Employment Discrimination

The field of employment discrimination, to a greater extent than other areas of the law, already accounts for nondeliberative explanations of people’s motivation and awareness, both jurisprudentially and doctrinally. For example, legal scholars, notably Krieger, have suggested that a large proportion of biased employment decisions result not from discriminatory motivations but from a variety of unintentional judgment errors of categorization.[[1]](#footnote-1) Similarly, from a behavioral perspective Agerström and Rooth demonstrate the importance of System 1 reasoning in hiring decisions.[[2]](#footnote-2) Specifically, their study found that participants’ likelihood of hiring people who are overweight was affected by their implicit attitude toward obesity. there isthe consideration,ofs’’hiring

Thus, this book’s discussion of employment discrimination is relatively short because expounding on the impact of dual reasoning systems on employment discrimination would be like preaching to the choir. Rather than describing new ways to understand employment discrimination, this chapter examines why the behavioral ethics approach is so highly developed in this area, which can help us understand how it can be effectively applied to other fields. After all, a main aim of this book is to raise the level of awareness of implicit and unconscious processes in accounting for people’s behavior in other legal areas, such as how people interpret contracts or approve transactions in the context of corporate law.[[3]](#footnote-3)

This chapter also addresses why the powerful research on the power of implicit biases in employment discrimination has had a minimal impact on legislation in this area. Given the richness of the behavioral findings on implicit employment discrimination, the lack of responsiveness of the law is frustrating. For the most part, current employment discrimination laws are still much better suited to deal with calculated wrongdoers than with situational wrongdoers, and most of the progress in reducing employment discrimination is occurring outside traditional legal contexts. We argue that adopting the ex-ante treatment through law paradigm, rather than waiting for harm to occur before regulating it, would enable the law to address situational wrongdoers. While law and economics scholars recognize the advantages of an ex-ante design, there is relatively little attention to incorporating situational design into the law.

## <H1>Implicit Discrimination

One of the reasons for the recognition of the influence of System 1 reasoning greatlyand .The processes leading people to discriminate are often unconscious—especially those involved in the first stage where people’s genuine primary prejudice is generated. Cognitive psychological research has been supplemented by social psychology research on intergroup psychology[[4]](#footnote-7) focusing on stereotyping processes as one of the central processes guiding implicit discrimination.[[5]](#footnote-8) Within this literature, Fiske’s work is especially promising because it offers a more nuanced and multidimensional approach to discrimination.[[6]](#footnote-9)

As discussed in earlier chapters, there are two systems of reasoning: automatic, intuitive, and mostly unconscious processes (labeled System 1) and controlled and deliberative process (labeled System 2)[[7]](#footnote-10). In the context of employment discrimination, research has shown that both conscious and unconscious processes interact without the individual's full awareness that discrimination even occurs.[[8]](#footnote-11)

Chris Crandall and Amy Eshleman[[9]](#footnote-12) provide insights into the processes through which discrimination is generated. They propose that “a suppression-justification model” results in either the expression or the suppression of discrimination. In this model, discrimination is or is not generated as a result of a two-stage cognitive process. In the first stage an automatic, genuine, primary prejudice is generated in which individuals are automatically evaluated based on their membership in a certain social group. In the second stage, the expression of the genuine prejudice in the form of discriminatory behavior is either suppressed or justified by beliefs, values, and social norms.

In the next section I differentiate between "good employers” who engage in intuitive discrimination and “bad people” who engage in deliberative discrimination, as well as between the likelihood of certain types of discrimination to occur. Although these distinctions are important from the liability perspective, they are even more significant in developing extralegal approaches that prevent discrimination from being generated or suppresses it once it occurs. Only by accounting for the processes that underlie people’s people discrimination can we predict differences in how discrimination occurs and to whom it is targeted.

