Employment Discrimination

The research developed for this book pertaining to regulating the behavior of “good” people is most relevant to legal field of employment discrimination. In contrast to other areas of law, where the existence of alternative explanations for people’s motivation and awareness is still not accounted for, both jurisprudentially and doctrinally, in employment discrimination, it is definitely not the case. For example, legal scholars, noteably among them is Krieger, have suggested that a large number of biased employment decisions result not from discriminatory motivation 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 in hiring decisions.[[2]](#footnote-2) In their study, participants’ likelihood of hiring people who are overweight is affected by their implicit attitude toward obesity.

For that reason, the discussion of employment discrimination in this book is going to be relatively short as this is one hand an excellent area to understand how dual reasoning could be important in normative analysis, but on the other hand, is like preaching to the quire. The focus here will not be on offering new ways to understand employment discrimination, as this is mostly discussed in the literature, but rather on the fact that the legal doctrine is highly developed and could help understand why psychology was so influential in that context as well as how could it be elaborated to various legal doctrines. At the same time, while the research on the power of implicit biases in employment discrimination is overwhelming, its impact on legislation is relatively marginal. With the richness of the behavioral findings on implicit employment discrimination, the lack of responsiveness of the law is frustrating. Thus, it seems for the most part, employment discrimination laws are much better suited to deal with calculated wrong-doers than with situational wrong-doers and most of the advancement occurs outside the traditional impact of the law.

It is interesting to consider, why is it that in employment discrimination, the normative importance of system 1 is so important, relative to other legal doctrines. Possibly one of the reasons is the far more developed research on social cognition that underlies the argument that that we make evaluations of other people based on intuitive rather than non-deliberative mechanisms[[3]](#footnote-3). In a sense, part of what this book is trying to do with regard to accounting for people’s behavior with regard to all of the legal areas, such as how people interpret contracts of make decisions on what transaction to approve in the context of corporate law, is to bring those areas to the same level of recognition as exist in employment discrimination law, where implicit discrimination is the main stream argument[[4]](#footnote-4).

One of the lessons that the book wishes to exhibit as a general message, which could be demonstrated in the gap between the knowledge and the treatment of biases in employment discrimination, is the ex-ante treatment through law, rather than waiting for harm to happen prior to regulating it. While law and economics scholars recognize the advantages of an ex-ante design, there is relatively little attention to the situational design itself, being part of the law itself. In addition, in this area of law, we see discussion of various types of discrimination, intentional and non-intentional as well as a recognition on the regulator limited ability to know what is one peoples mind when they make decisions.

## Implicit Discrimination

As suggested above, the processes leading people to discriminate are oftentimes unconscious – especially those involved in the first stage where people’s genuine primary prejudice is generated. Research on the non-rational aspects of discrimination is related to social and cognitive psychology research on intergroup psychology.[[5]](#footnote-5) Over the years, social psychology focused on the stereotyping processes as one of the central processes in charge of implicit discrimination.[[6]](#footnote-6) Within this literature, Fiske’s work is especially promising because it offers a more nuanced and multi-dimensional approach to discrimination.[[7]](#footnote-7)

Generally speaking, the argument of scholars studying implicit discrimination is that many people are unaware of the biases they have and of their application. The famous distinction psychologists make, which is discussed in the early chapters of the book, are between automatic, intuitive, and mostly unconscious processes (labeled System 1) and controlled and deliberative process (labeled System 2)[[8]](#footnote-8). In the context of discrimination, it has been shown that both conscious and unconscious processes interact without individual's full awareness that discrimination even occurs.[[9]](#footnote-9)

Chris Crandall and Amy Eshleman[[10]](#footnote-10) provide insights into the processes through which discrimination is generated. They propose a model called “a suppression-justification model” that 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 so that 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 paragraphs I will attempt to show the connection between the perspective of "good employers” who engage in intuitive discrimination, “bad people” who engage in deliberative discrimination and the likelihood that certain types of discrimination are more likely to occur. This distinction is important not just from the liability perspective but mostly from the perspective of the non-legal solution to both prior as well as after the discrimination process occurs. In other words only when accounting for the processes that underlie people’s people discrimination, we can predict differences in how this discrimination happens and toward what type of population.

