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

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ARTICLES

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

SUSAN D. CARLE*

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

* Professor of Law, American University Washington College of Law (WCL). My great thanks to Sarah Donovan, Brianna Gaddy, and Danli Lan for their excellent research assistance on this Article, and to many of my WCL colleagues for helpful comments, including but not limited to Bob Dinerstein, Amanda Frost, Bec Hamilton, Ann Shalleck, David Snyder, Robert Tsai, and Tony Varona. Special thanks to neuroscientist Dr. Terry Davidson, chair of the American University neuroscience department, and clinical psychologist Dr. Maya Coleman for their expertise in commenting on an earlier draft. I also greatly benefitted from my experiences teaching in the Fellowships at Auschwitz for the Study of Professional Ethics (FASPE) program. The editors of the *University of Miami Law Review* provided outstanding comments. All mistakes remain my own.

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.

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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

¹ See Alan Gathright & Louis Jacobson, *Donald Trump Says Hillary Clinton Is ‘Wrong’ to Say He Mocked a Disabled Reporter*, POLITIFACT (Oct. 20, 2016, 1:31 AM), <http://www.politifact.com/truth-o-meter/statements/2016/oct/20/donald-trump/donald-trump-says-hillary-clinton-wrong-say-he-moc/>.

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,⁴ Muslims as supporting terrorism,⁵ and African Americans as well as Latinos as committing the “overwhelming amount of violent crime in our major cities.”⁶ In all of these and many more instances, Trump linked a social category with allegedly aberrant ways of acting; in other words, he revealed people for *acting differently*.

Social scientists correlate Trump’s rhetoric with a rise in the social acceptability of expressing prejudiced opinions.⁷ Hate-watch groups document a significant uptick in the incidence of hate crimes throughout the United States.⁸ Even more disturbingly, Trump’s

³ See, e.g., Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> (quoting Trump saying, *inter alia*, “They’re bringing drugs. They’re bringing crime. They’re rapists”); Theodore Schleifer, *Trump: Mexican ‘Rapists’ Coming Now, Middle East ‘Terrorists’ Coming Soon*, CNN: POLITICS (June 25, 2015, 8:47 PM), <https://www.cnn.com/2015/06/25/politics/donald-trump-mexicans-terrorists-immigration-2016/> (quoting Trump saying, *inter alia*, “Some are good and some are rapists and some are killers”).

⁴ Brinley Bruton, Katy Tur & Molly Roecker, *Trump Tells Rally Syria Refugees ‘Probably’ ISIS as Muslim Protester Removed*, NBC NEWS (Jan. 9, 2016, 11:00 AM), <https://www.nbcnews.com/politics/2016-election/trump-tells-rally-syria-refugees-probably-isis-muslim-protester-removed-n493316>.

⁵ Jenna Johnson & Abigail Hauslohner, *‘I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.87c3e4bdeab9.

⁶ Roque Planas, *Donald Trump Blames Crime on Blacks, Hispanics*, HUFF POST (June 5, 2013, 8:04 PM), https://www.huffpost.com/entry/donald-trump-blames-crime_n_3392535 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2013, 4:05 AM), <https://twitter.com/realdonaldtrump/status/342190428675796992?lang=en>).

⁷ Chris S. Crandall & Mark H. White, II, *Trump and the Social Psychology of Prejudice*, UNDARK (Nov. 17, 2016), <https://undark.org/article/trump-social-psychology-prejudice-unleashed/>.

⁸ See, e.g., CTR. FOR THE STUDY OF HATE & EXTREMISM, CAL. STATE UNIV., SAN BERNARDINO, FINAL U.S. STATUS REPORT: HATE CRIME ANALYSIS & FORECAST FOR 2016/2017 (2017), [https://csbs.csusb.edu/sites/csusb_csusb/files/Final%](https://csbs.csusb.edu/sites/csusb_csusb/files/Final%20Report%202016-2017.pdf)

rhetoric against those who allegedly act differently may have helped rather than hurt him in the polls in 2016.⁹ Something about mocking others based on behavioral stereotypes appealed to many voters.¹⁰

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.”¹¹ 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.”¹² 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,”¹³ while California Senator John Briggs argued for firing all gay teachers because “most of them are seducing young boys in toilets.”¹⁴ I need not further bela-

20Hate%20Crime%2017%20Status%20Report%20pdf.pdf.

⁹ See Sean McElwee & Jason McDaniel, *Economic Anxiety Didn’t Make People Vote Trump, Racism Did*, NATION (May 8, 2017), <https://www.thenation.com/article/economic-anxiety-didnt-make-people-vote-trump-racism-did/> (discussing the authors’s analysis of the “American National Election Studies pre- and post-election survey” and concluding, “Trump accelerated a realignment in the electorate around racism, across several different measures of racial animus—and that it helped him win”).

¹⁰ *Cf. id.* (“Both racial resentment and black influence animosity are significant predictors of Trump support among white respondents . . .”).

¹¹ Ben Davis, *The Jim Crow Negro: Editor Ben Davis’ Observations*, RICHMOND PLANET, Dec. 13, 1919, at 3, <https://chroniclingamerica.loc.gov/lccn/sn84025841/1919-12-13/ed-1/seq-4.pdf>.

¹² Joseph Goebbels, *The War and the Jews*, CALVIN C.: GERMAN PROPAGANDA ARCHIVE, <http://research.calvin.edu/german-propaganda-archive/goeb37.htm> (last visited Mar. 23, 2019) (originally published in JOSEPH GOEBBELS, DER STEILE AUFSTIEG 263–70 (1944)).

¹³ TIM F. LAHAYE, THE UNHAPPY GAYS: WHAT EVERYONE SHOULD KNOW ABOUT HOMOSEXUALITY 46–47, 51, 153 (1978).

¹⁴ *History of the Anti-Gay Movement Since 1977*, SOUTHERN POVERTY L. CTR.: INTELLIGENCE REP. (Apr. 28, 2005), <https://www.splcenter.org/fighting->

bor this disturbing point: “othering”—or rendering subhuman a reviled out-group—often involves characterizing that group’s *behavior* as abhorrently different.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.¹⁶ Disability advocates have begun to use the term neurodiversity to capture these biologically based human variations.¹⁷ I have previously written on discrimination based on neurologically based differences in how people behave socially,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.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.²⁰ Just as perceptions that someone acts differently can produce discrimination in the disability law

hate/intelligence-report/2005/history-anti-gay-movement-1977; *see also* Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, SOUTHERN POVERTY L. CTR.: INTELLIGENCE REP. (Nov. 4, 2010), <https://www.splcenter.org/fighting-hate/intelligence-report/2010/18-anti-gay-groups-and-their-propaganda>; *The Religious Right and Anti-Gay Speech: Messengers of Love or Purveyors of Hate?*, WIRED STRATEGIES: MATTHEW SHEPARD ONLINE RESOURCES, <http://www.wiredstrategies.com/sheldon.html> (providing a long list of quotes from gay bashers attributing abhorrent conduct to gay people).

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).

¹⁸ *See* Susan D. Carle, *Analyzing Social Impairments Under Title I of the Americans with Disabilities Act*, 50 U.C. DAVIS L. REV. 1109 (2017) [hereinafter Carle, *Social Impairments*].

