has turned to studying these resisters, whom he calls heroes for resisting the forces that cause conformity. See ZIMBARDO, supra note 239, at 488.

297 See BERNS, supra note 223, at 15–16 (presenting a social neuroscientist’s perspective on the brain characteristics underlying iconoclastic thinking).

298 Lauderdale, supra note 288, at 6 (giving examples such as Ralph Nader, Mother Theresa, Bobby Seale, Chelsea Manning, Edward Snowden, Daniel Ellsberg, and others, and noting that these figures “fuel the debate on whether they are patriots or traitors”). For a case example discussing 1970s anti-war activist David Dellinger’s biography, see id. at 7–8.

Others include “rate busters”—in other words, individuals who receive negative attention for doing better than the group standard and thus increasing performance pressure on the group. Shoenberger, supra note 290, at 27. This can involve morally neutral performances, such as the straight-A high school student whom other students dislike; or actions with a moral valence, such as whistle-blowing or speaking out against unjust acts. See id.; Lauderdale, supra note 288, at 6. And, of course, different audiences may have very different reactions: parents may admire the straight-A student while fellow students do not, just as members of the public may admire the whistleblower even while her employer fires her for exposing embarrassing secrets. See Lauderdale, supra note 288, at 6; Shoenberger, supra note 290, at 27. For example, members of U.S. society remain deeply split about the morality of the actions of national security whistleblower Edward Snowden. See Drew Desilver, Most Young Americans Say Snowden Has Served the Public Interest, PEW RES. CTR. (Jan. 22, 2014), http://www.pewresearch.org/fact-tank/2014/01/22/most-young-americans-say-snowden-has-served-the-public-interest/ (finding that fifty-seven percent (57%) of eighteen to twenty-nine year olds think Snowden’s leaks served rather than harmed the public interest, whereas only thirty-nine percent (39%) of fifty to sixty-four year olds and thirty-five percent (35%) of people sixty-five years old or over agree). Indeed, research shows that contestation around whether particular forms of deviance are positive or negative can drive social and cultural change. One researcher, for example, studied the French Impressionists in historical context as a case study demonstrating the potential “relativity” of positive versus negative deviance. See
tion about how to judge particular forms of deviance often constitutes a driver for social and cultural change. Antidiscrimination theorists and civil rights historians study this phenomenon too, as I will discuss further in Section II.B.1 below.

Social neuroscientists have further found that groups are most hostile to deviance when it is in-group members who violate group norms. They refer to this phenomenon as the “black sheep” effect. These findings suggest, as I will discuss further in Section II.A.4 below, that internal “deviants” or dissenters—i.e., those akin to whistleblowers in organizations—require strong antiretaliation laws to protect them in performing a socially important role. I move on to this discussion by bringing together the social neuroscience and legal theory literatures below.

II. HOW SOCIAL NEUROSCIENCE CAN INFORM ANTIDISCRIMINATION LAW

My aim in this Part is not so much to provide fully formed proposals for legal reform but to put two literatures—i.e., social neuroscience and legal antidiscrimination theory—into closer conversation with each other. As I already mentioned in the Introduction, I

Shoenberger, supra note 290, at 30 (citing Druann Maria Heckert, The Relativity of Positive Deviance: The Case of the French Impressionists, 10 DEVIANT BEHAV. 131 (1989)).

299 Shoenberger, supra note 290, at 28–30.
300 Cf. Alastair Coull et al., Protecting the Ingroup: Motivated Allocation of Cognitive Resources in the Presence of Threatening Ingroup Members, 4 GROUP PROCESSES & INTERGROUP REL. 327, 329 (2001) (finding that the most loyal members of groups are the most likely to lash out against those group members whose ideas deviate from the status quo).
301 Id.; see also Jose M. Marques & Vincent Y. Yzerbyt, The Black Sheep Effect: Judgemental Extremity Towards Ingroup Members in Inter- and Intragroup Situations, 18 EUR. J. SOC. PSYCHOL. 287, 289–91 (1988). This experiment, involving students at a Belgian university, found that, in comparison to a control group, in-group members—in this case, law students—evaluated poor in-group member speeches far less favorably than they evaluated poor out-group member speeches. Id. In other words, their judgments about in-group members were more extreme than their judgments about out-group members. Id. at 289. Marques and Yzerbyt suggest that the black sheep effect reflects a process by which group members define good exemplars of their in-group and at the same time strongly reject “bad” ones, because they damage the self-esteem that comes from identifying positively with one’s group. Id.
see two basic paths for how social neuroscience can inform thinking in the antidiscrimination arena. First, more modestly, social neuroscience can encourage courts and others to adopt an expanded view of how discrimination against traditional outsiders occurs. Second, from a more aspirational and long-term perspective, social neuroscience can illuminate the need under contemporary social conditions for an expanded appreciation of the classic, liberal human right to “act differently” within the bounds of others’ rights to do the same.

Any discussion of the examination of difference in contemporary legal theory must start with Dean Martha Minow’s germinal work in *Making All the Difference*[^302]. There, Minow applies feminist theory insights into what she calls the “dilemma of difference” to point out that human variation becomes difference only because those with the power define it as such[^303]. These ideas have genealogical roots in the approaches to deviance Becker and Goffman pioneered in the 1960s and 1970s, as already discussed in Section I.C.3 above. Yet Minow goes farther, using feminist insights as applied to law to point out that antidiscrimination law necessarily must grapple with difference because most barriers to equality cannot be handled simply by treating all people “the same.”[^304] People differ, and which differences matter depends on which groups have the power to decide this question[^305]. Thus, Minow shows, antidiscrimination law must figure out how to encompass difference so as to avoid simply reapplying rules that perpetuate the advantages those with power have built into social norms[^306].

Since Minow’s call for hard thinking about difference, many legal theorists have explored related matters. Here I can only highlight a few, though a thorough review of the literature would reveal many important treatments[^307]. Most fundamentally, a central trend in the

[^303]: See id. at 20, 22.
[^304]: Id. at 20 (“The problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.”).
[^305]: Id. at 20–23.
[^306]: Id. (“[R]efusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind.”).
literature has been to urge greater tolerance for difference as a feature of antidiscrimination law, just as social science research has reached similar conclusions, as I have sketched throughout Part I above. How then, practically speaking, could this be done in antidiscrimination law? Below I highlight several ways in which court-crafted antidiscrimination doctrines could be “tweaked” in this direction of tolerating difference more broadly. As I go, I will highlight some of the specific points of consilience between the findings of social neuroscience and the insights of antidiscrimination theory.

