

After Inclusion

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Abstract

What forms of discrimination are likely to be salient in the coming decade? This Essay flags a cluster of problems that roughly fall under the rubric of inclusive exclusions or discrimination by inclusion. Much contemporary discrimination theory and empirical work is concerned not simply with mapping the forces that keep people out of the labor market but also with identifying the forces that push them into hierarchical structures within workplaces and labor markets. Underwriting this effort is the notion that, while determining precisely what happens before and during the moment in which a prospective employee is excluded from an employment opportunity remains crucial to anti-discrimination theory and practice, significant employment discrimination problems can occur after a person is hired and becomes an employee. These problems transcend racial and sexual harassment and include a range of subtle institutional practices and micro interpersonal dynamics that create systemic advantages for some employees and disadvantages for others. We predict that the next generation of race discrimination scholarship will engage these “after inclusion” workplace difficulties—theoretically, empirically and doctrinally. .

I. Introduction

Employment discrimination today is not what it was when Congress passed the Civil Rights Act of 1964. There are a number of ways to articulate this change. Some emphasize the shift from explicit animus to implicit bias. (Kang 2005) Others employ the language of *de jure* and *de facto* discrimination to characterize the difference between the 1960s and the present. (Harris 2005) Still others ground their comparison in the distinction between conscious or purposeful discrimination, on the one hand, and unconscious or accidental discrimination, on the other. (Krieger 1995; Lawrence 1987)

Notwithstanding the competing rhetorical registers in which scholars sound their differences between discrimination *then* and *now*, there is consensus that there *is* a difference, that much of contemporary discrimination has gone underground (Blasi 2002), and that we are experiencing what some employment law theorists refer to as “second generation” discrimination. (Sturm 2001) To the extent the term “second generation” invites us to imagine a sharp divide or discontinuity between employment discrimination today and employment discrimination in the aftermath of Jim Crow, one can question its descriptive and historical accuracy. But if one understands “second generation” to be about salience and context—namely, that the salience of and the context in which racial discrimination occurs today differs from the Jim Crow era—the

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term has purchase. Consider conscious racial animus. While a claim that this form of discrimination has disappeared would be difficult to sustain, most would agree that conscious racial animus is not as prevalent a social practice as it once was and is not as salient. Moreover, because of shifts in our legal and social norms about equality, the context in which racial animus is practiced and experienced transcends the door of access and includes the ladder of advancement. In this respect, the challenge of employment law is to respond not just to new forms of discrimination (be they structural, psychological, cultural or inter-personal) but to the fact that different forms of discrimination shift in and out of salience, and become particularly “sticky” in different employment contexts, as a function of the historical backdrop within which the discrimination occurs.

Which brings us to the central question this Essay engages: How and in what context is discrimination imagined to occur today and what forms of discrimination are likely to be salient in the coming decade? We focus on a cluster of problems that we situate under the rubric of inclusive exclusions or discrimination by inclusion. Much contemporary discrimination theory and empirical work is concerned not simply with the forces that keep people *out* of the labor market but also with forces that push them into hierarchical structures within workplaces and labor markets. Put another way, while determining precisely what happens *before and during* the moment in which a prospective employee is excluded from an employment opportunity remains crucial to anti-discrimination theory and practice, employment scholars are beginning to pay more attention to what happens to that person *after* she is hired and becomes an employee. What happens, in other words, after inclusion?

Scholars across disciplines have noted the ways in which inclusion and marginalization often go hand in hand. Think of the widespread claim that blacks are second class citizens within the legal profession. Part of what underwrites this argument is the empirical fact that while law firms include blacks as associates (i.e., as institutional workers) they exclude them in significant numbers from partnership (i.e., as institutional leaders). (Wilkins 1998, 2007; Conley 2006) Or consider the problem of workplace ghettoization: women are included in academia and the professions but excluded from (or ghettoized in) certain areas of specialization. (Schultz 1990) In both examples, inclusion precedes and creates a condition of possibility for exclusion, thus our notion of inclusive exclusions or discrimination by inclusion.

Discrimination by inclusion should be differentiated from exclusionary models of discrimination, that is, models of discrimination within which exclusion and inclusion are mutually exclusive and oppositional social dynamics. Central to exclusionary models of discrimination are three core ideas: (1) that discrimination functions to keep people out by closing the doors of access, (2) that doors in the labor market remain closed for many people, and (3) that judges should employ anti-discrimination law as a door-opening mechanism—that is, as a vehicle to facilitate access.

While access is important, the story of discrimination does not end at the moment of access. *Inclusion in* does not mean *the absence of discrimination from*. Under certain conditions, an employer’s desire to grant access coexists with discriminatory policies and practices. Put another way, access can both reflect and facilitate discrimination. Below we explain how this is so in the context of assessing recent trends in discrimination theory, empirical work, and litigation. Our focus is on racial discrimination, but race discrimination is often not separable from discrimination based on other aspects of

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identity, such as gender, class, ethnicity, and sexual orientation. (Crenshaw 1993) We structure our discussion around the following eight themes: (1) preferential inclusion; (2) intellectual capital; (3) legal endogeneity and the behavior of compliance professionals; (4) incomplete consciousness; (5) performance and assimilation; (6) rational discrimination and accommodation; (7) intra-racial discrimination; and (8) racial endogeneity.

II. Inclusive Exclusion or Discrimination by Inclusion

Preferential Inclusion

Historically, exclusion constituted the quintessential form of discrimination. And this might still be true today. But *per se* exclusion does not exhaust how discrimination operates. Discrimination can still occur after or at the moment of inclusion. Some scholars employ this very observation to challenge the legitimacy of affirmative action policies. For these scholars, affirmative action increases the representation of racial minorities by including them on unfair terms. This understanding of affirmative action explains why various forms of social inclusion initiatives (including “pool creation” and outreach efforts) are referred to as “racial preferences.” (Sander 2006, 2004). While we do not view affirmative action in this way, the “racial preference” characterization of the policy illustrates that the notion that inclusion can facilitate or be predicated upon preferences already has social traction.