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.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 *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 acting differently.²²

Antidiscrimination law currently treats acts of discrimination against persons with social disabilities,²³ members of social out-groups,²⁴ and dissenters²⁵ 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.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.²⁷ My prior articles focused primarily on legal doctrine, as well as its development as a matter of civil rights history.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

²¹ See *infra* Section II.A.1.

²² See *infra* Section II.A.4.

²³ See Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2012).

²⁴ See 42 U.S.C. § 2000e-2(a).

²⁵ See *id.* § 2000e-3(a).

²⁶ See *infra* Section II.A.1.

²⁷ See Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL'Y REV. 186 (2016) [hereinafter Carle, *Angry Employees*]; Carle, *Social Impairments*, *supra* note 18.

²⁸ See, e.g., Carle, *Angry Employees*, *supra* note 27; Carle, *Social Impairments*, *supra* note 18; Susan D. Carle, *Conceptions of Agency in Social Movement Scholarship*, 39 LAW & SOC. INQUIRY 522 (2014) [hereinafter Carle, *Agency*].

and why the brain tends unconsciously to discriminate against others perceived to have behavioral differences.²⁹

Legal scholars have long mined the findings of psychology to assist them in constructing legal doctrine.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.³¹ It is important to point out at the outset that implicit bias does *not* completely explain discrimination.³² It does not, for example, capture the many complex historical and structural forces that present “built-in headwinds” for traditionally excluded outsiders.³³ But the science on implicit bias can provide *part* of the explanation for the complex phenomenon of persistent discrimination in U.S. society.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.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.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.³⁷

²⁹ See John T. Cacioppo & Jean Decety, *An Introduction to Social Neuroscience*, in THE OXFORD HANDBOOK OF SOCIAL NEUROSCIENCE 3, 7 (Jean Decety & John T. Cacioppo eds., 2015) [hereinafter SOCIAL NEUROSCIENCE HANDBOOK].

³⁰ See generally ANNE C. DAILEY, LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE 38–73 (2017) (discussing the history of legal scholars’ use of psychology).

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).

³² See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 950 (2006).

³³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (discussing discrimination based on “built-in headwinds”).

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).

³⁵ See *infra* Sections I.A.2, I.C.

³⁶ See *infra* Section I.A.2.

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.³⁸ In U.S. law today,³⁹ statutory prohibitions on discrimination in employment—the area of antidiscrimination law on which I will focus here⁴⁰—are limited to a handful of types of status distinctions. In federal antidiscrimination law,⁴¹ these protected statuses are race and color, sex, national origin, religion,⁴² age,⁴³ and disability.⁴⁴ 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.⁴⁵ 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).

⁴² Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012).

⁴³ Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2012).

⁴⁴ Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2012). Discrimination based on genetic information is also prohibited under the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. §§ 2000ff–2000ff-11 (2012).

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.⁴⁶ However, as many antidiscrimination theorists point out, much of this stark “first-generation” discrimination has gone underground.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.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.⁴⁹ These findings lend support to longstanding reform proposals that would turn courts and other policy influencers’ attention toward the performance of identity, rather

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 THELTON E. HENDERSON CTR. FOR SOC. JUSTICE, U.C. BERKELEY SCH. OF LAW, EQUAL OPPORTUNITY: THE EVIDENCE 7 (2012), <https://www.law.berkeley.edu/files/thcsj/EOTTheEvidence.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).

⁴⁷ See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–68 (2001) (defining first-generation discrimination as “deliberate exclusion or subordination based on race or gender[,]” which “violated clear and uncontroversial norms of fairness and formal equality” and analyzing methods of addressing “second generation” discrimination, which is more difficult to detect and address than first generation discrimination).

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

⁵⁰ See, e.g., DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RE-THINKING RACE IN “POST-RACIAL” AMERICA* 1–4 (2013) (arguing that discrimination occurs in actors’ responses to how individuals “perform” protected identities).

⁵¹ See *infra* Section II.B.

⁵² *Consilience*, OXFORD ENGLISH DICTIONARY (3d ed. 2015).

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.⁵⁷ 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.⁵⁸

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

⁵⁷ See Greenwald & Krieger, *supra* note 32 (introducing the science concerning implicit bias to a legal audience); see also Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 OR. L. REV. 359 (2016) (proposing to expand antidiscrimination rights based on studies of implicit bias); Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 318–29 (2015) (researching literature on evidence of bias in the housing industry); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010) (examining how law and legal institutions should respond to new scientific discoveries on social cognition); Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV. 443, 449 (2010) (citing social neuroscience studies to explain unconscious bias in employment discrimination).

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.⁵⁹ However, this point does not prove its opposite—*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 joiner 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.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.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,”⁶² establishing verifiable

⁵⁹ See Aleksandra Loewenau & Paul J. Windling, *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”).

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

⁶¹ See JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 124–28, 189, 212 (2013) (explaining the theoretical connections between utilitarianism and science and arguing for the benefits of adopting a utilitarian moral framework).

⁶² See Eric Bradner, *Conway: Trump White House Offered ‘Alternative Facts’ on Crowd Size*, CNN (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html> (reporting on Trump advisor Kellyanne Conway’s use of the term “alternative facts”); see also Piers Brendon, *Death of Truth: When Propaganda and ‘Alternative Facts’ First*

and replicable findings matters far more than it did in the recent past. Whereas two decades ago legal scholars enjoyed exploring post-modern theories on the relativity of truth, today the same scholars find themselves extolling the ideas of the Enlightenment.⁶³ These ideas include the basic tenets of scientific thinking, which involve generating valid empirical observations, testable hypotheses, and replicable results.⁶⁴ Empirically tested, well-documented, peer-reviewed, published, and replicated findings provide an initial groundwork for arguments about policies, principles, and values.⁶⁵ 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.⁶⁶ But the scientific method's emphases on verification through statistical analysis and replication of findings provides a disciplining check.⁶⁷ I therefore rely heavily on leading experts' syntheses of research findings considered highly respected work in the field.⁶⁸ From the cau-

Gripped the World, GUARDIAN (Mar. 11, 2017, 6:00 AM), <https://www.theguardian.com/media/2017/mar/11/death-truth-propaganda-alternative-facts-gripped-world> (taking an historical approach to the alternative facts phenomenon by analyzing various government regimes and their use of propaganda).

⁶³ Anne Marie Lofaso, *Workers' Rights as Natural Human Rights*, 71 U. MIAMI L. REV. 565, 608, 610–11 (2017) (noting the connection between Enlightenment and human rights values).

⁶⁴ *See id.* at 612.

⁶⁵ *See* Elaine McArdle, *The New Empiricists*, HARV. L. TODAY (May 4, 2015), <https://today.law.harvard.edu/feature/the-new-empiricists/>.

⁶⁶ *See* Torsten Wilholt, *Bias and Values in Scientific Research*, 40 STUD. HIST. & PHIL. SCI 92, 92–94 (2009).

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.⁶⁹ 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.⁷⁰

paths forward in the social sciences). This development is leading to ongoing revision of the canon of well-accepted research findings. See Pashler & Wagenmakers, *supra*, at 528. This points to the need for skepticism about what we think we know. In this Article, I exercise caution in my citation practices, relying on the “best” recognized work even though I realize I may be overlooking other important work in doing so. As a fellow scholar who dislikes the phenomenon of groupthink in my own field, I apologize in advance but feel the need to be guided by authority in venturing into fields that are new for me.