A. Courts Should Expand Their Appreciation for the Complex Ways in Which Discrimination Occurs

1. Courts Should Examine Discrimination Based on Perceptions of Behavioral Difference

Part I discussed the social neuroscience findings that “System One” processes, in the terminology of Kahneman and Tversky, can trigger negative reactions based on perceptions that someone is acting differently. This linking of discrimination to an actor’s vague, negative perception that someone is acting differently has echoes in the legal antidiscrimination concept of “performing identity,” most thoroughly developed in the late-1990s work of Carbado and Gulati.308 The basic idea is that the social self “construct[s]” itself by performing identity in front of others, as Goffman described in 1971.309 Others react to this performance, and it is this interaction that creates identity.310 It can also lead to unlawful discrimination,

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02 (2001) (arguing that law must better respect internal dissent within groups about cultural norms).


309 See GOFFMAN, supra note 157, at 5.

310 See id.
as Carbado and Gulati explore.\textsuperscript{311}

Carbado and Gulati examine \textit{Price Waterhouse v. Hopkins},\textsuperscript{312} an iconic U.S. Supreme Court case on gender discrimination.\textsuperscript{313} There, the Price Waterhouse accounting firm was considering for partnership Ann Hopkins, a talented employee.\textsuperscript{314} Hopkins had the reputation for being a hard-charging project manager who was highly demanding of team members and unkind to subordinates, but she produced excellent results that pleased clients.\textsuperscript{315} Nevertheless, the firm’s partnership voted to postpone her partnership consideration.\textsuperscript{316} Afterwards, one of the partners who supported Hopkins’ candidacy counselled her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”\textsuperscript{317}

Hopkins filed suit arguing that these admissions about the decision-makers’ motives were direct evidence of illegal gender stereotyping.\textsuperscript{318} The U.S. Supreme Court agreed.\textsuperscript{319} Price Waterhouse had considered other women candidates for partnership before considering Hopkins, and the firm argued that this showed that it did not discriminate on the basis of sex.\textsuperscript{320} Rejecting this defense, the Court held that discrimination could occur based not only on identity per se, but also based on stereotypes about how one should behave—or perform one’s identity, to use Carbado and Gulati’s phrase—as a female.\textsuperscript{321} A Price Waterhouse partner had squarely admitted that the firm rejected Hopkin’s bid for partnership because of gender-linked characteristics pertaining to how she acted: She did not properly engage in the stereotypic performances associated with being a “lady” partner, as he quaintly put it.\textsuperscript{322}

\begin{footnotes}
\item[311] Carbado & Gulati, \textit{Identity}, \textit{supra} note 308, at 1262.
\item[312] 490 U.S. 228 (1989).
\item[313] CARBADO & GULATI, \textit{supra} note 50, at 84–90.
\item[314] \textit{Hopkins}, 490 U.S. at 233–34.
\item[315] \textit{Id.} at 234.
\item[316] \textit{Id.} at 235.
\item[317] \textit{Id.} at 235; CARBADO & GULATI, \textit{supra} note 50, at 84.
\item[318] \textit{Hopkins}, 490 U.S. at 232.
\item[319] \textit{Id.} at 256–58.
\item[320] \textit{Id.} at 236.
\item[321] \textit{Id.} at 251; CARBADO & GULATI, \textit{supra} note 50, at 81.
\item[322] \textit{Hopkins}, 490 U.S. at 235.
\end{footnotes}
Carbado and Gulati, as well as others, point out that the insights the Court stumbled upon in *Price Waterhouse* have many more applications. Most obviously, discrimination can occur whenever employers hold stereotypes about how persons belonging to traditional outsider categories should behave.

Carbado and Gulati identify many ways this can occur. Most of their examples focus on large law firms and the law school professorate, two contexts they know well. One scenario involves what Carbado and Gulati refer to as “lumpy” good citizen assignments in both law schools and law firms. These are time-consuming institutional service assignments, such as being on hiring or diversity committees, which take a great deal of time away from the kinds of work, such as writing well-placed law review articles or handling big deals, that end up being most important to the evaluation of junior employees at promotion time.

Thus, as Carbado and Gulati’s work teaches, discrimination on the basis of traditional outsider status can occur based not only on a worker’s status per se, but also based on perceptions of what is appropriate conduct for a person of a particular identity. Ann Hopkins was subject to illegal discrimination not because she was female, but because she did not perform that identity in a particular, stereotypical manner—she did not, in the words of the Price Waterhouse partner, act “femininely.” Yet she faced a classic Catch-22, because the firm at the same time expected her to be hard charging in impressing clients and pushing her work forward in the firm.

The social science concept of deviance maps onto Carbado and Gulati’s ideas of performativity. As Carbado and Gulati point out,
persons with traditional outsider identities frequently face Catch-22 situations.\(^{331}\) Social norms call on traditional outsiders to signal that they realize they are inferior, yet social expectations also call on them to present themselves as competent agents in performing their positions.\(^{332}\) This point is central to civil rights historian Ken Mack’s important book *Representing the Race: The Creation of the Civil Rights Lawyer*,\(^{333}\) as I have explored in greater depth elsewhere.\(^{334}\) Mack shows that mid-twentieth century African American civil rights lawyers produced social change through the very act of performing their identity as courtroom lawyers.\(^{335}\) In that capacity, they necessarily had to act as the equals of the white lawyers and witnesses with which they were interacting.\(^{336}\) Put otherwise, Mack offers an example of social change produced through positive deviance, a concept I discussed in Section I.C.3.\(^{337}\) Performing identity in the conflicted social spaces in which subordination occurs gives rise to friction that can lead to positive social change, but it can also lead to negative reactions from those in power.\(^{338}\) Those negative reactions, interlaced with status discrimination against traditional outsiders, constitute classic discrimination—*i.e.*, negative treatment based on traditional outsider identity.\(^{339}\)

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331 See Carbado & Gulati, *Identity*, supra note 308, at 1291. Sometimes persons cannot help but be perceived as deviant, especially when an immutable characteristic is involved. Sometimes they can “cover” their differences, but only at great cost to their sense of well-being, as I discuss further in Section II.B.1 below. And some people have a high tolerance for risking the opprobrium that comes from violating group norms. Some in this category are motivated to violate norms out of a sense of higher purpose. Cf. Carle, *Agency*, supra note 28, at 528 (discussing Ken Mack’s investigation into how African American lawyers violated social norms simply by performance of identity in their regular lawyering).


336 See id.

337 See supra Section I.C.3.


339 Carbado and Gulati, as well as Mack, teach that the situation is often even more complex. People can rebel. They can reject a group norm for ethical and/or political reasons. See Berns, *supra* note 223, at 10–11 (presenting a neuro-economist’s explanation of the brain functions involved out-of-the-box thinking).
Carbado and Gulati urged courts to pay more attention to various traditional outsider quandaries about performing identity. Yet thus far courts have largely failed to do so outside the sex-stereotyping context. Social neuroscience can help return attention to why they should: The brain may unconsciously discriminate against persons based on perceptions of nonconformity in how those persons act in relation to their outsider identities. The mandate by Congress banning discrimination against traditional outsiders requires that the law reach such discrimination.