Preferential inclusion, or instances in which an employer prefers one employee over another based on problematic terms, occurs in many forms, some of which are directly linked to assumptions about the kind of worker the employee is likely to be after inclusion. Consider the relationship between preferential inclusion and the racial segmentation of occupations. Imagine an employer who wants a workforce of pliant and uncomplaining employees who have a strong work ethic and are unlikely to insist on rigorous compliance with workplace laws. Such an employer might prefer hiring recent Latino/a immigrants, especially those who have an ingrained fear of the immigration authorities. (Rodriguez 2007) The employer prefers not to hire white or African American employees because he believes that they have a higher likelihood of causing trouble, agitating for better conditions, and filing legal charges. This preferential inclusion is based on expectations about the ways in which Latinas/os will negotiate their relationship to hierarchy and authority within the workplace after they are included. Do these preferred Latino/a employees have a claim against the employer on the ground that the employer’s preference for them was based on problematic racial stereotypes? Are the terms upon which the Latino/a workers included illegally discriminatory, even though they appear to have been beneficiaries rather than victims of stereotype discrimination?

Another form of preferential inclusion is word-of-mouth hiring practices. They tend to produce ethnically or linguistically homogenous work forces. An example is an immigrant-run business that favors immigrant workers and employs word-of-mouth hiring to effectuate that preference. Does this practice provide employment opportunities for a group who might otherwise have difficulty finding jobs, or does it discriminate against other groups? The proliferation of nail salons in many U.S. cities brings this question into sharp relief. To a considerable extent, these salons are ethnic enclaves

dominated by recent Vietnamese immigrants. Is this affirmative action for Vietnamese or discrimination against others? Courts have generally rejected challenges to word-of-mouth hiring, notwithstanding that this practice produces ethnically homogenous workforces. (Cao 2003) One question is whether there will be a shift in this doctrinal approach, particularly against a backdrop of empirical studies based on census data that suggest that racial and ethnic discrimination at the workplace level is pervasive. These studies indicate that ethnic discrimination is especially acute among white and Latina/o workers, that there was no decline in racial and ethnic workplace segregation between 1990 and 2000 (Hernandez 2007), and that while Latino/a-white segregation was unchanged over the decade, black-white segregation increased by about 20 percent. (Hellerstein, Neumark & McInerney 2007).

Preferential inclusion can occur not only based on perceived race or ethnicity but also based on perceived behaviors. Sexual harassment presents a case in point. Catharine MacKinnon is credited with pioneering work establishing that a supervisor's explicit and enforced demand that an employee submit to sexual overtures as a condition of hiring or promotion is illegal sex discrimination. (MacKinnon 1979) But more subtle forms of preference based on pliability remain of uncertain legal status. A manager who engages in sexual banter with his attractive female employees and rewards those who respond favorably with promotions, pay bonuses, mentorship and training discriminates against those employees who do not wish to participate in the manager's workplace sexual antics. The unconsenting employees are left alone; they are forced to endure no sexual banter but neither do they receive mentoring or the supervisory attention that enhances opportunities for promotion. It is unclear whether they can bring a sex discrimination claim. Is *not* being included within the ambit of a sexually charged set of interactions a form of discrimination because it denies them, among other things, the benefits of mentoring? Is the manager's preference for women who are willing to go along with his sexualized behavior a form of preferential inclusion?

One of the ways in which human resource departments have responded to the nexus between a sexualized workplace and sex discrimination law is to disfavor informal fraternizing that might lead to sexual harassment liability—such as socializing over dinner and drinks with subordinates of the opposite sex. If the effect of this prophylactic is to deny young female employees the opportunity to mingle informally with older male supervisors, it is unclear whether the women's equal employment opportunities are being enhanced or harmed by the policy. (Thomas 1990). This helps explain why some feminist scholars have begun to argue that sexually sanitizing the workplace is not the answer to and often obfuscates gender inequality within the workplace. (Schultz 2003; Halley 2006) This line of work is consistent with the broader point this Essay advances: that the story of discrimination does not end with inclusion; there are many forms of discrimination by inclusion, preferential inclusion being just one of them. (Carbado 2005; Agamben 1998)

Now that scholars, lawyers and judges understand discrimination to include norms and practices that define the *terms* on which racial or ethnic groups are included in the workplace, the ambit of legally relevant behavior has expanded. No longer is the question solely whether particular policies close the doors to employment opportunities. The ways in which doors to employment are opened can themselves facilitate discrimination and will be a central area of study. We can no longer afford to think about

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access in terms of *whether* people are getting in, we have to continue to think critically and carefully about *how* they are getting in and what happens when they do.

Intellectual Capital

Inequality in intellectual capital is today one of the principal concerns of race discrimination studies. Formal education and technical skill are perhaps more important today than at any time in American history. (Stone 2006; Fisk 2005) With the decline of American manufacturing and the decline of union density in jobs requiring less than a college education, real wages for workers with only a high school education or less have fallen, whereas real wages for the highly educated have increased. (Rosén & Wasmer 2005) Many scholars and policy makers argue that differences in education and skill provide at least a partial explanation for the growing gap between rich and poor in the United States and globally, for the under-representation of certain races in some jobs and their over-representation in others, and for a variety of other inequalities including rates of incarceration, family structure, and health. They also contribute to starkly unequal levels of job satisfaction, employment security, pay, and the availability of health, disability, and retirement insurance. More generally, some of the standard indicators of well-being are linked to levels of educational attainment. The pattern of inclusion and exclusion of racial groups in the workplace is thus linked to inequalities of intellectual capital.