## <H1>Implicit Discrimination and Differentiated Discrimination

With Tami Kricheli-Katz and Haggai Porat I have conducted theoretical and empirical studies of differentiated discrimination focusing on both implicit and explicit processes. We noted that although employment antidiscrimination laws prohibit specific forms of employment discrimination based on race, sex, religion, and age,[[10]](#footnote-14) these laws do not take into account the different mechanisms generating each of those forms. Rather, the laws take a blanket approach, applying similar remedies and prohibitions to each form. To identify the specify mechanisms motivating each form of discrimination, we reviewed four types of discrimination identified in the theoretical and empirical literature. The first form is taste-based discrimination, which occurs when disparities are the result of discriminators’ likes and dislikes of certain social groups. With this form of discrimination, the discriminator is willing to forgo material gain in order to cater to his or her preferences.[[11]](#footnote-15) Two other forms of discrimination are statistical discrimination[[12]](#footnote-16) and mistaken-stereotypes discrimination, and both arise due to cultural beliefs about social groups.[[13]](#footnote-17) These beliefs tend to center on ability and performance, with members of certain social groups perceived as performing better than members of other groups in particular contexts. Generally speaking, when cultural beliefs are statistically supported, people who take these statistics into account (without testing them in the individual case) engage in statistical discrimination. When cultural beliefs are statistically erroneous, people practice mistaken-stereotypes discrimination. The fourth form of discrimination is normative discrimination, which occurs when people act in accordance with their normative evaluations and moral judgments. With this form of discrimination, people are discriminated against not because it is perceived to be costly to interact with them, but because their actions are viewed by others as normatively wrong. For the most part, the literature on the different forms of discrimination does not pay much attention to the reasoning mechanisms underlying each. Nonetheless, it is possible to speculate on those mechanisms and the connection between the type of discrimination and the likelihood that implicit discrimination will occur.[[14]](#footnote-18)

In parallel to the research on automatic and implicit discrimination, social psychology research suggests that people in social interactions categorize each other immediately and intuitively and place others into membership in social groups accordingly. Thus, for example, people tend to immediately categorize each other by sex and skin color. These categories tend to have associated cultural beliefs about the characteristics of group members; for example, cultural beliefs about women may be that they are more communal, emotional, and expressive than men.[[15]](#footnote-19)

Based on research about how the human mind works and about how people interact with each other, we have argued that the ways in which social interactions and the human mind work in relation to each of these categories of employment discrimination—race, sex, religion, and age—differ from each other, and therefore to better address each form of discrimination, those differences across categories need to be taken into account.

To better understand how the differences across categories may play out differently and result in differing discriminatory outcomes, we analyzed gender, race, and age discrimination in the United States.[[16]](#footnote-20) Because tand automatically and intuitively rely on these categories in their perception and evaluation of others. The cultural beliefs that are associated with these categories—for example, women are “less assertive” and “more communal” than men—are therefore immediately evoked whenever people interact with each other.

**<H1>**

When employers make discriminatory decisions on the basis of these salient features, discrimination may function differently depending on the type of decision the employer is expected to reach (e.g., hiring, firing, or promotion), the level of information available to the employer on the candidate (e.g., personal background information), the way alternatives are framed (e.g., comparatively, in absolute terms), and the situational constraints on the possibility to deliberate (e.g., time to decide, accountability).

**<H2> Familiarity**

We predicted that, in hiring decisions, job candidates’ visible traits (gender, race, age) will play a larger part in giving rise to implicit discrimination than less visible traits such as religion and sexual orientation. However, visible traits play less of a role in promotion and firing decisions, when employers know much more about their employees’ abilities and performance than what they see on the surface. In other words, employers are likely to have more information on which they can make deliberate decisions, compared to the earlier hiring stages where, for certain social groups, the level of information on each candidate is minimal and the reliance on stereotypical information is greater. Thus, familiarity increases use on System 2 reasoning, while lack of it increases the reliance of System 1 processes.[[17]](#footnote-23)