## Implicit Discrimination and Differentiated Discrimination

Another contribution of this chapter attempts to connect the differences between implicit and explicit discrimination with the differences in motivation for discrimination. The general idea that I will try to develop in the following paragraphs is the connection between the discrimination motivation, the social group toward which the discrimination occurs and the likelihood that implicit processes play a major role in the discrimination.

The above work on implicit discrimination is highly related to the theoretical and empirical work I have done with Tami Kricheli-Katz and Haggai Porat with regard to the concept of differentiated discrimination focusing on both implicit and explicit processes. In our joint research, we have noticed that employment anti-discrimination laws prohibit specific forms of employment discrimination such as discrimination based on race, sex, religion and age.[[11]](#footnote-11) These laws however do not to take into account the different mechanisms generating each one of them. Rather, the approach taken by the law is general and similar remedies and prohibitions that are applied to each of the various forms. In our work, we have reviewed the literature on four forms of discrimination that have been identified in the theoretical and empirical literature on discrimination. 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 tastes[[12]](#footnote-12)Two other forms of discrimination are statistical discrimination[[13]](#footnote-13) and mistaken-stereotypes discrimination, and both arise due to cultural beliefs about social groups.[[14]](#footnote-14) These beliefs tend to center on ability and performance with members of certain social groups perceived to be more able or to perform better than members of other groups in particular contexts. Generally speaking, when the 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 who take the statistics into account 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 didn’t put too much attention into the reasoning mechanism, mostly it focused on the rationale. Nonetheless, it is possible to speculate on the connection between the type of discrimination and the likelihood that implicit discrimination will occur.[[15]](#footnote-15)

In parallel to the research on automatic and implicit discrimination, the research in social psychology suggests that people in social interactions, immediately and intuitively categorize each other by their membership in social groups. Thus, for example, people tend to immediately categorize each other by factors such as their sex and skin color. These categories tend to have cultural beliefs associated with them about the characteristics of group members. The cultural beliefs associated with being a woman for example, are of being more communal, emotional, and expressive.[[16]](#footnote-16)

Based on understandings about how the human mind works and about how people interact with each other, we have argued that the multiple forms of discrimination are not only different in the mechanisms that generate them, but that they also result in differences in discriminatory behavior in employment decision-making. We did not argue that one category is more likely to generate greater discrimination than other categories. Rather, we argued that the ways in which social interactions and the human mind work in relation to each of these categories differ from each other, and therefore in order to better address each form of discrimination, the differences – as well as the similarities – across categories ought to be better explored.

To better understand how the differences across categories may play out differently and result in differing discriminatory outcomes, we have analyzed the examples of gender, race and age. Gender, race and age are primary categories in the United States.[[17]](#footnote-17) People automatically and intuitively rely on these categories in their perception and evaluation of others. These categories are based on salient physical features that are easily and quickly recognized, so people immediately categorize others by them.[[18]](#footnote-18) The cultural beliefs that are associated with these categories – like that women are “less assertive” and “more communal” than men, for example – are therefore immediately evoked whenever people interact with each other.

It follows from the above that in a world that focuses on implicit discrimination, 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, 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).

**Differences across Forms of Discrimination**

Based on the above set of theories about the ways in which people process information and interact with each other, we can predict that in hiring decisions, job candidates will experience more discrimination on the basis on their visible traits (gender, race, age) than on the basis of other less visible traits life religion and sexual orientation. With promotions however, when employers know more about their employees than what they can see, we expect this gap between visible and invisible traits to be narrower. In addition to having a basis for a differentiated approach to discrimination, it is also the case that there will be a difference in the automatic components of discrimination in different stages of the employment discrimination. For example, in promotion and firing the decisions employers are likely to have more information on which they can make deliberate decisions, relative to the much 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. Clearly, people look on pictures of people differently when they know the person and what they don’t, familiarity hence increases system 2 reasoning while lack of it increases the reliance on system 1[[19]](#footnote-19). Adopting the state of mind where the policy makers are looking to identify ex-ante the stages in which automatic discrimination is more likely, will help target discrimination in a more focused way.