Yet education today is unequal, particularly with respect to race. More than 50 years after *Brown v. Board of Education* declared *de jure* race segregation in public education unconstitutional, primary and secondary education remains racially segregated. (Clotfelter 2004; Parker 2003, 2001). As in the pre-*Brown* era, non-whites schools are significantly under-resourced in comparison to their white counterparts and therefore offer an inferior education. Efforts of school districts and universities to adopt enrollment plans to ensure integration have been invalidated by the Supreme Court. (Siegel 2007). And legal challenges to unequal resources are difficult to mount and have met with only limited success. (Koski 2007). To some extent, lawyers today are in a more difficult doctrinal position arguing for racial equality in the context of education than their pre-*Brown* counterparts. They can argue neither for integration nor for equal resources. Pre-*Brown*, the latter argument was constitutionally cognizable. (Carbado 2002). Although minorities are no longer formally excluded from equal educational opportunity and are, in theory, entitled to equal expenditures on education, the formal equality of access to education masks inequality in the terms on which minority students are included in educational institutions. What remain are schools that are *de facto* segregated and non-white schools that are under-funded.

Against this backdrop, a narrative has emerged that attributes racial differences in educational attainment to cultural attitudes toward education. Proponents of this view argue that efforts to equalize the funding differential between white and nonwhite schools should be redirected at culturally transforming the way in which black families, for example, view education—in other words, towards altering perceptions and incentives in a manner that results in greater investment in education in the poorer sections of the black community. Even liberals articulate some variant of this argument. Thus, while Barack Obama, for example, would not jettison the project of equalizing funding for blacks

schools, he is also clear that at least part of the black community is in need of a cultural reconstruction—and that many in the black community recognize this. According to Obama, “go into any inner city neighborhood, and folks will tell you that government alone can't teach kids to learn. They know that parents have to parent, that children can't achieve unless we raise their expectations and turn off the television sets and eradicate the slander that says a black youth with a book is acting white.” (Obama 2004).

As access to knowledge and intellectual capital becomes more important in the postindustrial workplace, questions about the relationship between racial inequality in employment and educational inequality also become more salient. Race and gender segregation at the workplace tends to be self-perpetuating, and racial minorities and women of all races are over-represented in lower-paying jobs and at firms on the economic periphery where they face greater risk of layoffs during economic downturns. (Reskin, McBrer & Kmec 1999). The task of identifying the causes of racial and gender segmentation in labor markets and its relationship to inequality is complex (Baron & Bielby 1980), but it is clear that both discrimination by and within firms and inequalities in the attainment of skills and knowledge play a role. Scholars have attempted to understand what part of the under-representation of blacks in elite labor markets—the professions, business, and academia—is attributable to differences in education and skill, and what part is attributable to bias. As with investments in schooling, one question is whether part of the story has to do with inadequate investments by black employees in firm-specific capital, which then results in inadequate investment in them by the firm, the end result of which would be a lower success rate for even those blacks who have gained inclusion within firms. Perceptions of discrimination may provide one explanation for these lower investment levels. Thus far, there has been little research on the question. Even when scholars agree that historical and contemporary discrimination play at least a partial role in explaining the differences in educational attainment across racial groups, they often disagree about whether employers should—or even can—implement affirmative action programs to correct for that discrimination.

Even as social scientists have shown the pervasiveness of racial segregation in education and work and the dire consequences for workforce equality and social integration, some judges and some legal scholars are less optimistic than they previously were about the power of courts to equalize societal differences (Tushnet 2006). Now there is controversy over the very idea that law *should* or *can* address systemic inequalities in education, intellectual capital, and health or pervasive racial segregation in housing, education, or occupations. Part of the controversy has to do with the notion that individual agency and responsibility on the part of (especially) blacks could significantly change the level of black peoples' educational achievement. As suggested earlier, the notion is that blacks need to change themselves and positive educational outcomes will follow. Another explanation for the fact that law is less available today to eliminate inequalities in education (among other places) is the widespread skepticism about whether the law should be explicitly redistributivist. Still another explanation has to do with merit—namely, that affirmative action-like policies are preferences that undermine merit and unfairly burden and/or discriminate in the reverse against whites (and Asian Americans). (Harris & Narayan 1994; Crenshaw 2007).

This last argument about merit and reverse discrimination occupies much space in contemporary debates. As the value of elite education and technical job skills rises and

competition to attain them intensifies, affirmative action policies are increasingly vulnerable to the critique that they are unfair because they instantiate preferences for candidates with less intellectual capital. Already, the legal debate is less about whether employers discriminate against people of color with lower levels of formal education attainment by failing to examine their hiring or promotion criteria rigorously to see whether they needlessly cause a disparate impact (as was supposed in the seminal case *Griggs v. Duke Power Co.*) and more about whether employers discriminate by attempting to do so. (Sander 2006; Coleman & Gulati 2006) Yet, while commitment to race-based affirmative action is wavering, there remains concern about how to create social policies that allow intergenerational upward mobility when access to elite higher education appears to be easier for elites. (Malamud 1997, 1996; Onwuachi-Willig 2007)

Legal Endogeneity and Compliance Professionals

Part of managing a firm entails translating and operationalizing legal rules, including anti-discrimination regimes. Managers have to understand what the law commands and then institutionalize that understanding into concrete workplace practices. This is no easy task. Legal prescriptions are often both unclear and indeterminate. Certainly this is true of anti-discrimination law. When does a racial joke cross the line and create a hostile environment? What kind of affirmative actions programs are legal? Under what circumstances does a facially neutral employment policy (e.g., refusing to hire persons without a high school diploma or with any criminal record) cause an illegal disparate racial or gendered impact? An industry of compliance professionals has emerged to help firms make sense of the foregoing questions, among others. Not surprisingly, empirical research on discrimination attempts to understand the role and significance of compliance professionals in shaping legal norms and in shaping institutional behaviors.