⁶⁹ See Judith G. Edersheim, *Can Neuroscience Predict Human Behavior?*, HUFF POST: LIFE (Dec. 14, 2012, 10:58 AM), https://www.huffpost.com/entry/traumatic-brain-injury_n_2296203. The use of neuroscience in particular cases is *not* my topic here. For that inquiry, see the burgeoning literature focusing on the use of neuroscience in criminal law cases. See, e.g., Emily Hughes, *The Empathic Divide in Capital Trials: Possibilities for Social Neuroscientific Research*, 2011 MICH. ST. L. REV. 541, 553–65 (using social neuroscientific studies to understand jurors’ feelings toward capital defendants); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 141 (2010) (studying the effect of implicit bias in criminal trials where the defendant’s race is different from the race of the jurors); Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J. F. 406, 410–15 (2017), <http://www.yalelawjournal.org/forum/systemic-implicit-bias> (discussing implicit bias in the criminal justice system).

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.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.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. 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.⁷³ As an interdisciplinary field,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.⁷⁵ Medical investigators have used this

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).

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

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

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

⁷⁵ Beadle & Tranel, *supra* note 70, at 49, 52.

technique, known as brain lesion studies, for centuries.⁷⁶ Social neuroscientists also use very new technologies, such as electromagnetic brain mapping, to study how the brain responds to social stimuli.⁷⁷ 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.⁷⁸

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.⁷⁹ Instead, social neuroscientists locate all mental functioning in the physical brain and study it as such.⁸⁰ They

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 Matusall et al., *supra* note 73, at 17–20.

⁷⁸ 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.

⁷⁹ 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.⁸¹ Instead, social neuroscientists trace their conception of the unconscious to the pioneering experimental work of late nineteenth-century psychologists such as William James.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 increasingly convinced of the powerful role of the unconscious in even the most basic aspects of perception.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.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.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.⁸⁶ Their work became popular in legal scholarship when Kahneman won the Nobel Prize for economics and published a best-selling book entitled *Thinking, Fast and Slow*.⁸⁷

⁸¹ See LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* 16–17, 33, 104 (2012); Keenan et al., *supra* note 79, at 315.

⁸² MLODINOW, *supra* note 81, at 31–33.

⁸³ For a recent accessible introduction into this research, see generally *id.*

⁸⁴ *Id.* at 35.

⁸⁵ *Id.*

⁸⁶ Deborah Smith, *Psychologist Wins Nobel Prize*, *MONITOR ON PSYCHOL.* Dec. 2002, at 22, 22.

⁸⁷ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

after Tversky's death in 1996.⁸⁸

Kahneman and Tversky discuss two distinct mental processes that operate in human thought.⁸⁹ One, called "fast thinking," is rapid, intuitive, and automatic, occurring "with little or no effort" or voluntary control.⁹⁰ Kahneman adopted the label "System One" for this fast, intuitive system.⁹¹ The other, called "slow thinking," involves the attentive, deliberative, effortful, rational thought we typically associate with thinking.⁹² For this second, more ponderous and deliberative system, Kahneman adopted the label "System Two."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.⁹⁴ System One, as Kahneman explains, often performs brilliantly, allowing System Two to persist in its "indolent" ways.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.⁹⁶ Yet, as they further demonstrate, the thought processes of System One are also error-prone and rife with many kinds of systematic biases.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.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.⁹⁹ For example, young adults asked to create sentences from the words "Florida, forgetful, bald, grey or wrinkle," later walk down a hallway more

⁸⁸ Smith, *supra* note 86.

⁸⁹ KAHNEMAN, *supra* note 87, at 20.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 20–21.

⁹³ *Id.*

⁹⁴ *Id.* at 21–28.

⁹⁵ *Id.* at 417.

⁹⁶ *See id.* at 21–28.

⁹⁷ *Id.* at 25–28.

⁹⁸ *See id.* at 53–54.

⁹⁹ *Id.*

slowly than members of a control group do.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.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."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.¹⁰³ This, Kahneman argues, shows how human beings, through the operation of heuristics, privilege "representativeness" over logic.¹⁰⁴ Subjects focus intently on

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.

¹⁰¹ *Id.* at 156.

¹⁰² *Id.* at 156–57.

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.

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.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.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.¹⁰⁷ A host of studies from a wide variety of disciplines prove this fact.¹⁰⁸

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

¹⁰⁵ See *id.* at 157–58.

¹⁰⁶ See Smith, *supra* note 86.

¹⁰⁷ See Ezequiel Morsella & John A. Bargh, *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. *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, *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 *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, 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., *Attitudes*, in SOCIAL NEUROSCIENCE HANDBOOK, *supra* note 29, at 212, 212.

¹⁰⁸ See, e.g., MLODINOW, *supra* note 81, at 40; WILSON, CONSILIENCE, *supra* note 79, at 112.

fore experimental subjects are aware that they are looking at a human face.¹⁰⁹ As another example, the processes by which human beings quickly and intuitively grasp what other human beings are thinking, which researchers often refer to as “theory of mind,” appears to be substantially non-volitional and unconscious as well.¹¹⁰

Similarly, the brain rapidly and automatically decides, prior to deliberative judgment, who is similar to oneself and who is not.¹¹¹ An enormous amount of research has documented that this unconscious social brain makes automatic and non-volitional positive associations with persons perceived to be similar to the subject, based on even trivial similarities.¹¹² To take another example, people regularly prefer other individuals who share their same birthday or first name.¹¹³ Researchers have found that people in most professions like members of their own profession significantly more than members of other professions.¹¹⁴

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.¹¹⁵ Another finding comes from the “ultimatum game” in experimental behavioral economics.¹¹⁶ This classic experiment involves giving one player, called the proposer, 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 Todorov, *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 Fairness Norm Violations in the Ultimatum Game*, 5 *SOC. PSYCHOL. & PERSONALITY SCI.* 662, 663 (2014).

vide that sum between herself and another player, called the responder.¹¹⁷ The responder then chooses whether to accept or reject the proposal.¹¹⁸ If the responder accepts, the players split the money according to the proposer's offer.¹¹⁹ If the responder rejects the proposal, neither player receives any money.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.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.¹²²

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

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

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)).

¹²² *See id.*

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.*

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

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.¹²⁴ 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.¹²⁵ In effect, the researchers explained, the two groups of students had viewed “a totally different game.”¹²⁶

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.¹²⁷ The experiment found that subjects holding anti-abortion views saw protestors commit

do others, such as choice of paper towels).

Years before, French sociologist Pierre Bourdieu undertook an investigation into how tastes in music, art, furniture, and other material objects signal one’s identity as members of various socio-economic classes. See PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 6–10, 70–72 (Richard Nice trans., Routledge 2010) (1984).

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).

¹²⁴ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129–30 (1954).

¹²⁵ *Id.* at 130, 132.

¹²⁶ Molenberghs, *supra* note 121, at 1532 (citing Hastorf & Cantril, *supra* note 124, at 132).