**Frequency of social interactions**

Discriminated traits vary also in the frequency of the social interactions that take place between members of different groups. Men and women interact with each other more often, and usually with greater intimacy, than do same-sex persons of different races and religions, as do people of different ages. Whereas we tend to have family or household members of the other gender and of different ages, we are less likely to share a household or to have relatives of other races and religions. The daily interactions between men and women and between people of different ages result in many of the cultural beliefs and stereotypes about gender and age being reinforced in social relations. When interactions between members of different groups are less frequent, as in the case of race and religion, other more institutional mechanisms, like the media, the law, or differential organizational positions of power may be more important in generating and reinforcing cultural beliefs about the differences between the members of various groups. It is therefore possible to predict that new information, especially information regarding the warmth and good nature of a job candidate, will reduce employers’ race and religion based biases, but it will have a smaller reduction in the biases against women and people of different ages. For example, information regarding the applicant’s volunteer work will affect the beliefs of employers more in the biases based on race and religion than on gender and age.

In the upcoming paragraphs, I will discuss some of the potential solutions which exist, at least in literature with regard to curbing implicit discrimination. It is important to note that for the most part, the solution offered did not account for the need to deal simultaneously with both implicit and explicit types of discrimination.

# Implicit Discrimination: Solutions

Care for smaller decisions

## In addition to the relationship between recognition of implicit discrimination and intentional decimation as well as the type of discrimination, which is more likely to occur, the literature has come up with many solutions to implicit discrimination. In line with the general arguments of this book; it considers the many legal contexts in which non-deliberate reasoning is likely to play a significant role in the outcome of the decision.

The need of policy makers to deal with two types of employment discrimination: calculated and situational at the same time. In the following paragraphs, we present some directions, which could help mitigate some of the challenges associated with regulating discrimination processes that operate on different level of intentionality and awareness. In light of the above arguments on the differences between the social categories, further research might need to be conducted to examine whether the joint versus separate effect is as good for non-gender based discrimination.

## Statistical enforcement:

One of the ideas that we have discussed is of statistical unethicality, which basically recognizes the difficulty in finding out the state of mind of the individual wrong-doer. This concept is based for the most part on ideas developed in the area of employment discrimination, where the limitations of the decision-making process in a given situation by a single employer are clear. A certain hiring or a promotion procedure could not be seen as biased until one looks at the aggregate of many decisions occurring in one workplace over time.[[20]](#footnote-20) Work done by Porat and Posner on aggregation and the law, in the context of normative aggregations, builds the theoretical framework for learning on people behavior based on aggregated data.[[21]](#footnote-21) Taking this concept to the area of regulating the bounded ethicality of people might suggest that through aggregation it might be possible to better understand various ethical biases of people, which might not even be clear to the person making the decision. Such an approach is especially important for dealing with situations when people believe their behaviors are done solely by relevant and permissible consideration; but only aggregated data could allow for a closer look at people full set of motives.

## Masked applications:

An additional approach, which was used in other countries and could be modified to deal with the situational wrong doer, is the masked applications approach. A relatively new approach taking into account that hiring managers might, at least partially, discriminate against their own will and are prone to automatic biases through stereotype information, calls for the removal of stereotypical information (i.e. gender, a potential migrant background, marital status and age) from application files. In one of the classic studies on masking personal information, Goldin and Rouse have shown that musicians who performed auditions, when their gender was concealed were more likely to pass both the screening and the hiring stage.[[22]](#footnote-22) Lumb and Veil have shown that an attempt to help non-European candidates to get accepted to medical school by masked application was proven unsuccessful, possibly due to the ability of application evaluators to recognize one’s origin through other details in the application.[[23]](#footnote-23) In a study conducted in Sweden by Åslund & Skans, it was found that anonymous applications have proved effective for eliminating both race and gender discrimination in the first stage (i.e. being invited for the interview).[[24]](#footnote-24) However, chances of being hired were improved only for gender related discrimination and not for race based discrimination. In a study conducted in the Netherlands by Bøg & Kranendonk, which focused mostly on ethnicity, a small effect was present in the invitation for interview decision, which completely disappeared in the hiring process.[[25]](#footnote-25) In a European study on the market for economics PhDs, masking personal information was shown to have a reverse effect in that fewer female applicants received invitations for interviews, relative to the traditional approach.[[26]](#footnote-26) In a pilot project, raised by the German Anti-Discrimination Agency, recruiting departments received only depersonalized applications where personal data was omitted. The results of the project were announced quite enthusiastically as a successful potential change in hiring procedures. 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 in the course of depersonalized procedures than in conventional ones[[27]](#footnote-27).