Compliance professionals translate vague legal prescriptions specific institutional protocols. In this sense, compliance professionals are legal agents. They quite literally determine how an institution negotiates its relationship to anti-discrimination law. (Edelman, Uggen & Erlanger 1999; Dobbin & Kalev 2007, 2006)

The now-ubiquitous practice of diversity training has become an important part of managing the problem of workplace discrimination. Much, though certainly not all, of this training focuses on employment discrimination issues that arise after inclusion. In particular, compliance professionals have played a crucial role in helping employers address issues of hostile work environment. One of the mechanisms through which they have done so is diversity training. Compliance professionals encourage employers to utilize diversity training as an institutional mechanism to reduce the risk of discrimination law suits and increase the likelihood of successfully defending them. The thinking has intuitive appeal: diversity training makes employees more aware of the multiple forms employment discrimination can take; and this awareness reduces the likelihood that the employees will engage in behavior that a legal decision-maker would conclude is discriminatory.

But compliance professionals do more than “norm” workplace behavior; they also “norm” anti-discrimination law itself. To the extent there is adoption of the procedures compliance professionals prescribe, it is possible that courts and other regulators will

internalize these prescriptions. The prescriptions become formally folded into the law. To continue with the diversity training example, a judge or jury might point to the presence or absence of diversity training as relevant to the question of whether the employer created a hostile work environment. Understood this way, compliance professionals are legal agents not only in the sense of interpreting the law but in the sense of shaping the content of law. Pointedly, compliance professionals constitute the very laws they purport to institutionalize. Law is endogenous to and not simply constitutive of their prescriptions. (Edelman 2005, Edelman, Fuller & Mara Drita 2001, Edelman & Suchman 1999)

The endogeneity of anti-discrimination mandates is especially likely in areas where regulation is difficult. Under such circumstances, the regulators have an incentive to allow the regulated to devise and implement the legal regimes under which the regulated will operate their businesses. In this way, the regulated become self-regulating, which increases the likelihood that they will window-dress rather than reform their institutional practices. (Bisom-Rapp 2001; Krawiec 2003) One can expect this problem to get worse as the industry of compliance professionals grows in size and influence. The larger and more influential this industry, the more it is likely to push its own legal reform agendas.

Even in the absence of this endogeneity problem, there is an empirical question about the efficacy of compliance professionals' prescriptions. Scholars are beginning to question whether compliance professionals help or hinder the elimination of discrimination after inclusion. (Dobbin & Kalev 2006; 2007). The initial results might surprise us: The compliance professional industry seems to be benefiting compliance professionals more than potential victims of discrimination. Put another way, running diversity training is big business, but it is not clear that it helps the potential victims of discrimination.

This raises a more general question about the efficacy of reform efforts on the part of employers to eliminate racism from the workplace. While legal scholars have begun to try systematically to assess the effects of litigation and institutional reforms aimed at eliminating overt and subconscious discrimination, a host of questions remain. (Selmi 2003; Hart 2005; Levit 2008) For example, what deterrent effect might be generated by the threat of large damage and/or attorneys fee awards and the adverse publicity in connection with the filing of large class actions? To what extent has the recent growth in the availability of employment practices liability insurance affected legal compliance? The study of anti-discrimination mandates in the next generation will be inextricably intertwined with the study of the compliance industry, an industry that, because of its investment in litigation and liability avoidance, is fundamentally concerned with what happens to employees after inclusion.

Incomplete Consciousness

The four decades' worth of legal and social science scholarship since the federal prohibition of employment discrimination has established that simply outlawing the exclusion of minorities was not enough to ensure that minorities were included in numbers equal to their representation in the relevant labor market. In trying to determine why minorities are still underrepresented, scholars have focused particularly on the legal

doctrine requiring that plaintiffs prove an adverse employment action was motivated by discriminatory intent. The law's emphasis on the motive of the employer – as opposed to the harm to the victim – has been termed a “perpetrator perspective”; the model requires legal decision-makers to look for a bad person who acted consciously and intentionally to bring about some discriminatory result. (Freeman 1990). The requirement of proving discriminatory intent has become a substantial obstacle for many plaintiffs because few today admit even privately to harboring bias, and virtually no one admits to acting on it. Not surprisingly, in today's labor market, every employer insists that it is an equal opportunity employer.

The legal requirements of proof of intent have generated doctrinal confusion and complexity. (Sullivan 2005; Zimmer 2004; Malamud 1994) Over the past two decades, the federal courts have ruled on a variety of evidentiary issues, such as: if a supervisor made a racist remark but did so in a context other than in acting on a decision about the plaintiff's employment, is that remark evidence of bias or is it an irrelevant “stray remark”? Must a plaintiff adduce “direct” evidence of discriminatory intent, or is circumstantial evidence sufficient? Is testimony by other employees about allegedly discriminatory events that are similar to what the plaintiff alleged she experienced relevant? Must a plaintiff who was passed over for promotion prove that the person who was promoted was less or equally qualified? As one doctrinal conflict is settled, a new one arises.

Apart from the doctrinal complexity, critics also assail the intent doctrine on consequentialist grounds: there is pervasive racial inequality at work yet no one is legally to blame for it except, possibly, the victims themselves. Frustrated with the arcane disputes over structures of proving discriminatory intent which, plaintiffs' lawyers believe, make it unduly difficult to prove a case, many legal scholars and social scientists began to question the focus on intent *vel non*. What if discrimination is the product of subconscious or unconscious biases, biases beyond our conscious awareness? (Krieger 1995; Oppenheimer 1993)

The notion of unconscious or negligent discrimination raises thorny questions. First, how do we know whether unconscious discrimination is a real phenomenon? Second, assuming that people do have unconscious racial desires or thoughts, can we identify them? To answer these two questions, social psychologists have developed the Implicit Association Test (IAT), which measures reaction times to subtle racial stimuli. (Lane, Kang & Banaji 2007). Their work has attracted the attention of legal scholars who employ it to argue that unconscious or subconscious discrimination is scientifically verifiable. (Kang & Banaji 2006). If the IAT does indeed measure unconscious racial thinking, a third question arises: does such thinking affect conduct in a way that law should recognize? A battle on this topic is being fought in the pages of law reviews, in which some scholars argue that social science evidence shows that unconscious and subconscious bias are pervasive and their pervasiveness justifies legal rules to remedy that bias (Kang & Banaji 2006) and other scholars argue that the evidence of a connection between unconscious bias and discriminatory conduct is weak or nonexistent. (Mitchell & Tetlock 2006). The difficult methodological problem is to link evidence of pervasive bias drawn from the IAT and other types of psychological tests with evidence of pervasive racial inequality in employment.