2. COURTS SHOULD TAKE THE HARMs OF WORKPLACE EXCLUSION MORE SERIOUSLY

As discussed throughout Part I above, antipathy toward particular identity categories can result in social exclusion. Yet court-developed doctrines sometimes ignore the ways social exclusion results in unlawful discrimination. Policymakers should revisit those doctrines in light of current social neuroscience findings.

Here is one example: Antidiscrimination doctrine has long provided, correctly in my view, that an employee must experience a “material” harm, such as a loss of pay, promotion, or one’s job, in order to have an actionable employment discrimination claim. It is the existence of such a material harm, also known as a “tangible” action, that establishes that the employee has experienced discrimination in the “terms and conditions of employment,” as required under the statutory language of Title VII and similar laws.

These types of acting differently also deserve legal protection, as I discuss further in Section II.B.4 below.

340 Carbado & Gulati, Identity, supra note 308, at 1293–95.
341 See id. at 1293–95.
342 Timmons v. Gen. Motors Corp., 469 F.3d 1122, 1128 (7th Cir. 2006) (explaining that “an adverse employment action must be material . . .”); 1 Abigail Cooley Modjeska, Employment Discrimination Law § 1:2, at 1-4 (3d ed. 2017) (“A claimant can establish that the employer has taken an adverse employment action by showing that the employer has made disadvantageous changes in the employee’s terms and conditions of employment that are objectively ‘significant,’ ‘tangible,’ or ‘material.’”).
343 Modjeska, supra note 342, § 1:2, at 1-4 & nn.4 & 6 (citing relevant statutes and noting the significant difference in meaning of the term “adverse action” under the antidiscrimination versus the antiretaliation provisions of Title VII); see 42 U.S.C. § 2000e-3 (2012).
Although the doctrine itself correctly states the statutory require-
ment, courts have sometimes applied the material harm test too re-
strictively. For example, courts have dismissed plaintiffs’ claims of
discrimination based on exclusion from informal work groups, train-
ings, social opportunities, and the like, and some courts have found
no material harm when employers assign workers less attractive
work within a job classification. These holdings tend to be highly
fact-specific and sometimes appear correct. After all, courts cannot
grant relief for every minor incident employees experience at
work. Yet, sometimes courts’ conclusions on the question of what
counts as actionable discrimination appear erroneous, as if they are
aimed more at clearing cases off dockets than carefully evaluating
whether discriminatory dynamics are in play. Where excluding
persons from informal opportunities and/or assigning them less de-
sirable work gets in the way of their job success, material harm has
occurred.

Better understanding of the relationship between in-group
bias, social exclusion, and discrimination could make courts
more attuned to how unlawful workplace discrimination takes
place. Trivial complaints should not make out an actionable claim,
lest courts end up even more flooded with antidiscrimination cases
(already an enormous problem but one outside the scope of this ar-
ticle to discuss). But long-term, repeated and persistent exclusion,
including social shunning linked to traditional outsider identity that
has adverse implications for job success, should be found actionable
by courts that examine these facts with more care than they some-
times take today.

Scholars have also documented other ways in which courts in
antidiscrimination cases give short shrift to more subtle evidence of

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344 See, e.g., Higgins v. Gonzales, 481 F.3d 578, 585–87 (8th Cir. 2007) (hold-
ing that the plaintiff failed to establish an adverse action when her job duties were
changed and she was denied mentoring and training but did not lose pay).
345 See, e.g., id.
346 See Carle, Angry Employees, supra note 27, at 191–98.
347 But see Higgins, 481 F.3d at 586.
348 See supra Section I.A.2.
349 See supra Section I.C.
350 See Carle, Angry Employees, supra note 27, at 191–98 (discussing this
problem in more detail).
exclusionary acts in the workplace.\[351\] Terry Smith, for example, notes that persons of color, for whom discrimination is a constant, raw, and usually un-redressed problem, see discrimination all around them, while whites (which continue to represent the substantial majority of judges in both state and federal courts)\[352\] are far less likely to notice.\[353\] A workplace encounter that would seem relatively minor absent the element of persistent discriminatory atmosphere feels far more intense to a person in a racial outsider category who has had the experience of many similar experiences building up over time.\[354\]

Courts should be more sensitive to these dynamics, as I have argued elsewhere.\[355\] In one iconic Supreme Court case in which the majority ignored such facts in ruling against the plaintiff’s claims, an employer insisted that an African American be the sole worker assigned to clean up after the work of white employees in his same job classification and denied this worker training opportunities available to white employees who were otherwise similarly situated.\[356\] In another, the Court rejected a class action lawsuit where

\[351\] See, e.g., Keri Lynn Stone, Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law, 77 Mo. L. Rev. 149 (2012) (critiquing the “stray comments” doctrine, which permits courts to dismiss discriminatory workplace talk and insults as mere “stray comments” that did not figure into a decision maker’s actions).

\[352\] See Barry J. McMillion, Cong. Research Serv., R43426, U.S. Circuit and District Court Judges: Profile of Select Characteristics 5, 17 (2017), https://fas.org/sgp/crs/misc/R43426.pdf (reporting that seventy-five percent (75%) of U.S. circuit court judges and seventy-one percent (71%) of district court judges were white as of June 1, 2017); Tracey E. George & Albert H. Yoon, The Gavel Gap: Who Sits in Judgment on State Courts 18 (2016), http://gavelgap.org/pdf/gavel-gap-report.pdf (reporting that eighty percent (80%) of state court judges were white as of December 2014).


\[354\] See id. at 550.

\[355\] Carle, Angry Employees, supra note 27, at 203.

an employer granted work privileges, such as a separate air-conditioned dining hall and sleeping quarters, to employees in job classifications consisting almost entirely of whites, while relegateing to rougher, non-air-conditioned accommodations all employees in job classifications consisting entirely of persons of color.\textsuperscript{357} The facts in these cases reflect social exclusion of racial outsiders that affected their terms and conditions of employment. The majority opinions in these cases should have appreciated this. Judicial training on the findings of social neuroscience could help increase courts’ awareness in this regard.

3. **Courts Should Revise Their Evidentiary Standards in Hostile Environment Discrimination Cases**

In an analytically related but doctrinally different point, courts should revise their evidentiary standards in hostile environment discrimination cases. Court-crafted doctrines hold that actions in a workplace that create a hostile atmosphere are not sufficiently “severe or pervasive” to give rise to actionable discrimination if they do not amount to a change in a “term, condition, or privilege of employment.”\textsuperscript{358} These doctrines are analytically correct, but can be too restrictive when applied to hostile environment situations.