¹²⁷ Dan M. Kahan et al., “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 864 (2012).

fewer illegal acts than did subjects who favored access to abortion.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.¹²⁹ The experimenters had constructed the video clips so that the two groups were exactly equivalent on this measure.¹³⁰ Each team, however, judged members of their own team as faster.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.¹³²

Neuroscientists have sought to study the brain processes involved favoring in-group members through brain imaging studies.¹³³ They found that people’s brains are more active when they perceive members of their in-group being subjected to painful stimuli.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*.¹³⁵ In these studies of empathic response, “ethnic identification was the largest predictor for in-group favoritism.”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.¹³⁷ Along with other psychologists, neuroscientists theorize that people assign more positive feelings and higher social status to in-group members than to out-

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).

¹²⁹ Molenberghs, *supra* note 121, at 1532.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1533.

¹³³ See, e.g., *id.* at 1532–33.

¹³⁴ *Id.* at 1533.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1531–32; Samantha Morrison et al., *The Neuroscience of Group Membership*, 50 NEUROPSYCHOLOGIA 2114, 2115 (2012).

group members.¹³⁸ Individuals produce positive self-esteem by assigning high social status to themselves and their identity group.¹³⁹ In other words, a process of distinguishing “us” from “them” appears to create both self-identity and self-esteem.¹⁴⁰ Researchers term this concept Social Identity Theory.¹⁴¹

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.¹⁴² 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.¹⁴³ 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.¹⁴⁴

These same unconscious and non-volitional processes also have

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.¹⁴⁵ In modern societies, fighting among social groups is often counterproductive.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.¹⁴⁷

At the extreme, the social construction of out-groups leads to dehumanization¹⁴⁸—in other words, the construction of human beings as less than human.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,¹⁵⁰ the genocide in Darfur,¹⁵¹ the Nazi Holocaust,¹⁵² and Cambodia's killing fields,¹⁵³ to name just a few. Social neuroscientists have begun to study the neural processes involved in these atrocities.¹⁵⁴ Researchers have found that when

¹⁴⁵ In GREENE, *supra* note 61, at 19–27, Joshua Greene makes this point powerfully.

¹⁴⁶ *See id.*

¹⁴⁷ *See supra* notes 41–44.

¹⁴⁸ Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Response to Extreme Out-Groups*, 17 *PSYCHOL. SCI.* 847, 848 (2006).

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).

¹⁵⁰ SAPOLSKY, *supra* note 109, at 571–72 (discussing the Hutu genocide of Tutsis in Rwanda from the perspective of a social neuroscientist).

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).

¹⁵² *See* SAUL FRIEDLANDER, *THE YEARS OF EXTERMINATION: NAZI GERMANY AND THE JEWS, 1939–1945* (2007) (describing the Nazi Holocaust).

¹⁵³ *See* CRAIG ETCHESON, *AFTER THE KILLING FIELDS: LESSONS FROM THE CAMBODIAN GENOCIDE* (2005) (detailing the atrocities committed by the Khmer Rouge).

¹⁵⁴ *See, e.g.*, Harris & Fiske, *supra* note 148, at 848.

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.¹⁵⁵ Instead, when experimenters showed images of members of these groups to experimental subjects, the images activated regions of the brain associated with disgust.¹⁵⁶ 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,¹⁵⁷ 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.¹⁵⁸ 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

¹⁵⁵ *Id.* at 847–48.

¹⁵⁶ *Id.* at 850.

¹⁵⁷ ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

¹⁵⁸ See, e.g., Michael Selmi, The Paradox of Implicit Bias and a Plea for a New Narrative 4–5, 18 (Aug. 24, 2017) (unpublished manuscript), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2558&context=faculty_publications.

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.¹⁵⁹ Antidiscrimination theorists have recognized that these studies have much to offer legal theorists' understanding of discrimination.¹⁶⁰ But the uncontested 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.¹⁶¹ Researchers have used a method that incorporates the “Stroop task.”¹⁶² The Stroop task most often consists of requiring participants to name the ink color of a written color word.¹⁶³ 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.”¹⁶⁴ 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).

¹⁶⁰ See, e.g., Tanya Kateri Hernández, *One Path for “Post-Racial” Employment Discrimination Cases—The Implicit Association Test Research as Social Framework Evidence*, 32 L. & INEQ. 309, 310–12 (2014).

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

¹⁶² Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1141 n.154 (2004); see also *Overview*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html> (last visited Mar. 30, 2019).

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.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.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.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.¹⁶⁸ In the United States, for example, subjects show slower response times in connecting positive associations with persons belonging to racial minorities.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.¹⁷⁰ Among the dominant racial group—*i.e.*, in the United States, among whites—a wide range of implicit bias scores exists.¹⁷¹ Average scores vary by region of the country as well as other variables.¹⁷²

Reaction time testing is most often aimed at measuring bias

¹⁶⁵ See *id.*

¹⁶⁶ See, e.g., *id.* (describing multiple studies using the Stroop task).

¹⁶⁷ See *id.*

¹⁶⁸ See, e.g., Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. PERSONALITY & SOC. PSYCHOL. 475, 477–79 (1990).

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).

¹⁷¹ See Chris Mooney, *Across America, Whites Are Biased and They Don’t Even Know It*, WASH. POST (Dec. 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/?utm_term=.dccc4d399ccc.

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).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.¹⁷⁴ IAT thus helps explain the statistics showing that employment discrimination persists despite a half-century's prohibition.¹⁷⁵ However, IAT solely proves the existence of unconscious bias; it does not in itself explain why such bias occurs.¹⁷⁶

Researchers have sought to explain the processes in the brain that account for IAT results.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.¹⁷⁸ This is because the IAT measures the efforts of the brain to suppress prejudiced thoughts that the subject *does not want to have*.¹⁷⁹ The delay in response time reflects the brain's effortful work to suppress stereotypes and prejudicial attitudes—what

¹⁷³ See, e.g., Hernández, *supra* note 160, at 322.

¹⁷⁴ See, e.g., Russell G. Pearce et al., *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).

¹⁷⁵ See, e.g., Leora F. Eisenstadt & Jeffrey R. Boles, *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.

¹⁷⁶ Hernández, *supra* note 160, at 321–22.

¹⁷⁷ See Dylan D. Wagner et al., *Staying in Control: The Neural Basis of Self-Regulation and Its Failure*, in SOCIAL NEUROSCIENCE HANDBOOK, *supra* note 29, at 360, 369.

¹⁷⁸ See *id.* at 369; Cunningham et al., *supra* note 107, at 220.

¹⁷⁹ See Wagner et al., *supra* note 177, at 369.

neuroscientists call “cognitive control.”¹⁸⁰ The IAT measures how much cognitive control subjects are exerting.¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ What human

¹⁸⁰ *Id.* at 368–69.

¹⁸¹ *Id.* at 369.

¹⁸² *Id.*; see also Todd F. Heatherton & Dylan D. Wagner, *Cognitive Neuroscience of Self-Regulation Failure*, 15 TRENDS COGNITIVE SCI. 132, 132–37 (2011) (explaining why cognitive control fails).

¹⁸³ See Rob Waugh, *Racism Is ‘Hardwired’ into the Human Brain - and People Can Be Prejudiced Without Knowing It*, DAILY MAIL (June 26, 2012, 6:33 AM), <http://www.dailymail.co.uk/sciencetech/article-2164844/Racism-hardwired-human-brain--people-racists-knowing-it.html> (asserting that “[r]acism is hardwired into the brain”). *But see Are We Hard-Wired to Be Racist?*, NPR (Dec. 4, 2008, 9:00 AM), <https://www.npr.org/templates/story/story.php?storyId=97802442> (discussing that stereotypes and associations can be changed).