An equally difficult legal problem is choosing a standard for proving a connection between unequal outcomes in the absence of evidence of overt bias and an appropriate range of remedial measures. Should firms not hire people whose implicit bias is above a certain threshold? Should the law require firms to measure the cumulative implicit bias of their workplaces as a way to ascertain whether an environment is racially hostile? Already scholars have begun to engage the issue of de-biasing—that is, whether steps can be taken to remove or decrease our level of implicit bias (Bielby 2007; Jolls & Sunstein 2006). Should the law mandate that employers subject their employees to “de-biasing agents,” in addition to or in lieu of the usual diversity training programs? (Kang & Banaji 2006). For example, if having a black manager reduces one’s level of implicit bias, should that (rather than diversity) constitute a sufficient legal justification for engaging in race-based affirmative action in appointing managers? Finally, what if there are measures that minority employees could take to reduce implicit bias? If assimilation to dominant norms reduces implicit bias, may firms require minorities to assimilate, as, for example, by requiring black women to straighten their hair or by hiring only those who do?

The difficulty of determining an appropriate standard of proof or remedial structure to deal with the problem of implicit bias relates to larger questions about whether litigation is the right regulatory vehicle through which to combat implicit bias. Perhaps an *ex ante* regulatory solution (e.g., mandating that managers be screened for biases via psychological testing) might work better than an *ex post* litigation solution. Perhaps the optimal schema would be one that entails an anti-discrimination certification process to determine whether the firm has the appropriate protections in place to ensure that discrimination in that workplace is minimized.

The recent literature on implicit bias invites renewed attention to an older legal literature on the circumstances in which law prohibits practices that are neutral on their face but have a discriminatory impact. (Sullivan 2005). Charles Lawrence tackled this question in the context of constitutional law, arguing that when a law disparately burdens a non-white group it should be unconstitutional if that disparate impact reflects and entrenches negative social or cultural meanings about that non-white group. (Lawrence 1987). If his “cultural meaning” test were employed in the context of Title VII, an economically rational neutral employment practice – e.g., hiring table staff and busboys through word of mouth such that table staff were predominantly Anglo women and busboys were predominantly Latino men -- would be illegal if it fostered negative racial stereotypes. If implicit bias exists as a kind of background norm, maybe we are in a better evidentiary and conceptual position to ascertain whether facially neutral explanations for an adverse employment action – such as that the plaintiff had a poor attitude or was difficult to get along with – are in fact evidence of racial bias.

Doctrinally, the challenge would be to distinguish the legitimate race neutral explanations from the illegitimate ones. In other words, how do we know when the employer’s facially race neutral claim that an employee has a poor attitude is racially infused? Consider this problem in the context of gender. When an accounting firm passed over a successful female partnership candidate on the grounds that she was too abrasive, the Supreme Court majority in *Price Waterhouse v. Hopkins* could perceive the explanation as being possibly discriminatory because among the explanations partners gave for their decision was the advice that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear

jewelry.” (490 U.S. 228, 235) Absent the comments about her appearance, how should courts identify bias in comments about “abrasiveness”? In part because of this difficulty, the 1980s witnessed a pointed contestation about whether disparate impact should be the dominant framework for adjudicating discrimination claims. Lawrence’s proposals that were based on Freudian notions (and a prior generation of research) are now being revisited in the context of the recent empirical research such as that on the IAT test (*Connecticut Law Review Symposium* 2007).

A final question has to do with legitimacy. Assuming that unconscious racism is real and can be doctrinally managed, should unconscious discrimination claims be cognizable? If discrimination is inadvertent, then it is not clear that the employer is in the best position to prevent it. Scholars debate whether law should “punish” (or hold the employer liable for) something the manager did not intend. Should law focus on whether an institutional decision-maker did something “wrong,” and does “wrong” turn on intent? Or should law focus on whether an employee or a prospective employee experienced a recognizable harm? (Bagenstos 2003; Jolls 2001).

There is no consensus on the question of whether subconscious and unconscious discrimination play a meaningful role in producing discriminatory outcomes. Nevertheless, the fact that employment remains racially segregated invites continued scholarly attention to the question. Incomplete consciousness looks to be a prime candidate to explain the persistence of inequality in the absence of evidence of the sort of overt bias that existed half a century ago, but studying the phenomenon and designing legal rules to address it remain vexing empirical and theoretical problems.

Performance and Assimilation

Ordinarily we do not think of race in terms of assimilation, in part because of the claim that that one’s capacity to assimilate is itself racialized. Thus the notion that black people, because they are (physically marked as) black cannot fully assimilate into mainstream society. Because of the currency of this “impossibility thesis,” (Robinson 2001; Inniss 1999; Jaynes & Williams 1989; Haley & Malcolm X 1965) discussions of assimilation tend to be class-oriented. As blacks and other racial minorities who might have once been subject to the impossibility thesis are being included into mainstream working environments, however, the assimilation question is becoming relevant to the operation of contemporary race discrimination.

After the decline of public discussion of the alleged racial inferiority of some European immigrant groups, discrimination against immigrants was rarely thought to be about immigrant status *per se*. More frequently, this discrimination was deemed to be a reaction to perceived lower-class behavior. The thinking was that once the Irish, Italian, Jewish, Eastern and Southern European immigrants of the early twentieth century assimilated into American culture and jettisoned the ways of the “old world,” they would ascend the social and economic hierarchy, join elite social groups, and lose their outsider status. The idea that various immigrant groups could assimilate rendered institutional exclusion passé and offered an optimistic story that all forms of discrimination—particularly racial discrimination—could be transcended over time.