**<H2>Frequency of Social Interactions**

The frequency of the social interactions that take place between members of different groups affects the occurrence of discrimination. Whereas we tend to have family or household members of both genders and of different ages, we are less likely to share a household or to have relatives of other races and religions. Daily interactions between men and women and between people of different ages reinforce many of the cultural beliefs and stereotypes about gender and age in social relations. When interactions between members of different groups— such as those of different races and religions—are less frequent, other, more institutional mechanisms, such as the media, the law, or differential organizational positions of power, may be more important in generating and reinforcing such cultural beliefs. We can therefore predict that new information, especially information regarding a job candidate’s performance and personal qualities, such as his or her warmth and good nature, will reduce employers’ race- and religion-based biases to a smaller extent than their biases against people of a different gender and those of different ages. For example, information regarding the applicant’s volunteer work will reduce race- and religion-based biases of employers to a greater extent than biases resulting from their cultural beliefs regarding gender and age.

## **<H2>Statistical Enforcement**

Statistical unethicality recognizes the difficulty in determining the state of mind of the individual wrongdoer. This concept is based primarily on ideas developed in the area of employment discrimination, in which one can only evaluate whether an employer’s hiring or promotion decisions reflect discriminatory practices by looking at them in the aggregate.[[18]](#footnote-24) Work done by Porat and Posner on aggregation and the law has laid the theoretical groundwork for learning about people’s behavior based on aggregated data.[[19]](#footnote-25) In regulating the bounded ethicality of people in making hiring and firing decisions, aggregation may enable a better understanding of their various ethical biases, which might not even be clear to those making such decisions. Such an approach is especially important for dealing with situations in which people believe their choices are solely determined by relevant and permissible considerations: only aggregated data of their decisions over time can allow for a closer look at their full set of motives.

# **<H1>Ways to Reduce Implicit Discrimination**

Care for smaller decisions

## Efforts to reduce implicit discrimination need to consider the many legal contexts in which nondeliberate reasoning is likely to play a significant role in hiring and firing decisions. They also need to address discriminatory processes that operate on different levels of intentionality and awareness. The approach advocated in the book is an evidence-based combination of education, regulation, and differentiated enforcement.

## **<H2>Masked Applications**

The masked applications approach is a relatively new method that assumes that hiring managers might, at least partially, discriminate unconsciously and are prone to automatic biases generated by stereotyped information, even though they may deny or be unaware of those biases. It calls for the removal of stereotypical information (i.e., gender, age, whether one is an immigrant, and marital status) from application files and then sometimes the use of “blind” interviews, in which the employer cannot see the candidate. In one of the classic studies on masking personal information, Goldin and Rouse showed that musicians who performed auditions behind a screen, thereby concealing their gender and age, were more likely to pass the audition and be hired than those candidates who performed in full view.[[20]](#footnote-26) However, Lumb and Veil found that an attempt to help non-European candidates get accepted to medical school by masked application was unsuccessful, possibly due to the ability of application evaluators to recognize the applicants’ country of origin through other details in the application.[[21]](#footnote-27) In a study conducted in Sweden by Åslund and Skans, it was found that anonymous applications were effective in eliminating the effects of both race and gender discrimination in the first stage (i.e., being invited for the interview).[[22]](#footnote-28) However, chances of subsequently being hired were improved only for applicants of a different gender but not for those of different races. In a study conducted in the Netherlands by Bøg and Kranendonk, which focused mostly on ethnicity, a small effect of masking identity was found in invitation-for-interview decisions, but it completely disappeared in the hiring process.[[23]](#footnote-29) In a European study of the academic marketplace for those with doctorates in economics, masking personal information was shown to have a reverse effect in that fewer female applicants received invitations for interviews, relative to the traditional approach.[[24]](#footnote-30) In a pilot project conducted raised by the German government’s Anti-Discrimination Agency, recruiting departments received only depersonalized applications that omitted personal data. Managers as well as applicants reported that they perceived the process as more fair, and some applicants even stated that they estimated that their chances of being invited to a job interview were higher when depersonalized procedures were used rather than conventional ones.[[25]](#footnote-31) The agency is exploring implementing this approach more widely.