¹⁸⁴ Gianfranco Biondi & Olga Rickards, *The Scientific Fallacy of the Human Biological Concept of Race*, 42 MANKIND Q. 355, 374–78 (2002) (arguing that race is not a byproduct of human evolution).

brains are sensitive to and prone to hostility about is not skin color or facial features per se, but *any* relevant socially constructed difference.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.¹⁸⁶ This relevant period, natural scientists point out, stretches back more than 60,000 years.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.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.¹⁸⁹ What differences are relevant depends on socially constructed meanings that vary widely across time and place.¹⁹⁰ On this theory, System One processes in the brain notice and react to subtle social differences that, in very old evolutionary

¹⁸⁵ Cf. HAIDT, *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).

¹⁸⁶ See GREENE, *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, *supra* note 113, at 239 (“There’s nothing special about race.”); SAPOLSKY, *supra* note 109, at 407 (pointing out that “there is no evolutionary legacy of humans encountering people of markedly different skin color”).

¹⁸⁷ See MARK PAGEL, 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*.

¹⁸⁸ *Id.* at 49–54 (discussing the great density of language differences among pre-modern societies); GREENE, *supra* note 61, at 52.

¹⁸⁹ See, e.g., PAGEL, *supra* note 187, at 57.

¹⁹⁰ See Biondi & Rickards, *supra* note 184, at 374–78.

terms, allowed group members to make quick determinations imperative to their survival.¹⁹¹ 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.¹⁹²

Experimental psychology research supports evolutionary biologists' view. For example, experiments have shown that subjects stop noticing race (but not gender)¹⁹³ when they are told that a characteristic other than race is the important marker differentiating members of their in-group from an out-group.¹⁹⁴ Thus, subjects shown a series of photos and asked to remember faces noticed race when not given another classification criteria.¹⁹⁵ 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.¹⁹⁶

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

¹⁹¹ 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).

¹⁹² *See id.*

¹⁹³ 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, *CONSILIENCE*, *supra* note 79, at 170 ("The optimum sexual instinct of men . . . is to be assertive and ruttish, 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.

¹⁹⁴ 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).

¹⁹⁵ Kurzban et al., *supra* note 193, at 15,388–89.

¹⁹⁶ *Id.* at 15,389.

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.¹⁹⁷ We experience it within ourselves on a constant basis.¹⁹⁸ Yet social neuroscience discovered how this tendency to imitate others occurs at a neural level only fairly recently, and then by accident.¹⁹⁹ According to the oft-told story,²⁰⁰ this discovery occurred as Italian neurologists were conducting brain scans on macaque monkeys.²⁰¹ A graduate student entered the room eating an ice cream cone.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.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.²⁰⁴ These observations led the scientists to propose the existence of what have come to be popularly termed “mirror neurons,”

¹⁹⁷ See BERGER, *supra* note 123, at 27–28.

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 33–35.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 33–34.

²⁰² *Id.* at 34.

²⁰³ *Id.*

²⁰⁴ *Id.*

which encourage the brain to perform behaviors it sees others doing.²⁰⁵

After first discovering mirror neurons in monkey brains, neuroscientists found something like them in human brains as well.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.”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.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.’”²⁰⁹ Imitation is an automatic process of the social brain that signals likeness, *i.e.*, the fact that I act like you shows “that we have things in common or are part of the same tribe,”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.

i. Classic Studies

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

²⁰⁵ *Id.* at 35.

²⁰⁶ *Id.*

²⁰⁷ Morsella & Bargh, *supra* note 107, at 341.

²⁰⁸ BERGER, *supra* note 123, at 40–41.

²⁰⁹ Morsella & Bargh, *supra* note 107, at 341.

²¹⁰ BERGER, *supra* note 123, at 41.

²¹¹ Aysel Kayaoğlu et al., *The Unknown Muzafer Sherif*, BRITISH PSYCHOL. SOC., <https://thepsychologist.bps.org.uk/volume-27/edition-11/unknown-muzafer-sherif> (last visited Feb. 24, 2019).

in 1935.²¹² 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.²¹³ The light remained stationary, but continuing to stare at the light made it appear to move, a phenomenon known as the auto-kinetic effect.²¹⁴ The experimenter instructed the participants to estimate aloud how far the light was moving.²¹⁵ Sherif showed that with repeated trials the subjects converged on similar estimates about the distance covered by the motion of the light.²¹⁶ Between groups, the estimates varied widely, but within groups they became very similar over repetitions.²¹⁷ 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.²¹⁸

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.²¹⁹ This time he put each participant in the darkened room alone to watch the dot of light.²²⁰ 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.²²¹ Sherif thus proposed that individuals retain group perceptions even when they are no longer with the group.²²²

Another important early social psychologist, Solomon Asch, ascribed his interest in social conformity to his personal connections

²¹² *See id.*

²¹³ *See* MUZAFER SHERIF, PUB. NO. 187, A STUDY OF SOCIAL FACTORS IN PERCEPTION 17–18, 28 (R.S. Woodworth ed., 1935).

²¹⁴ *Id.* at 18.

²¹⁵ *Id.* at 23.

²¹⁶ *Id.* at 30.

²¹⁷ *Id.* at 31.

²¹⁸ *See id.* at 25.

²¹⁹ *See id.* at 30.

²²⁰ *Id.* at 27–28.

²²¹ *Id.* at 30.

²²² *Id.*

to the Holocaust as a Polish Jew.²²³ 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.²²⁴ To do this, Asch asked small groups of experimental subjects to match lines of varying lengths.²²⁵ 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.²²⁶ 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.²²⁷

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.²²⁸ Approximately three quarters of the participants conformed incorrectly at least once (meaning that one fourth never conformed).²²⁹ 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.²³⁰

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.²³¹ 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.²³²

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.²³³ 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.²³⁴ 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.²³⁵

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.²³⁶ While investigating group conformity, Milgram discovered that individuals obeyed authority even when they were not in a group.²³⁷ 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.²³⁸

The results of the Milgram experiment have been replicated many times in many settings around the world.²³⁹ In Milgram's experiment, test subjects designated as "teachers" followed the experimenters' instructions to deliver to a person cast as a "learner" what

²³³ See THOMAS BLASS, *THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM* 118–19 (2004).

²³⁴ *Id.* at 42–43, 62, 118–20.

²³⁵ Cari Romm, *Rethinking One of Psychology's Most Infamous Experiments*, ATLANTIC (Jan. 28, 2015), <https://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/>.

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 Nestor 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.²⁴⁰ 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.²⁴¹ Many “teachers” protested and complained or expressed extreme discomfort in obeying the experimenters’ commands to keep going, but followed the instructions nevertheless.²⁴² All teachers administered some level of shocks to the learners, but thirty-five percent (35%) refused to continue at some point in the experiment.²⁴³

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.²⁴⁴ A key variable that lowered rates of compliance was the presence of other subjects who refused to deliver the shocks.²⁴⁵ The presence of two dissenters lowered compliance rates to ten percent (10%).²⁴⁶

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

²⁴⁰ ZIMBARDO, *supra* note 239, at 271.