The immigrant assimilation story has not gone unchallenged. The literature on white ethnics—and particularly Jewish and Irish people—demonstrates the way in which

racism can actually facilitate assimilation. Both the Irish and the Jews became white because of the existence (not the absence) of racism. (Ignatiev 1995; Brodtkin 1998) The literature on Latina/o assimilation also helps to reveal the nexus between assimilation and racism. (Golash-Boza 2006; Johnson 1997) Scholars are asking, among other questions, whether Latino/a integration in American society is more like that of ethnic whites or that of African Americans? Asked another way, are Latinos/as having an ethnic experience in the United States or a racial one? (Rodriguez 2006; Haney López 1997). The heated political debates about bi-lingualism and English-only initiatives are about both race and assimilation. (Matsuda 1991; Rodriguez 2006) What unites the literature on Latina/o assimilation is its focus on the many ways in which institutions subtly and overtly make it difficult for immigrants to thrive or succeed, whether through rules about language, religious practice, appearance, conformity to customer preferences, or familiarity with unspoken norms about professionalism, social interaction, or business practice. The central normative question this literature presents is whether people should be forced to give up some aspect of their identity—for, example, language—in order to fit into mainstream American society and its institutions. (Rodriguez 2006; Haney López 1996).

The issue of “fit” is directly applicable to race. One way to make this point is to focus on Latinas/os as a racial group. To extent that Latinas/os are conceptualized in this way, the pressures they experience to fit in are necessarily racial pressures. Part of the difficulty with this argument is the racial assumption about Latinas/os it reflects: that they are a single racial group. It may be more accurate to say that Latinas/os occupy all racial categories—white, mestizo, black, Indian, etc. (Rivera 2007)

There is another way to make the argument about “fit” and race that does not depend on conceptualizing Latinas/os as a single racial group. We are in a better conceptual position to understand this argument once we move away from a static or phenotypic understanding of race to a performative understanding. Across American workplaces, employees are being asked—explicitly and implicitly—to shape aspects of their identity to fit into a dominant workplace culture. Assimilation may take the form of changing one’s appearance, attending to diction, or adopting particular pastimes. A lively debate addresses the question whether assimilationist pressure is racial. Scholars have debated, for example, whether it is racial discrimination to prohibit black women from wearing their hair in braids. (Caldwell 1991; Rosette 2007; Flagg 2007) Even those who see pressure to assimilate as a form of race discrimination debate whether anti-discrimination law is the best doctrinal method to challenge employment policies that demand assimilation. (Fisk 2006; Selmi 2006) More broadly, does conceptualizing race as a performative identity conflate race with ethnicity and/or national origin?

The dominant anti-discrimination approach has been to conceptualize blackness as a fixed and static racial category. To be black was simply to be black, regardless of the way in which some persons of African or Caribbean ancestry were perceived as being “more” or “less” black based on their skin color, hair, or facial structure, or their class status, accent, manner of dress or deportment. If race is an expressive identity that can be constituted by language, accent, demeanor, or dress, where does race end and ethnicity begin?

As racial minorities are being included in mainstream workplaces as nominal equals (as opposed to as invisible support staff), they are simultaneously also being asked to assimilate. This assimilatory demand creates an incentive for employees to play with

their racial identity—to push and pull it at the margins—in non-phenotypic terms. The implications of this racial flexibility for anti-discrimination law will be precisely the question employment discrimination scholars will be forced to engage. More fundamentally, scholars are beginning to think about how to articulate where the borders of race begin and where race shades into class, ethnicity, and sexual orientation (none of which – except sometimes ethnicity – is currently a protected status under federal anti-discrimination law).

Rational Discrimination and Accommodation

Though not always explicitly framed in this way, rational discrimination and accommodation present an after-inclusion problem. Is it rational for an employer to refuse to hire people whose productivity, after inclusion, the employer believes will not be on par with that of other employees? Although early work assumed that most forms of discrimination were economically irrational because the employer would artificially constrict its pool of talent, scholars have observed that in many circumstances, it is economically rational for an employer to discriminate against people possessing or lacking a certain trait. Employers might prefer not to hire people with genetic or other proclivity to illness or injury, or women of childbearing age, or people with physical or mental disabilities. Through a lively debate about which traits ought to be barriers to occupational equality (differential work ethics, for example) and which ought not (the ability to see, hear, or walk, or having children), a number of scholars, primarily in the area of disability and gender, argued that law should address the problem of rational discrimination by imposing an affirmative obligation on employers to accommodate certain traits. (Bagenstos 2006; Jolls 2001; Fisk 1986) The notion is that if, after inclusion, the employer redesigned the workplace to eliminate barriers to one worker's being able to work as productively as another, the ability of each employee to contribute to the employer's profits is on par with every other employee's and the cost of particular conditions will no longer be borne solely by the individuals who have the condition. A duty to accommodate difference, therefore, can be conceptualized as a kind of preferential treatment after inclusion.

Accommodation mandates would not only spread some of the costs of disability from individuals onto society as a whole, they would, proponents hoped, eliminate stereotypes by forcing employers to see that many prospective employees could accomplish much more in a job than the employer might have imagined. An accommodation mandate would thus show in some cases that accommodation was not really required at all, except to overcome an employer's bias about the capacities of some employees. Another goal of accommodation was de-biasing. Eliminating the bias in favor of able-bodied persons would make elevators and ramps rather than stairs the dominant way of building. Eliminating the bias in favor of men with stay-at-home wives would make flexibility in schedule and working from home the norm, rather than the 9-to-6 day or 24/7/365 availability. The idea behind de-biasing was to restructure the institution of work and the norms about what constitutes "hard work" and a "good worker" so as to include more "different" kinds of people within the social norm of the capable worker. Central to this project was the realization that different workers might have to be included in the workplace on different terms.