Employment discrimination scholars have documented many ways in which courts in antidiscrimination cases give short shrift to evidence of prejudice manifested through workplace verbal abuse.\textsuperscript{359} For example, under the “stray comments” doctrine, courts may dismiss egregious talk in the workplace involving use of the “n” word and vile words about women as mere “stray remarks” that

\textsuperscript{357} See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989) (holding that the plaintiffs did not make out a prima facie case of discrimination); id. at 663 n.4 (Stevens, J., dissenting) (noting the “plantation” atmosphere reflected in the employer’s facilities).


\textsuperscript{359} See Carle, Angry Employees, supra note 27, at 192–95 & nn.28–30 (summarizing this literature).
do not tend to prove discrimination.\textsuperscript{360} Courts’ frequent rulings that such acts are not evidence of discrimination reinforce the message that expressing bias is acceptable.\textsuperscript{361} In turn, that message coming from the judiciary exacerbates hostility among social groups in the workplace, worsening rather than ameliorating the problem antidiscrimination law aims to address.\textsuperscript{362}

Neuroimaging studies of the brain show individuals experience negative treatment from a group as severely painful,\textsuperscript{363} as I discussed in Section I.C.2. This research can inform courts’ understanding of the harm of hostile environment discrimination. Those findings indicate that working in an environment in which hostility toward a social group is frequently expressed is, in itself, a change in the terms and conditions of employment.\textsuperscript{364} Most certainly, working in an environment inflicting physical abuse would be sufficient to meet the standard for discriminatory harassment.\textsuperscript{365} Courts should be more aware that verbal abuse can create severe pain just as physical abuse does, and should evaluate facts in hostile environment cases accordingly. While trivial comments should not be blown out of proportion, courts should better recognize that both verbally and physically abusive treatment can cause intense and long-lasting harm amounting to a change in the terms and conditions of employment.

\textsuperscript{360} See id. at 199 n.57; Stone, supra note 351 (critiquing the “stray comments” doctrine for allowing courts to grant summary judgment to employers despite strong evidence of discriminatory motive).

\textsuperscript{361} See Carle, Angry Employees, supra note 27, at 198.

\textsuperscript{362} Id.

\textsuperscript{363} Giovanni Nolfe et al., Bullying at Workplace and Brain-Imaging Correlates, 7 J. CLINICAL MED., no. 8, 2018, at 1 (“Moreover, we observed a statistically significant link between the hippocampal atrophy and the working environment’s dysfunctional phenomena. This significant relationship is related to the work harassment and to anomalies of the interpersonal relationships (bullying at workplace) rather than to the phenomena more clearly related to organizational working stress.”).

\textsuperscript{364} See supra Section I.C.2.

\textsuperscript{365} See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (explaining that a “physically threatening or humiliating” work environment is indicative of hostility).
4. COURTS SHOULD EXPAND ANTIRETALIATION PROTECTIONS

All federal antidiscrimination statutes, as well as hundreds more aimed at preventing environmental and financial harms, bar employers from retaliating against employees for complaining about discriminatory or otherwise unlawful employer conduct.\textsuperscript{366} Happily, from the perspective of antidiscrimination advocates, the requirements for showing an “adverse action” under antiretaliation law are more lenient than the requirements for showing a tangible action or material harm under the substantive antidiscrimination provisions of various statutes.\textsuperscript{367} In the antiretaliation context, any employer action that objectively would deter a reasonable employee from complaining about unlawful conduct qualifies to establish an “adverse action[].”\textsuperscript{368} Less happily from plaintiffs’ perspective, however, courts have imposed other onerous restrictions in retaliation cases, especially as to the acceptable manner of employees’ conduct in opposing discrimination, as I have written about previously.\textsuperscript{369} The findings about the black sheep effect, as discussed in Section I.C.3


\textsuperscript{367} See Modjeska, supra note 342, § 1:4, at 1-49 to 1-52 (explaining the difference between the definitions of adverse action under the antidiscrimination and antiretaliation provisions of Title VII). To make matters even more complex, some courts use the term adverse action in the context of both types of discrimination. Compare id. at 1-4 to 1-10, with id. at 1-49 to 1-52.

\textsuperscript{368} See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57, 66–67 (2006) (holding that the threshold for establishing an adverse action for purposes of antiretaliation law is lower than under substantive antidiscrimination law; for retaliation, an adverse action is any employer action that would tend to deter other employees from coming forward with complaints about unlawful employer conduct); see also id. at 69 (“[T]o retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee’s professional advancement might well deter a reasonable employee from complaining about discrimination.”).

\textsuperscript{369} See Carle, Angry Employees, supra note 27, at 215–17 (arguing that courts should be more permissive in judging the manner in which employees may complain about discrimination without losing antiretaliation protection); see also id. at 215–16 nn.140–41, 144–45 (citing additional scholars making similar arguments).
above, document groups’ tendencies to be particularly harsh toward internal or in-group dissenters (or so-called “deviants”) from social norms. These findings are especially relevant in the antiretaliation context, in which whistleblower employees typically are in-group members of their organizations. Employees bound together by codes of secrecy and loyalty find whistleblowers particularly repugnant.370

As social neuroscience findings regarding the black sheep effect attest, retaliation against those who accuse an employer of committing moral wrongs is particularly likely, even by otherwise lawful employers; groups, including organizations, strongly dislike criticism and are thus likely to lash out against internal dissenters.371 Yet as Justice White held in Burlington Northern, protecting internal dissent of this type is highly important to the proper functioning of the nation’s laws aimed at protecting the public interest.372

Justice White’s observations correspond to the social science research regarding the benefits of dissent and other forms of resisting groupthink, as discussed previously in Section I.C.1 above. To encourage and protect employees who speak out against perceived employer wrongdoing, courts should err on the side of providing more generous protections against retaliation. Again, a consilience emerges between the empirical findings of social psychologists and other science-based researchers, on the one hand, and antidiscrimination scholars and other civil rights policy advocates, on the other. This consilience pushes toward greater protection for workplace dissenters as well as those who act differently in other scenarios. Indeed, the social psychology research I sketched in Part I counsels greater protection of the right to act differently as a more general principle as well.

370 See Robert C. Vaughn, The Successes and Failures of Whistleblower Laws 63–65 (2012) (describing a New York City police officer who was threatened and harassed for breaking the “code of silence” because he refused to take bribes or be complicit in corruption and, subsequently, gained a reputation for “ratting out” his fellow officers). For an excellent introduction into the complex topic of the policy behind whistleblower law, see generally id. at 10–34.