²⁴¹ See Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 374, 376 (1963) (reporting that twenty-six out of forty subjects continued with the experiment to the highest purported shock on the generator).

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.

²⁴⁵ STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 119 (1974).

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 MUZAFER 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

ii. Contemporary Research

Today no research review board would permit experiments on human subjects as intense as the Milgram experiment.²⁴⁹ His work raises too many ethical issues, especially in causing trauma to unwitting participants asked to engage in morally problematic conduct.²⁵⁰ Experimenters 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.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.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.²⁵³

The following example is representative of the results of many

toward the "prisoners." *Id.*; see also ZIMBARDO, *supra* note 239, at 183–84 (describing the guards verbal and sometimes even physical abuse of those in the prisoner role). Zimbardo has published little of his data and it has not been subject to peer review. See SAPOLSKY, *supra* note 109, at 466–67 (noting problems with the scientific standards under which both the Stanford and Milgram studies were conducted).

²⁴⁹ See THOMAS BLASS, OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON MILGRAM PARADIGM 211 (2000).

²⁵⁰ See *id.*

²⁵¹ See BERGER, *supra* note 123, at 58.

²⁵² *Id.* at 58–59 (making this point about Asch's findings in his line-length experiment); JAMES SUROWIECKI, THE WISDOM OF CROWDS 38–39 (2004).

²⁵³ SUROWIECKI, *supra* note 252, at 29–31, 36–39 (noting experiments finding that diversity of thinking in groups greatly improves the accuracy of collective outcomes, but only if participants are each required to think independently rather than subject to group influences); see Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> (summarizing the leading literature on the benefits of diversity).

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

²⁵⁴ See SUROWIECKI, *supra* note 252, at 255; Jack L. Treynor, *Market Efficiency and the Bean Jar Experiment*, 43 FIN. ANALYSTS J., May–June 1987, at 50, 50.

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.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.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.²⁶⁴

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 (*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.

²⁶³ See Richard S. Pond, Jr. et al., *Social Pain and the Brain: How Insights from Neuroimaging Advance the Study of Social Rejection and Variants of Normal*, in *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, *Ostracism*, 58 *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 . . .”).

²⁶⁴ See Pond, Jr. et al., *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.²⁶⁵ 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.²⁶⁶ In reality, the experimental subjects are playing a game with a computer program.²⁶⁷ At first, the ball comes to the experimental subject along with all the other apparent “participants.”²⁶⁸ After a while, however, the ball does not come to the experimental subject anymore.²⁶⁹ She suddenly finds herself excluded from the game, while neuroimaging records her brain’s response.²⁷⁰ 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.²⁷¹

Social neuroscientists have established that when human beings experience social pain, it registers as an intense experience.²⁷² The long-term effects of social pain are also striking.²⁷³ 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.²⁷⁴ 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.²⁷⁵

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

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.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.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.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.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.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.²⁸¹ They found that even several generations later, epigenetic effects continued.²⁸² The researchers documented the transfer of a host of adverse health effects caused

²⁷⁶ *Id.* at 442.

²⁷⁷ *Id.* at 442–44.

²⁷⁸ See, e.g., Mark R. Leary et al., *Teasing, Rejection, and Violence: Case Studies of the School Shootings*, 29 *AGGRESSIVE BEHAV.* 202, 206–07 (2003).

²⁷⁹ For a survey and summary of this literature, see Yin Paradies et al., *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, *PLOS ONE*, Sept. 23, 2015, <http://europepmc.org/backend/ptpmrender.fcgi?accid=PMC4580597&blobtype=pdf>.

²⁸⁰ SIDDHARTHA MUKHERJEE, *THE GENE: AN INTIMATE HISTORY* 392–93 (2016).

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).

²⁸² MUKHERJEE, *supra* note 280, at 394.

by famine to the descendants of the famine survivors.²⁸³ 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.²⁸⁴

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.²⁸⁵ 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.²⁸⁶ As one contemporary expert explains, “[D]eviance . . . [is] any behavior that violates societal norms

²⁸³ *Id.*

²⁸⁴ See, e.g., Christopher W. Kuzawa & Elizabeth Sweet, *Epigenetics and the Embodiment of Race: Developmental Origins of US Racial Disparities in Cardiovascular Health*, 21 AM. J. HUM. BIOLOGY 2, 3–4 (2009) (investigating the intergenerational effects of racism on cardiovascular health).

²⁸⁵ See Adam Gopnik, *The Outside Game*, NEW YORKER (Jan. 5, 2015), <https://www.newyorker.com/magazine/2015/01/12/outside-game>.

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.

²⁹⁰ See Nicole A. Shoenberger, *Bridging Normative and Reactivist Perspective: An Introduction to Positive Deviance*, in *DEVIANCE HANDBOOK*, *supra* note 286, at 24, 24.

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.”²⁹⁵

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,²⁹⁶ iconoclasts,²⁹⁷ whistleblowers, and “moral entrepreneurs.”²⁹⁸ Research shows that contes-

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 whistleblowing 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*

tation about how to judge particular forms of deviance often constitutes a driver for social and cultural change.²⁹⁹ 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.³⁰⁰ They refer to this phenomenon as the “black sheep” effect.³⁰¹ 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: Judgmental Extremity Towards Ingroup Members in Inter- and Intra-group 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

³⁰² MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

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 *See 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.”).

³⁰⁷ *See, e.g.,* Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 500–

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 anti-discrimination 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,

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

³⁰⁸ See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1292 (2000) [hereinafter Carbado & Gulati, *Identity*]; see also Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103, 127–35 (2000) [hereinafter Carbado & Gulati, *Conversations*] (discussing examples of performing identity in law firms and law faculties); Carle, *Agency*, *supra* note 28 (pointing to leading civil rights legal historian Ken Mack’s use of social theorists’ performance theory in his work); see also, e.g., CARBADO & GULATI, *supra* note 50, at 80–95 (discussing “identity performance” in the context of “gender performance” of women in the workplace).

³⁰⁹ See GOFFMAN, *supra* note 157, at 5.

³¹⁰ See *id.*

as Carbado and Gulati explore.³¹¹

Carbado and Gulati examine *Price Waterhouse v. Hopkins*,³¹² an iconic U.S. Supreme Court case on gender discrimination.³¹³ There, the Price Waterhouse accounting firm was considering for partnership Ann Hopkins, a talented employee.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.³¹⁵ Nevertheless, the firm's partnership voted to postpone her partnership consideration.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."³¹⁷

Hopkins filed suit arguing that these admissions about the decision-makers' motives were direct evidence of illegal gender stereotyping.³¹⁸ The U.S. Supreme Court agreed.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.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.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.³²²

³¹¹ Carbado & Gulati, *Identity*, *supra* note 308, at 1262.

³¹² 490 U.S. 228 (1989).

³¹³ CARBADO & GULATI, *supra* note 50, at 84–90.

³¹⁴ *Hopkins*, 490 U.S. at 233–34.

³¹⁵ *Id.* at 234.

³¹⁶ *Id.* at 235.

³¹⁷ *Id.* at 235; CARBADO & GULATI, *supra* note 50, at 84.

³¹⁸ *Hopkins*, 490 U.S. at 232.

³¹⁹ *Id.* at 256–58.

³²⁰ *Id.* at 236.