The concepts of rational discrimination and accommodation are decidedly more controversial with respect to race than with respect to disability and pregnancy. A wave of scholarship in the 1960s staked out the position that, by and large, racial bias was irrational. (Schuman & Harding 1964; Simpson & Yinger 1958). The exception was instances in which an employer who herself harbored no racial animus discriminated in order to accommodate customers' racist preferences. More recently, however, courts and scholars have struggled to determine whether discrimination that is based on generalizations about statistically significant differences between races should be condemned as simple stereotyping or should be understood as a kind of rational discrimination. In either case, the question is whether law should compel employers to revise their judgments about the capable worker, even if it means imposing on firms the cost of hiring a worker who turns out to be more risky or more expensive to employ.

Consider an employer who knows the incarceration rates of young black men and middle-aged white women. The employer might prefer to hire the latter based on the conclusion that young black men are far more likely to be criminals than middle-aged white women. Similarly, an employer who knows that many African Americans have been beneficiaries of affirmative action in education might conclude that, as between a black and a white job candidate who graduated from the same college, the white candidate might have had higher predictors of academic achievement upon entering the school. (Sander 2006). If the employer believes that predictors of academic achievement are correlated with job performance, the employer might rationally choose to discriminate against the black candidate.

This problem could occur after inclusion as well. That is, an employer could decide that, because of affirmative action, a black candidate is less qualified than a white candidate. The employer could nevertheless decide to hire both candidates but give the white candidate more and better work. Over the course of several years, this disparate treatment could result in the white candidate being more qualified for promotion than the black candidate. This "more qualified" status is directly a result of the way in which the white and black candidates were treated after inclusion.

The foregoing examples raise at least the following two questions. First, should they be conceptualized as rational discrimination? Second, assuming the answer is yes, how do we think about accommodation? Commitment to a robust notion that anti-discrimination law should spread from individuals to firms some of the cost of certain traits (e.g., a greater likelihood of having a prior criminal record) might suggest that the law should compel employers to take a chance on young black men, even if they are statistically more likely to have criminal records. With respect to affirmative action, some argue that, in effect, it "accommodates" the fact that the affirmative action beneficiaries might not do as well on the job as the other applicants. Of course, this formulation can be contested. Traditional measures of academic achievement may, for example, under-predict job performance of outsiders who do not compete on a level playing field in school. That is, a variety of institutional dynamics might negatively affect academic achievement of non-white students in predominantly white schools and poor resources might negatively affect the academic achievement of non-white students in predominantly non-white schools. Regardless of whether affirmative action beneficiaries perform less well than their counterparts, to the extent that that perception exists—and is instantiated in law—scholars are going to continue to struggle with whether the language

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of rational discrimination and its concomitant, accommodation, ought to be applicable to the racial context. If the answer is yes, should accommodation transcend the hiring context and operate after inclusion? Some already argue that the line between anti-discrimination (in the race context) and accommodation (in the disability context) is incoherent. (Bagenstos 2003)

Intra-racial Discrimination

As more racial minorities successfully climb the workplace ladder, they become part of the decision-making apparatus. They become institutionally empowered to influence the hiring and firing of other outsiders. They also become racial barometers, which is to say, their white counterparts will turn to them to ascertain the racial climate of the workplace and, more particularly, to determine the presence or absence of intentional discrimination in the workplace. (Carbado & Gulati 2004). But what if some of the first generation of outsiders treat members of their own racial groups worse than they do the white employees?

Consider why black managers might treat junior black employee worse than junior white employees. Black managers might believe that non-whites have the racial burden of working twice as hard as whites; anything less would not disrupt negative racial stereotypes of the group. Alternatively, the senior black employee could have internalized negative stereotypes of their own racial group. This could produce a scenario in which, for example, a black manager racially allocates work, preferring an Asian American employee over her black counterpart based on racial stereotypes about alleged disparity between Asian-American and African-American work ethics. Still another reason to think blacks in leadership positions might treat junior blacks more harshly than junior whites relates to self-monitoring; blacks might be less inclined to self-monitor their racial interactions with other blacks on the view that they are not likely to discriminate against members of their own racial group. In other words, because intra-racial racial discrimination might be unintelligible or unimaginable to black managers or otherwise at odds with their sense of racial commitment and community, they do not monitor their interactions with their junior black colleagues to ascertain whether they are racially infused. In addition, black managers might mistreat their black employees to shore up their own standing in the firm or to prove to their white colleagues that they are not going to engage in racial favoritism. (Carbado & Gulati 2004)

Apart from the question of whether black managers treat black employees worse than white employees is the question of whether they treat some black employees better than others. Assume that Paul, a black manager, is more than happy to promote those black employees who perform their race in a particular way—that is, those who are most conforming in terms of their institutional behavior. Can the disfavored black employees bring suit? One line of cases suggests that the answer might be yes; that intra-racial discrimination might be cognizable under Title VII. For example, courts have long recognized colorism cases—that is, cases in which a black person discriminates against another black based on the fact that that person is too dark or too light. (Banks 2000; Jones 2000; Hernandez 2007). But courts also employ the fact that the discrimination plaintiff and the institutional decision-maker are of the same race to find an absence of discrimination. This creates an incentive for majority-white firms to structure their line of

authority so that it appears that hiring and firing decisions involving non-whites are made by non-whites. Of course, some institutions will have more institutional space than others to engage in such strategic behavior. The point is that, if a firm is worried about discrimination, it can structure things so that the key decisions are made in the intra-race context.

Another difficulty with intra-racial race discrimination cases is class. At some point, a black manager's preference for another black person begins to look like class discrimination. How we dress, speak, and comport ourselves are class inscribed. This does not mean that race is not also at play. As with the issues of assimilation and identity performance discussed above, it becomes difficult to know where class ends and race begins. (Malamud 2003). This problem of class is all the more salient because of our tendency to view race as phenotype. To the extent that a black manager picks one phenotypically black person over another phenotypically black person (and both are phenotypically black in the same way—i.e., there is not a dark skin/light skin problem), there is no discrimination on the basis of phenotype. For many, that means there is no discrimination on the basis of race. (Carbado & Gulati 2003).