## Two tier expressive approach:

An additional solution deals with the fact that there are both good and bad people and that both implicit and explicit discrimination is likely to occur relates to an idea which was first advocated by Krieger.[[28]](#footnote-28) Given our focus on good people and bad people and the need to differentiate between people based not just on their results but, rather on their intention, it might be a good idea to come up with different names for each type of discrimination possibly 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, which intentional wrong-doers could receive.

To better tailor the law to implicit discrimination, scholars have suggested various ways the law could be more sensitive to uncovering employment discrimination. For example, making the litigation process more equipped to uncover implicit bias.[[29]](#footnote-29) In addition, various initiatives were suggested in order to redesign the hiring and promotion procedures based on knowledge accumulated on how people make these decisions.

Among those changes to the hiring procedures, which are supposed to deal with both implicit and explicit discrimination, is a diversified team which is more likely to be sensitive to candidates from minority groups.

### Education and Debiasing

Training against implicit racial biases is another important concept to consider[[30]](#footnote-30) when taking an ex-ante approach to regulation of implicit discrimination. Within the line of research on training it is also important to mention the work of Sunstein and Jolls who focus on four main approaches to fight workplace discrimination:

Prohibiting Consciously Biased Decision-making- the first approach is the simplest. It relays on the literature that suggests that the presence of population diversity in an environment that tends to reduce the level of implicit bias[[31]](#footnote-31) and that anti-discrimination laws reduce implicit biases because people have more opportunities to see people from various backgrounds in the workplace. In their language "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[[32]](#footnote-32) simply by exposing people to more positive exemplars of availability and affect heuristics."[[33]](#footnote-33). In addition, “government affirmative action plans may operate as a form of direct debiasing"[[34]](#footnote-34) due to the mere exposure to more employees from underrepresented minorities.” While the importance of this paper is in putting the spotlight on the abilities of laws to change people’s implicit attitudes, their paper suggests little attention to the details of the debiasing mechanisms.

In addition to debiasing, another important approach is to change people’s intrinsic motivation. In the concept of training it is important to recognize the role of internal motivation to reduce discrimination versus external motivation that is promoted by the law.[[35]](#footnote-35) The most efficient way to ensure diversity is to be committed to it; this goal must be reflected by organizational models, priority, etc. [[36]](#footnote-36)

Another important work dealing with racial bias is Levinson and Smith’s 2012 book, *Implicit Racial Bias Across the Law*.[[37]](#footnote-37) They 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. Chapter 6, which deals with individual differences and unethicality, focuses on changing the behavior of good people who do not want to discriminate but do so implicitly and that of bad people who discriminate both implicitly and explicitly. The approach advocated in the book is an evidence-based combination of education, regulation, and differentiated enforcement.

Ex ante design of the job interview the Joint vs. Separate:

In her book, *What Works: Gender Equality by Design*,[[38]](#footnote-38) Iris Bohnet presents a situational design approach that incorporates elements of both the BLE and BE models. She focuses on improving hiring practices in ways that will reduce discrimination against women. In an earlier paper Bohnet et al.[[39]](#footnote-39) shows that negative stereotypes regarding race are weaker when people evaluate others in a between-subject comparison, rather than in a within-subject comparison. They explain 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; System 1 thinking has a greater impact on the latter decision, which therefore is more prone to be biased. 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.

Conclusion:

In this short chapter on employment discrimination, we have shown how employment discrimination law has embraced the concept of dual reasoning. The notion of implicit discrimination seems to be highly recognized within this literature. Understanding the differences between this area of law and other areas of in terms of the openness of these fields to recognize the importance of implicit process and of the good employers whose some of their friends are .. is an important direction for the behavioral analysis of law approach. 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 could teach important lessons on the barriers to full integration of the good people rationale within more areas of law.

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