³²¹ *Id.* at 251; CARBADO & GULATI, *supra* note 50, at 81.

³²² *Hopkins*, 490 U.S. at 235.

Carbado and Gulati, as well as others, point out that the insights the Court stumbled upon in *Price Waterhouse* have many more applications.³²³ Most obviously, discrimination can occur whenever employers hold stereotypes about how persons belonging to traditional outsider categories should behave.³²⁴

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.³²⁵ One scenario involves what Carbado and Gulati refer to as “lumpy” good citizen assignments in both law schools and law firms.³²⁶ 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.³²⁷

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.³²⁸ 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.”³²⁹ 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.³³⁰

The social science concept of deviance maps onto Carbado and Gulati’s ideas of performativity. As Carbado and Gulati point out,

³²³ CARBADO & GULATI, *supra* note 50, at 84–94. For other work in this vein, see, for example, Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL’Y 369 (2007).

³²⁴ Roberts & Roberts, *supra* note 323, at 370.

³²⁵ Carbado & Gulati, *Conversations*, *supra* note 308, at 129–30.

³²⁶ *Id.* at 127.

³²⁷ *Id.*

³²⁸ Carbado & Gulati, *Identity*, *supra* note 308, at 1294.

³²⁹ *Price Waterhouse*, 490 U.S. at 235.

³³⁰ *Id.* at 234; CARBADO & GULATI, *supra* note 50, at 90–91.

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

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).

³³² Carbado & Gulati, *Identity*, *supra* note 308, at 1294.

³³³ KENNETH W. MACK, *REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER* (2012).

³³⁴ See Carle, *Agency*, *supra* note 28 (analyzing Mack's work).

³³⁵ See MACK, *supra* note 333, at 86–98.

³³⁶ See *id.*

³³⁷ See *supra* Section I.C.3.

³³⁸ Carbado & Gulati, *Identity*, *supra* note 308, at 1291–93.

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 BERNIS, *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.³⁴⁰ 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.³⁴¹ 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.³⁴² 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.³⁴³

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 requirement, courts have sometimes applied the material harm test too restrictively. For example, courts have dismissed plaintiffs' claims of discrimination based on exclusion from informal work groups, trainings, social opportunities, and the like, and some courts have found no material harm when employers assign workers less attractive work within a job classification.³⁴⁴ These holdings tend to be highly fact-specific³⁴⁵ 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 constitutes actionable discrimination appear erroneous, as if they are aimed more at clearing cases off dockets than carefully evaluating whether discriminatory dynamics are in play.³⁴⁶ Where excluding persons from informal opportunities and/or assigning them less desirable work gets in the way of their job success, material harm has occurred.³⁴⁷

Better understanding of the relationship between in-group bias,³⁴⁸ social exclusion,³⁴⁹ 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 article to discuss).³⁵⁰ 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 sometimes take today.

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

³⁴⁴ See, e.g., *Higgins v. Gonzales*, 481 F.3d 578, 585–87 (8th Cir. 2007) (holding 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).

³⁵³ Terry Smith, *Everyday Indignities: Race Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 549–51 (2003).

³⁵⁴ See *id.* at 550.

³⁵⁵ Carle, *Angry Employees*, *supra* note 27, at 203.

³⁵⁶ See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105–08, 120–21 (2002) (holding that admittedly disturbing facts were time-barred for an antidiscrimination claim because the clock for the statute of limitations begins from the time of each "discrete act," not the totality of the discrimination). For a full explanation of the facts, see *Morgan v. Nat'l R.R. Passenger Corp.*, 232 F.3d 1008, 1011–13 (9th Cir. 2000).

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 relegating to rougher, non-air-conditioned accommodations all employees in job classifications consisting entirely of persons of color.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.”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.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

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).

³⁵⁸ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); see Sandra F. Sperino & Suja A. Thomas, Opinion, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html> (pointing out that, under the high bar the Supreme Court has set for sexual harassment claims, many situations laypersons would consider sexual harassment are not legally actionable).

³⁵⁹ See Carle, *Angry Employees*, *supra* note 27, at 192–95 & nn.28–30 (summarizing this literature).

do not tend to prove discrimination.³⁶⁰ Courts' frequent rulings that such acts are not evidence of discrimination reinforce the message that expressing bias is acceptable.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.³⁶²

Neuroimaging studies of the brain show individuals experience negative treatment from a group as severely painful,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.³⁶⁴ Most certainly, working in an environment inflicting *physical* abuse would be sufficient to meet the standard for discriminatory harassment.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.

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).

³⁶¹ See Carle, *Angry Employees*, *supra* note 27, at 198.

³⁶² *Id.*

³⁶³ Giovanni Nolfè 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.”).

³⁶⁴ See *supra* Section I.C.2.

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.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.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[.]”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.³⁶⁹ The findings about the black sheep effect, as discussed in Section I.C.3

³⁶⁶ See, e.g., 42 U.S.C. § 12203(a) (2012) (prohibiting retaliation for reporting discrimination under the Americans with Disabilities Act). For a helpful summary of these many federal statutes, see JON O. SHIMABUKURO ET AL., CONG. RESEARCH SERV., R43045, SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS 192 (2013), <http://fas.org/sgp/crs/misc/R43045.pdf>.

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.

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.”).

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).

³⁷⁴ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* ix–xii (2007).

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.³⁷⁸ Yoshino’s theme, too, is about acting differently; covering, he notes, involves a demand to suppress “the behavioral aspects of identity.”³⁷⁹

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.³⁸⁰ 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.³⁸¹ Interweaving personal narrative and the legal-analytic parts of his book, Yoshino argues for a new civil rights paradigm³⁸² that would essentially recognize a “right to personality.”³⁸³

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.”³⁸⁴ 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.³⁸⁵ Yoshino acknowledges, however, that much of the work needed to bring such a concept to life cannot be done by law.³⁸⁶

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

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.³⁸⁷ 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 liberalism³⁸⁸—even more important. His insights contribute to the arsenal of arguments supporting the promotion of human variation as a positive feature of social life.³⁸⁹ In a politically dangerous time in which a number of global leaders are manipulating the strong emotions induced by “us-versus-them” thinking,³⁹⁰ 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*.³⁹¹ Using engaging examples, Kramer in essence argues for a discrimination-based right to expression of one's personality.³⁹² 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.³⁹³

³⁸⁷ Cameron Brick & Sander van der Linden, *How Identity, Not Issues, Explains the Partisan Divide*, SCI. AM. (June 19, 2018), <https://www.scientificamerican.com/article/how-identity-not-issues-explains-the-partisan-divide/>.

³⁸⁸ See YOSHINO, *supra* note 374, at 25.

³⁸⁹ See, e.g., SUROWIECKI, *supra* note 252, at 29–31, 36–39.

³⁹⁰ See, e.g., Max Fisher, *The Weaknesses in Liberal Democracy That May Be Pulling It Apart*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/world/americas/democracy-brazil-populism.html>.

³⁹¹ ZACHERY KRAMER, *OUTSIDERS: WHY DIFFERENCE IS THE FUTURE OF CIVIL RIGHTS* 4–5 (2019).

³⁹² See *id.*

³⁹³ RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016); Eric Williamson, *Dean Risa Goluboff Wins American Society for Legal History Book Award for 'Vagrant Nation'*, U. VA. SCH. L. (Oct. 28, 2017), <https://www.law.virginia.edu/news/201710/dean-risa-goluboff-wins-american-society-legal-history-book-award-vagrant-nation>.