371 See supra Section I.C.3.

372 Burlington N., 548 U.S. at 67 (“Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act’s primary objective depends.”).
B. Policy Influencers Should Press Forward on Recognizing a General Human Right to Act Differently

The proposals I have offered above go to immediate pragmatic tweaks to court-crafted employment antidiscrimination doctrine. They would not require a fundamental overhaul of U.S. antidiscrimination law but instead change the interpretation of what constitutes actionable harm. The last proposal I will discuss is far more abstract and ambitious, but merits discussion nonetheless, especially because it has emerged as an underlying theme in much recent civil rights scholarship. That proposal calls on scholars, lawmakers, and others to work toward the recognition of a general human right to act differently within the bounds of others’ rights. While ambitious, this is not as outlandish a proposal as it might at first appear. Other thoughtful scholars have made variants of it long before me, all the way back to the classical liberalism of John Stuart Mill.373 In more recent times, one such scholar is Kenji Yoshino, who introduced the term “covering” to describe how discrimination based on behavioral difference manifests itself today.374

1. Recognizing the Harm of “Covering” and Like Violations of the Right to Act Differently

Ten years after Carbado and Gulati’s path-breaking work discussed in Section II.A.1 above, Yoshino picked up the theme of acting differently in a lyrical, genre-bending book that not only discusses but also models that theme.375 Part memoir, part prose poem, and part legal analysis, Covering extends Erving Goffman’s insights in Stigma to civil rights policy and law.376 Yoshino explores how people struggle to hide nonconforming aspects of what he calls their “authentic selves” in order to avoid social disapproval.377 Yoshino asks why, more than five decades after the advent of federal civil

373 See MILL, supra note 58, at 76, 139 (opposing the “tyranny of the majority” and arguing for the right of persons to liberty in conduct provided they do not harm the rights of others).
375 Id. at x–xii.
376 Id. at 18 (acknowledging his debt to Goffman’s work).
377 Id. at 184.
rights protections, so many people still feel the need to “cover” in this way. Yoshino’s theme, too, is about acting differently; covering, he notes, involves a demand to suppress “the behavioral aspects of identity.”

In the personally reflective parts of the book, Yoshino focuses on two aspects of his identity. One of these is as a gay man; another is as a man of Japanese descent raised in the United States with an ambivalent relationship to his heritage. In moving terms, Yoshino describes examples of times in which he felt the need to “cover” with respect to both these aspects of his identity. Interweaving personal narrative and the legal-analytic parts of his book, Yoshino argues for a new civil rights paradigm that would essentially recognize a “right to personality.”

Presciently, yet far too optimistically as it turns out, Yoshino warns in 2007 that the country’s overwhelming focus on group identity politics threatens to “balkanize the country into separate fiefdoms of competing identity groups.” Almost wishfully, he predicts that Americans will move toward a new politics of universal rights to liberty rather than encouraging the continuing fracturing of people into divided identity groups. Yoshino acknowledges, however, that much of the work needed to bring such a concept to life cannot be done by law.

Unfortunately, Yoshino’s vision for universal rights to liberty and tolerance of difference has not come to pass. Its dystopian opposite instead looms quite real in U.S. politics today as the nation’s

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378 Id. at 24–25.
379 Id. at 24; see also id. at 22 (“Outsiders are included, but only if we behave like insiders—that is, only if we cover.”).
380 See id. at xii.
381 See, e.g., id. at 59–63, 117–22 (relating personal narratives about his dual gay and Japanese-descended identities).
382 Id. at 183.
383 Id. at 189 (invoking the German constitutional “right to personality”).
384 Id. at 183.
385 Id. at xii, 26–27, 183.
386 Id. at 192 (proposing that “law will be a relatively trivial part of the new civil rights[,]” and noting that “many covering demands are made by actors the law does not—and in my view should not—hold accountable . . . “); see also id. at 27 (arguing for “social” rather than legal solutions).
divisions along lines of social difference become ever more contentious. But this state of affairs only makes Yoshino and others’ calls for universal civil rights—including a right to act differently along the lines of the classic principles of philosophical liberalism—even more important. His insights contribute to the arsenal of arguments supporting the promotion of human variation as a positive feature of social life. In a politically dangerous time in which a number of global leaders are manipulating the strong emotions induced by “us-versus-them” thinking, promoting the principle of tolerance toward difference becomes all the more important.

Yoshino’s radical vision for the future has won dedicated followers. A recent contribution that builds from Yoshino is Zachery Kramer’s book, appropriately titled *Outsiders*. Using engaging examples, Kramer in essence argues for a discrimination-based right to expression of one’s personality. Kramer may not succeed in his argument for a right recognized in law, but this work should make other scholars take notice.

Still other scholars, such as civil rights legal historians Risa Goluboff and Ken Mack, focus on the theme of acting differently as well. I have discussed Mack in Section II.A.1 above. For her part, Goluboff explores, in her multiple award-winning book *Vagrant Nation*, a decades-long campaign in the United States to strike down vagrancy laws as applied to a wide variety of so-called deviants.

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388 See YOSHINO, supra note 374, at 25.
392 See id.
These people included poor and homeless persons, persons on skid row—especially African Americans, even when employed—as well as those encompassed under the traditional image of the hobo, or non-geographically attached, freedom-loving male wanderer whom Justice Douglas romanticized as a symbol of liberty. They also included a wide range of others who did not conform to social norms and were targeted for persecution under anti-vagrancy laws for this reason. Thus, as Goluboff puts it, “the ‘queer,’ the ‘Commie,’ the ‘uppity’ black man, the ‘scruffy’ young white one,” all embodied difference; the police and others who enforced law were “trained to see difference as dangerous, to see the unusual as criminal.”

Goluboff thus focuses on the commonality, in the form of shared criminal persecution, underlying various forms of deviance. Vagrancy law bound a wide variety of groups embodying disparate kinds of social difference. As one key civil rights lawyer explained, vagrancy laws were used to suppress dissent; war protestors, communists, irascible political contrarians and other political dissidents were prosecuted under their authority. Those laws likewise attacked race dissenters: “[If you are f]or integration[,] [y]ou’re a Vagrant.” Police applied vagrancy laws to dignified African American ministers taking part in civil rights protests. They applied them to arrest mixed race groups in the South and to persons in the wrong racial neighborhoods all over the country.