## **<H2>Two-Tier Expressive Approach**

Another approach that accounts for the fact that there are both good and bad people and that both implicit and explicit discrimination are likely to occur stems from an idea first advocated by Krieger.[[26]](#footnote-32) Given the focus on good people and bad people and the need to differentiate between people based not just on their results of their behavior but also on their motivations, it might be helpful to come up with different names for each type of discrimination based on the distinction between implicit and explicit discrimination. Such an approach prevents a situation where people who engage in situational wrongdoing and those engaged in intentional wrongdoing will be treated in a similar way. Such similar treatment undermines the social condemnation that intentional wrongdoers could receive for engaging in discriminatory practices.

Scholars have suggested various ways the law and employment practices can be redesigned to be better able to reduce implicit employment discrimination. Hiring and promotion procedures can be redesigned based on the social and cognitive research into how people make these decisions; for example, use of a diversified hiring team, made up of individuals likely to be more sensitive to candidates from minority groups, should help reduce the impact of implicit discrimination. This idea is based on Sunstein and Jolls’s concept of prohibiting consciously biased decision making, which suggests that the presence of population diversity in an environment tends to reduce the level of implicit bias[[27]](#footnote-35); they further argue that antidiscrimination laws reduce implicit biases because people have more opportunities to see people from various backgrounds in the workplace: "The law does not simply protect an immediate victim or set of victims from behavior deemed to be unlawful; instead, the law tends to shape and affect the level of implicit bias of all those present[[28]](#footnote-36) simply by exposing people to more positive exemplars of availability and affect heuristics."[[29]](#footnote-37) In addition, “government affirmative action plans may operate as a form of direct debiasing"[[30]](#footnote-38) due to the mere exposure to more employees from underrepresented minorities.” , as andies. Finally, after the fact, the litigation process could be redesigned to be better able to uncover implicit bias.[[31]](#footnote-40)

### **<H2>Education and Debiasing**

Training against implicit racial biases has been shown to be an effective tool[[32]](#footnote-41) in the ex-ante approach to the regulation of implicit discrimination because of its ability to change people’s intrinsic motivation. It is important to recognize the role of internal motivation in reducing discrimination versus that of external motivation, which is promoted by the law.[[33]](#footnote-42)

Levinson and Smith, in their 2012 book, *Implicit Racial Bias Across the Law*,[[34]](#footnote-45) argue that implicit racial bias is not only invisible but is also largely unintended; hence, coercion is likely to be unproductive in changing behaviors that are based on such biases. They suggest, instead, the importance of employees’ internalization of values of diversity in the workplace. However, this line of work cannot address those people who *want* to act on the basis of their intentional biases.

**<H2>Ex ante Design of the Job Interview: Joint vs. Separate**

In her book, *What Works: Gender Equality by Design*,[[35]](#footnote-46) Iris Bohnet outlines a situational design approach to reducing employment discrimination against women that incorporates elements of both the BLE and BE models. In an earlier paper, Bohnet et al.[[36]](#footnote-47) showed that negative stereotypes regarding race are weaker when people evaluate others in a between-subject comparison, rather than in a within-subject comparison. They explained this finding by arguing that comparing multiple candidates requires more deliberative System 2 reasoning than does making a simple yes-or-no evaluation of a single candidate, which more strongly activates System 1 thinking. Thus, when people need to decide between two or more candidates at the same time, their System 2 reasoning is activated, and so they are more likely to monitor and reduce the potentially disruptive effect of stereotypes on their decision making.

**<H1>Conclusion**

In this short chapter on employment discrimination, we have shown how employment discrimination law has embraced the concept of dual reasoning and the related notion of implicit discrimination. Understanding why this area of law has been open to the importance of implicit process and of the distinction between “good” and “bad” employers may be helpful in our efforts to advance these concepts in other legal areas. At the same time, it is important to note that even within this area of law there is still a gap between the legal literature and the legal doctrine, and this gap in itself can teach us important lessons on the barriers to full integration of the good people rationale within more areas of the law.

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26. Krieger, *supra note* 98. [↑](#footnote-ref-32)
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