These people included poor and homeless persons, persons on skid row³⁹⁴—and especially African Americans, even when employed³⁹⁵—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.³⁹⁶ 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.³⁹⁷ 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.”³⁹⁸

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.³⁹⁹ As one key civil rights lawyer explained, vagrancy laws were used to suppress dissent; war protesters, communists, irascible political contrarians and other political dissidents were prosecuted under their authority.⁴⁰⁰ Those laws likewise attacked race dissenters: “[If you are f]or integration[,] [y]ou’re a Vagrant.”⁴⁰¹ Police applied vagrancy laws to dignified African American ministers taking part in civil rights protests.⁴⁰² They applied them to arrest mixed race groups in the South⁴⁰³ and to persons in the wrong racial neighborhoods all over the country.⁴⁰⁴

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.⁴⁰⁵ Vagrancy laws were applied to women having sex outside marriage and women and African American men having sex across race lines.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.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 *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.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.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.⁴¹⁰

⁴⁰⁵ *Id.* at 3, 40, 47, 80–81.

⁴⁰⁶ *Id.* at 306–08.

⁴⁰⁷ *Id.* at 53–55, 170, 221.

⁴⁰⁸ SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 63 (2009).

⁴⁰⁹ *Id.* at 24–39, 63–64; GOLUBOFF, *supra* note 393, at 3.

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. *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. *See id.* at 341–44.

As Goluboff further notes, the general theme of expanding tolerance for those who act differently had emerged in legal scholarship by the 1970s. *See id.* at 399 n.9, 441 n.53 (citing NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 4 (1971) (opposing forced therapy for so-called deviants)); *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.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.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.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 regard⁴¹⁴—remains an important aspirational norm among progressive political forces.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.⁴¹⁶ This paradox bedevils anti-hate speech campaigns.⁴¹⁷ It can be seen in the tendency toward over-dogmatization that can arise from too much political correctness.⁴¹⁸ As

⁴¹¹ See SCHWEIK, *supra* note 408, at 207–08.

⁴¹² See GOLUBOFF, *supra* note 393, at 318.

⁴¹³ See, e.g., *id.* at 316 (illustrating Goluboff's use of the term "the long 1960s").

⁴¹⁴ See generally PETER SINGER, *THE EXPANDING CIRCLE: ETHICS, EVOLUTION, AND MORAL PROGRESS* 3–22 (First Princeton Univ. Press 2011) (1981) (presenting a moral philosopher's take on this concept).

⁴¹⁵ See john a. powell, *Us vs. Them: The Sinister Techniques of 'Othering' – And How to Avoid Them*, *GUARDIAN* (Nov. 8, 2017, 7:37 AM), <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").

⁴¹⁶ Cf. Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 *COLUM. HUM. RTS L. REV.* 1, 12–17 (2001).

⁴¹⁷ See *id.*

⁴¹⁸ E.g., Julia Symons, Essay, *Has Political Correctness Gone Too Far?*, *ECONOMIST* (Sept. 10, 2018), <https://www.economist.com/open-future/2018/09/10/has-political-correctness-gone-too-far> (acknowledging that "some aspects of tolerance culture" go too far while advocating for political correctness generally).

Yoshino (and many other) legal scholars have noted, not all antidiscrimination and fairness goals can be achieved directly through law.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.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.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 shaming⁴²² (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”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

⁴¹⁹ See, e.g., YOSHINO, *supra* note 374, at 192.

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).

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).

⁴²² Levin et al., *supra* note 420, at 475.

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.⁴²⁴ 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.⁴²⁵ 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.⁴²⁶ 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.⁴²⁷ 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.⁴²⁸ 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."⁴²⁹ There must always be debate about how to translate scientific findings into social policy, so

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.

⁴²⁸ Michael Conklin, *Walking on a Wire: The Delicate Balance of Free Speech on College Campuses*, 9 HOUS. L. REV.: OFF REC. 35, 43 (2019) (book review).

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.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

[p]erhaps 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.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.⁴³² This is one of the reasons social psychologists argue for

Symons, *supra* note 418.

⁴³⁰ See, e.g., Paul Cairney & Kathryn Oliver, *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>.

⁴³¹ WILSON, *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.”).

⁴³² See SUROWIECKI, *supra* note 252, at 29–31; *supra* Section I.C.3.

the benefits of diversity writ large.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.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;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.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.⁴³⁷ That feedback loop hurts not only individuals but also the performance of groups in which it occurs.⁴³⁸ Thus, promoting difference as a matter of policy requires institutions to conduct

⁴³³ See BERNIS, *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.”).

⁴³⁴ See Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 793–94. 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. 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.

⁴³⁵ See WILSON, SOCIAL CONQUEST, *supra* note 80, at 80–81.

⁴³⁶ See *supra* Section I.C.2.

⁴³⁷ See *supra* Section I.C.2.

⁴³⁸ See SUROWIECKI, *supra* note 252, at 29–31 (noting that research shows that

self-audits for where barriers to the inclusion of difference exist.⁴³⁹ 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.⁴⁴⁰ 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.⁴⁴¹

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.⁴⁴² The research indicates that professionals can be trained to not act on their

the best performing groups are not necessarily composed of the top experts or the best individual performers; instead, the dynamic of diverse viewpoints coming together accounts for the superior results groups can produce).

⁴³⁹ See Sarah Brown, *Auditing Diversity* (May 15, 2016), <https://www.chronicle.com/article/Auditing-Diversity/236428>.

⁴⁴⁰ See *id.*

⁴⁴¹ See generally, e.g., ANTHONY S. CHEN, *THE FIFTH FREEDOM* 32–87 (2009) (on the historical move from quasi-voluntary standards to hard law in employment antidiscrimination law).

⁴⁴² Mimi V. Chapman et al., *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., *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., *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.⁴⁴³ 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.⁴⁴⁴

Such research on how to reduce implicit bias is still in its early stages;⁴⁴⁵ 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.

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).

⁴⁴⁴ See *Hidden Brain: Radio Replay: The Mind of the Village*, NPR (Mar. 9, 2018), <https://www.npr.org/templates/transcript/transcript.php?storyId=5918954> 26. The following exchange occurred between implicit bias expert Mahzarin Banaji and the podcast host Shankar Vedantam:

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.

⁴⁴⁵ 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.”⁴⁴⁶ Moreover, small diverse groups foster more individual participation and generate a broader array of ideas than do larger, more homogeneous ones.⁴⁴⁷ In other words, increasing diversity in groups that allow for individual participation lowers the likelihood of groupthink.⁴⁴⁸ Some researchers have also found that diverse groups often are more productive than homogenous ones.⁴⁴⁹ 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 anti-discrimination theory, on the other.

Social neuroscience has shown that unconscious, non-volitional processes in the human brain detect subtle, socially relevant behavioral differences.⁴⁵⁰ 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).

⁴⁴⁷ See SUROWIECKI, *supra* note 252, at 29–31, 36–39.

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.⁴⁵¹ 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.

⁴⁵¹ See Sherwin Rosen, *Specialization and Human Capital*, 1 J. LAB. ECON. 43, 43 (1983).