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394 Goluboff, supra note 393, at 80–81.
395 Id. at 115–20.
396 Id. at 228–29.
397 Id. at 3. Goluboff traces the origins of anti-vagrancy laws to Sixteenth-Century English concepts of everyone having a proper place; those lacking social power who threatened to move out of their proper place faced prosecution for no other reason than this, whether they were “‘out of place’ socially, culturally, politically, racially, sexually, economically, or spatially.” Id.
398 Id.
399 Id. at 3–4.
400 See id. at 25–26.
401 Id. at 123 (quoting Anthony Amsterdam).
402 Id. at 112.
403 Id. at 123.
404 Id. at 116–17.
Likewise, sexual minorities came under their reach, as in prosecutions of so-called “vag lewd” charges against gay men and arrests of persons of both sexes for cross dressing or even engaging in identity performances that fell too close to the line dividing the sexes.\textsuperscript{405} Vagrancy laws were applied to women having sex outside marriage and women and African American men having sex across race lines.\textsuperscript{406} Another application involved defining as vagrants hippies, beatniks, and other members of the American counterculture of the 1950s and 1960s, whom police defined as criminally dangerous and “vagged” merely because they violated conventional norms concerning styles of dress, hair, lifestyle and behavior.\textsuperscript{407}

Goluboff does not focus on the application of vagrancy and similar laws to persons with disabilities, but another book fills in that important gap. In \textit{The Ugly Laws}, Susan Schweik documents how civic leaders used vagrancy and other laws to banish from public spaces persons with disabilities others viewed as unsightly.\textsuperscript{408} As in Goluboff’s narrative, Schweik shows how persons with power used laws to exclude and penalize persons regarded as repugnant due to their perceived social differences.\textsuperscript{409}

Both books trace various strains of the complex, decades-long, intersectional, coalition-necessitating, and eventually successful activism that abolished broad vagrancy statutes as well as ugly laws.\textsuperscript{410}

\textsuperscript{405} Id. at 3, 40, 47, 80–81.

\textsuperscript{406} Id. at 306–08.

\textsuperscript{407} Id. at 53–55, 170, 221.

\textsuperscript{408} SUSAN M. SCHWEIK, \textit{THE UGLY LAWS: DISABILITY IN PUBLIC} 63 (2009).

\textsuperscript{409} Id. at 24–39, 63–64; GOLUBOFF, supra note 393, at 3.

\textsuperscript{410} GOLUBOFF, supra note 393, at 3; SCHWEIK, supra note 408, at 207–29. Civil rights advocates argued that these laws violated values involving geographical and spatial freedom, privacy, equality and nondiscrimination, as well as rights to nonconformity, all of which are complexly embodied in liberal interpretations of the U.S. Constitution. \textit{See} GOLUBOFF, supra note 393, at 298–332. Goluboff also tells the story of how the Court has backtracked from these values, illustrating that there is no certain path toward greater enlightenment on human rights issues. \textit{See} id. at 341–44.

\textsuperscript{406} As Goluboff further notes, the general theme of expanding tolerance for those who act differently had emerged in legal scholarship by the 1970s. \textit{See} id. at 399 n.9, 441 n.53 (citing NICHOLAS N. KITTRIE, \textit{THE RIGHT TO BE DIFFERENT} 4 (1971) (opposing forced therapy for so-called deviants)); \textit{see also} GOLUBOFF, supra note 393, at 316 (discussing this theme in other legal scholars’ work, including that of Charles Reich).
These initiatives contributed to the U.S. history underlying contemporary moves to broaden recognition of a general right to act differently.\textsuperscript{411} There is, of course, a long stretch from constitutional law prohibitions applying to government action, on the one hand, and recognition of a general human right to act differently in all spheres, on the other.\textsuperscript{412} But the historical narratives Goluboff and Schweik document are telling even though the Supreme Court’s retrenchment after “the long 1960s,” as Goluboff puts it, wiped out some of the gains made.\textsuperscript{413} A general thrust toward the principle of greater tolerance toward all—or, to put it another way, toward constructing a more expansive and inclusive circle of regard\textsuperscript{414}—remains an important aspirational norm among progressive political forces.\textsuperscript{415}

It may be that fostering cultural change in this direction, rather than imposing legal mandates, constitutes the best strategy. This may be for no other reason than the paradox that mandating tolerance is itself intolerant.\textsuperscript{416} This paradox bedevils anti-hate speech campaigns.\textsuperscript{417} It can be seen in the tendency toward over-dogmatization that can arise from too much political correctness.\textsuperscript{418}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Schweik}, supra note 408, at 207–08.
\item See \textit{Goluboff}, \textit{supra} note 393, at 318.
\item See, \textit{e.g.}, id. at 316 (illustrating Goluboff’s use of the term “the long 1960s”).
\item See \textit{John A. Powell}, \textit{Us vs. Them: The Sinister Techniques of ‘Othering’ – And How to Avoid Them}, \textit{Guardian} (Nov. 8, 2017, 7:37 AM), \url{https://www.theguardian.com/inequality/2017/nov/08/us-vs-them-the-sinister-techniques-of-othering-and-how-to-avoid-them} (criticizing conservatives for “othering” minority groups for political gains while calling for the creation of a “society where ‘we the people’ includes all the people”).
\item See id.
\item \textit{E.g.}, Julia Symons, \textit{Essay, Has Political Correctness Gone Too Far?}, \textit{Economist} (Sept. 10, 2018), \url{https://www.economist.com/open-future/2018/09/10/has-political-correctness-gone-too-far} (acknowleding that “some aspects of tolerance culture” go too far while advocating for political correctness generally).
\end{enumerate}
\end{footnotesize}
Yoshino (and many other) legal scholars have noted, not all antidiscrimination and fairness goals can be achieved directly through law.\textsuperscript{419} Some matters are best addressed, or can only be addressed, through “best practices” policies promoted through voluntary action in either the private sphere or the gray area in which public law and private action intersect.\textsuperscript{420}

Regulating through voluntary norms, or what is sometimes called “soft law,” involves developing principles or standards that civil society groups can use to encourage social change; in other words, non-government actors can promote adherence to certain norms.\textsuperscript{421} These standards lack the enforcement authority that accompanies “hard” law but can be effective through positive example and also through negative informal sanctions such as shaming\textsuperscript{422} (which, indeed, social neuroscience shows to be an effective technique for producing conformity, as described in Section I.C.2 above).

Below I briefly sketch some soft law or voluntary policies that institutions can adopt to promote fairness thinking and “nudge”\textsuperscript{423} the law toward an expanded recognition of a right to act differently.

2. ADOPTING PRIVATE POLICIES AGAINST EXPRESSING PREJUDICE

A deep appreciation of the mechanisms underlying implicit bias can help inform soft law approaches to upholding norms that favor antidiscrimination and broader tolerance for difference. Social

\textsuperscript{419} See, e.g., YOSHINO, supra note 374, at 192.

\textsuperscript{420} Leslie C. Levin et al., The Impact of International Lawyer Organizations on Lawyer Regulation, 42 FORDHAM INT’L L.J. 407, 473 (2018) (discussing how policies that reside at the intersection between public law and private action can affect lawyer conduct).

\textsuperscript{421} See id. at 472–76 (giving an overview of the literature and discussion of the relative advantages of soft law approaches); see also Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 INT’L ORG. 421, 434–50 (2000) (arguing that international actors often choose soft laws to achieve effective solutions); Benny Spanier et al., In Course of Change? Soft Law, Elder Rights, and the European Court of Human Rights, 34 LAW & INEQ. 55, 58–62, 86 (2016) (providing a general overview of the literature on soft law and arguing that soft law can help in the development of elder law and human rights jurisprudence as a step toward creating hard law in this field).

\textsuperscript{422} Levin et al., supra note 420, at 475.

\textsuperscript{423} See THALER & SUNSTEIN, supra note 123.
norms that disapprove of prejudice and stereotypic thinking can help reduce bias and increase fairness in decision-making. Similar results might come from social signals encouraging the brain to think expansively about one’s circle of regard. As noted in Section I.B.1, the worst situation for promoting antidiscrimination values is a social environment in which expressions of bias are deemed perfectly acceptable. In such situations, the mental work of “cognitive control” to avoid bias does not even begin to occur. That work, the reader may recall, involves the brain striving, with significant effort, to prevent prejudice from entering into decisions about persons the brain non-volitionally perceives as outsiders.

Social neuroscience findings highlight the damage caused by flagrant expressions of prejudice, especially by high authority and high visibility figures. Race supremacists, neo-Nazis, and like travelers who espouse ideologies of hate affect other people’s brains in ways to which those brains are particularly sensitive, even when they are not the ones directly subject to attack. Although, at this juncture, free speech doctrines restrict the government from banning much (though not all) hate speech, that does not mean that the policies of private institutions cannot do so. Below I explore some ways in which institutions can advance soft law in this respect.

3. Promoting Diversity and Inclusion as Benefits That Transcend the Current Culture Wars

There is currently a healthy political debate going on about the benefits and drawbacks of “diversity.” There must always be debate about how to translate scientific findings into social policy, so

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424 See Singer, supra note 414, at 20–22.
425 See supra notes 180–83 and accompanying text.
426 See supra Section I.C.2. They also suggest, as I have already discussed above, that courts have been far too lackadaisical in their reaction to use of the “n” word and other epithets manifesting bias in workplaces. See Carle, Angry Employees, supra note 27, at 199 n.57.
427 See Romero, supra note 416, at 9.
429 See Rainer Bauböck, Cherishing Diversity and Promoting Political Community, 1 Ethnicities 109, 109–10 (2001) (book review) (sketching the debate in political theory on multiculturalism); see also Conklin, supra note 428, at 42–43;
this debate is beneficial.\textsuperscript{430} What has become somewhat lost in it, however, is the fact that the benefits of diversity are largely noncontroversial to researchers based in natural science paradigms. Indeed, prominent natural science-based intellectuals, such as Nobel Laureate Edward O. Wilson, by no means a wild leftist, embrace diversity as a biological idea. Wilson writes

\textquote{Perhaps the time has come . . . to adopt a new ethic of racial and hereditary variation . . . . It would give proper measure to our species’ genetic variation as an asset, prized for the adaptability it provides all of us during an increasingly uncertain future. Humanity is strengthened by a broad portfolio of genes that can generate new talents, additional resistance to diseases, and perhaps even new ways of seeing reality. For scientific as well as for moral reasons, we should learn to promote human biological diversity for its own sake instead of using it to justify prejudice and conflict.} \textsuperscript{431}

This consilience between the biologically based sciences and legal theory provides another boost to arguments supporting the promotion of diversity writ large.

Groupthink research also provides empirical support for diversity. From various disciplinary perspectives, as I have explained above, the research on groupthink shows that combining diverse, independent human perspectives produces more accurate judgments.\textsuperscript{432} This is one of the reasons social psychologists argue for

\begin{itemize}
\item Symons, supra note 418.
\item See, e.g., Paul Cairney & Kathryn Oliver, \textit{If Scientists Want to Influence Policymaking, They Need to Understand It}, GUARDIAN (Apr. 27, 2016, 1:00 AM), https://www.theguardian.com/science/political-science/2016/apr/27/if-scientists-want-to-influence-policymaking-they-need-to-understand-it.
\item Wilson, \textit{Social Conquest}, supra note 80, at 80–81; see also id. at 254 ("[S]ocieties are mistaken to disapprove of homosexuality . . . . [Gay persons] should be valued instead for what they contribute constructively to human diversity. A society that condemns homosexuality harms itself.").
\item See Surowiecki, supra note 252, at 29–31; supra Section I.C.3.
\end{itemize}
the benefits of diversity writ large.\textsuperscript{433} From a social science perspective, as from a natural science perspective, promoting diversity—defined as many variations in the ideas generated by our so-called cultural gene pool—appears highly beneficial.

These conclusions converge with the fundamental tenets of classical liberalism. These tenets include the need for a “marketplace of ideas,” competition among ideas and the value of not shutting down or barring political disagreement—which, it bears noting, are ideas different from protecting hate speech.\textsuperscript{434} These concepts in political liberalism map onto theories in both the natural and social sciences that promote the value of diversity in human affairs. Evolutionary psychologists understand these benefits in biological terms, drawn from understanding the benefits of a broad gene pool;\textsuperscript{435} organizational psychologists understand them in terms of better group decision-making, as discussed in Section I.C.1 above. Again and again, varying knowledge disciplines return to core principles anchored in protecting human beings’ right to act differently.

The evidence on how the brain processes difference can be brought into conversation with the research on social exclusion. Being subject to ostracization causes individuals to experience social pain.\textsuperscript{436} When people experience social pain (and all people do, though to widely varying extents), they sometimes try even harder to conform to group norms, exacerbating the negative phenomenon of groupthink.\textsuperscript{437} That feedback loop hurts not only individuals but also the performance of groups in which it occurs.\textsuperscript{438} Thus, promoting difference as a matter of policy requires institutions to conduct

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\item\textsuperscript{433} \textit{See Berns, supra} note 223, at 104 (“[A] group with a lot of diversity among its members is more likely to arrive at a good decision than a group that is composed of members who are alike.”).
\item\textsuperscript{434} \textit{See} Kathleen E. Mahoney, \textit{Hate Speech: Affirmation or Contradiction of Freedom of Expression}, 1996 U. I.L. L. REV. 789, 793–94. \textit{Note} that social neuroscience helps establish how expressions that dehumanize others in fact diminish rich and diverse political speech. Researchers have now documented the harmful effects of dehumanizing speech on others’ brains. \textit{See supra} Section I.C.2. These scientific findings counsel in favor of considering revisions in free speech doctrines, though that complex subject is beyond the scope of this project.
\item\textsuperscript{435} \textit{See} Wilson, \textit{Social Conquest}, \textit{supra} note 80, at 80–81.
\item\textsuperscript{436} \textit{See supra} Section I.C.2.
\item\textsuperscript{437} \textit{See supra} Section I.C.2.
\item\textsuperscript{438} \textit{See Surowiecki, supra} note 252, at 29–31 (noting that research shows that
\end{itemize}
self-audits for where barriers to the inclusion of difference exist.\footnote{See Sarah Brown, \textit{Auditing Diversity} (May 15, 2016), https://www.chronicle.com/article/Auditing-Diversity/236428.} Are there policies that divide or segregate people in one’s institution? If so, are there important reasons for such policies or do they exist merely as a matter of tradition? What do the people on the outside of the divide between the in-group and the out-group think about their experience, and how would they propose moving toward a more comfortable and accepting environment for all? These steps are good policy even though they are not embodied in hard law.\footnote{See id.} Moreover, one day some of these policy experiments may become incorporated in law, just as has happened in antidiscrimination law as well as other fields.\footnote{See generally, e.g., \textit{Anthony S. Chen, The Fifth Freedom} 32–87 (2009) (on the historical move from quasi-voluntary standards to hard law in employment antidiscrimination law).}

4. Devoting More Resources to Implicit Bias Interventions

While researchers are studying how to reduce implicit bias, they have found no silver bullet. To the contrary, researchers have found that short-term trainings aimed at countering implicit bias do not work, though longer-term interventions that rely on multiple components to address implicit bias seem more effective.\footnote{Mimi V. Chapman et al., \textit{Making a Difference in Medical Trainees’ Attitudes Toward Latino Patients: A Pilot Study of an Intervention to Modify Implicit and Explicit Attitudes}, 199 SOC. SCI. & MED. 202, 203–06 (2018) (describing a promising “visual approach” intervention aimed at changing medical trainees’ attitudes toward Latino patients, which used life narratives and photos Latino adolescents made for doctors in response to the prompt, “What I wish my doctor knew about my life”); Patricia G. Devine et al., \textit{Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention}, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268, 1276 (2012) (finding that a multi-faceted twelve-week program produced dramatic reductions in implicit race bias, especially among people who were concerned about discrimination, while noting that it is unclear if short-term programs work); Calvin K. Lai et al., \textit{Reducing Implicit Racial Preferences:}
implicit biases even though they continue to test as having them. One study, for example, found that police officers could be trained to not act upon their implicit biases in shooting situations, while civilians could not. Another leading expert suggests that reminders—i.e., “priming”—can help doctors avoid implicit bias in pain prescriptions if given right at the time they are writing the prescriptions.

Such research on how to reduce implicit bias is still in its early stages; much more helpful information promises to be discovered soon about how to disrupt implicit bias in the workplace and elsewhere. Only time will tell what works, and policymakers interested in these matters should continue to monitor research developments.

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I. A Comparative Investigation of 17 Interventions, 143 J. EXPERIMENTAL PSYCHOL.: GEN. 1765, 1780–82 (2016) (comparing seventeen studies of interventions and finding that, when an intervention leverages multiple mechanisms to increase their impact on implicit bias preferences, it seems to be the most effective).

443 See Joshua Correll et al., Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020 (2007) (finding that both lay persons and police officers showed “robust racial bias” in response times regarding decisions to shoot Black versus White targets, but for police officers with training, this bias did not manifest itself in the decision to shoot).


BANAJI: You type in a painkiller that you want to prescribe to a patient into your electronic system while the patient is sitting next to you. And it seems, to me, quite simple that when you type in the name of any pain killer - let's say codeine - that a little graph pops up in front of you that says, please note, in our hospital system, we have noticed that this is the average amount of painkiller we give to white men. This is the average amount we give to black men for the same reported level of pain.

VEDANTAM: In other words, giving doctors an opportunity to stop for a second to make a decision consciously and deliberately. This can reduce the effect of implicit bias.

Id. Correll et al., supra note 443, at 1007.
A different, older empirical literature documents some of the variables that can counter groupthink. Researchers have found, for example, that groups are less likely to rely on groupthink if the groups are cohesive because they are “commit[ted] to [the] task” rather than if they are cohesive because of “interpersonal attraction.”

Moreover, small diverse groups foster more individual participation and generate a broader array of ideas than do larger, more homogeneous ones. In other words, increasing diversity in groups that allow for individual participation lowers the likelihood of groupthink. Some researchers have also found that diverse groups often are more productive than homogenous ones. In short, promoting diversity in small work groups that relate interpersonally can help counter groupthink, a finding that corresponds with the complementary strands of literature on discrimination and on groupthink I explored in Section I.C.1.

CONCLUSION

This Article has argued that antidiscrimination law should not focus solely on status or identity discrimination, but should also embrace the concept of discrimination based on negative social perceptions of those viewed as acting differently. To support this thesis, I have explored the emerging consilience between the findings of social neuroscience and related fields, on the one hand, and legal antidiscrimination theory, on the other.

Social neuroscience has shown that unconscious, non-volitional processes in the human brain detect subtle, socially relevant behavioral differences. The brain’s perception of these subtle cues can activate neural processes involved in warning about potential dan-

446 See Brian Mullen et al., Group Cohesiveness and Quality of Decision Making: An Integration of Tests of the Groupthink Hypothesis, 25 SMALL GROUP RES. 189, 199 (1994).
448 See id.
449 See, e.g., Richard B. Freeman & Wei Huang, Collaborating with People Like Me: Ethnic Coauthorship Within the United States, 33 J. LAB. ECON. S289, S313 (2015) (finding that the diversity of individuals within a group of scientists increased the likelihood that their scholarly papers would achieve renown).
450 See supra Section I.A.2.
ger. These automatic processes in turn can lead people to shun, negatively judge, treat badly, and illegally discriminate against persons they perceive to be acting differently—in other words, as “other”—based on whatever differences a society defines as socially salient.

In modern social conditions, human beings often deal with persons who are different from themselves. Indeed, pluralism and labor specialization are keys to creativity and efficiency in complex modern societies. Modern societies, which are politically based on pluralism and economically based on labor specialization, could not exist without a rich variety of differences among people. The non-volitional brain processes that can react negatively to perceived differences are maladaptive in present social conditions.

It is by no means the case that human beings are incapable of interacting across differences. Interacting positively across differences is a perfectly doable—indeed, often a highly enjoyable—activity. The problem is that today’s political conditions raise increasing dangers of automatic neural processes being triggered so as to cause discriminatory harms. It thus has become increasingly imperative that antidiscrimination advocates, using evidence-based research, promote appreciation for individuals’ “acting differently” (within the bounds of others’ rights) as a foundational value in anti-discrimination law.

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