Significantly, this problem exists with respect to whites as well. Consider a scenario in which a white manager hires or promotes a mainline Protestant graduate of an Ivy League college who enjoys playing squash rather than a working class, evangelical graduate of a Southern Bible college who enjoys watching Nascar races. An argument can be made that this is purely class discrimination. But, plausibly, race is at play as well. The very notion of a southern hick or a redneck does not make sense outside of its historical racial association.

Much is at stake, doctrinally and politically, with respect to whether an alleged act of discrimination is framed as class-based rather than a race-based claim. For one thing, class is notoriously difficult to define. (Malamud 1995). For another, doctrinally, class-based discrimination claims are not cognizable. Finally, because many people believe that class identity is fluid, that through hard work and determination the economically disadvantaged can transcend their class identity and become economically advantaged, there is little political will to address class inequality. These conceptual, doctrinal, and political difficulties with class makes race as a category around which to organize both legal and political anti-discrimination work all the more important. Scholars will therefore continue to think critically and carefully about where to draw the race/class line—and so will courts. How we draw this line after inclusion will shape how we respond to instances in which outsiders (particular juniors) experience disparate treatment in the workplace at the hands of other outsiders (particularly seniors).

Racial Endogeneity

Much work has documented the myriad ways in which race is socially constructed. (Gross 1998; 2006; Harris 2001; Crenshaw 2005) The claim that race is a social construction is deeply implicated in what we call inclusive exclusion. The terms upon which outsiders are included in the workplace and the ways in which they perform their racial identity after inclusion constructs race as well. Consider this point with respect to the widely shared belief that diversity is good for business. Sometimes this commitment to diversity is so diluted that it comes to mean anything but racial diversity.

(Edelman, Fuller, & Mara-Drita 2000). But when diversity means *racial* diversity and a firm decides to reduce the real or perceived reputational and economic costs of maintaining an all-white workplace, the firm's diversity hiring will have after inclusion effects. It produces (constructs) particular racial types for the workplace. Put another way, how an employer understands and operationalizes its commitment to diversity shapes the racial identity of the people within the workplace.

If an employer understands race to be nothing more than a physical marker, and it wants a diverse workplace based on skin color, it will employ black people who "look" "black." Under such a scenario, the employer might discriminate against light-skinned blacks—blacks who could pass for whites—based on one of two inter-related ideas: (1) that really light-skinned blacks are simply not black enough and (2) the fact that they are not black enough means that the firm won't get any diversity credits for hiring them. This would not necessarily mean that all light-skinned blacks would be excluded. Under American rules of racial recognition, many fair skinned black people are, based on hair texture and facial features, readily recognizable as blacks – but if they are perceived as less black, their diversity value is reduced. The point is that the racial content of employees after inclusion is a direct result of the how the employer operationalizes its commitment to diversity.

There are other approaches to race an employer could take. These, too, have after inclusion effects. An employer could, for example, take a view of race that is more focused on social meaning: black people have rhythm or are more attuned to certain aspects of pop culture or are lazy; white people are less hip or less athletic or are more industrious. Under this approach, the question is not simply whether the prospective employee is black in terms of physicality but whether she is black in terms of social behavior. Crudely, the question is whether, from the employer's perspective, she acts black. The employer could believe that people who act black or who are otherwise racially salient are more likely to embody negative racial stereotypes. Alternatively, the employer could worry about the cost of difference to the extent that difference causes grit rather than grease (division and distrust rather than teamwork and loyalty), diverse workplaces are difficult to manage. (Langevoort 2004). One way to reduce the grit and advance diversity is to hire people who look black but act white. This approach simultaneously maximizes diversity and reduces the transaction costs of managing difference. (Carbado & Gulati 2003; Yoshino 2006)

Three points about the foregoing bear mention. First, in both scenarios, race is not exogenous to the employment process. It is in part constituted in and therefore endogenous to that process. Put another way, in the context of hiring, employers make decisions about what race is—which is to say, they construct race. Second, how they do so shapes the identities of the employees after inclusion. While in the first example the employer constructs race by focusing on physicality, the employer in the second example does so by focusing on social meaning. These two approaches produce two different categories of black people for the workplace. Third, how employers operationalize diversity can produce an inclusive exclusion whereby the inclusion of some blacks is accomplished by the exclusion of others.

Racial endogeneity is not just a function of how employers screen prospective employees, it is also a function of how employees define themselves in the workplace after inclusion. A person of black and white parentage might define herself as bi-racial,

not black. Perhaps she does so because she fears that a black racial designation carries with it the baggage of negative racial stereotypes. Alternatively, she may not self-define as black because she does not want to be viewed as a beneficiary of affirmative action. Perhaps she feels that her racial identity is determined by whether she was raised by one parent but not another, or by whether her family associated more with “black culture” or “white culture.” Or perhaps the employee believes that one’s racial identity is a function of simple mathematics: black + white = $\frac{1}{2}$ white and $\frac{1}{2}$ black, or bi-racial.

Whatever the employee’s reasons for self definition, it creates a potential problem for a firm interested in promoting diversity. When employers provide the racial demographics of their workplaces, bi-racial is rarely a category – perhaps because bi-racial is barely cognizable. The standard racial categories are black, Asian, white and Native American. Within which of the foregoing racial boxes should the firm place a person who explicitly identifies as bi-racial? Is the firm obliged to defer to the employee’s self-definition or can it choose the category to ascribe —i.e., black—to the employee? What are the anti-discrimination implications—doctrinally and normatively—of a firm doing this? And does the answer to that question change if affirmative action played a role in the original hire (where, presumably, the employee in question was not consulted on his preferred racial classification).

III. Conclusion

While courts in the last decade have often evinced hostility to anti-discrimination claims, the scholarship in the area has experienced bountiful theoretical, doctrinal, and empirical growth. In an area of law that over its first several decades was prone to narratives either of progress (stories of law facilitating racial uplift and increasing racial harmony) or despair (stories of the persistence of inequality and law’s abandonment of the task of ending it), the narrative structure of the scholarship of the last decade might be described instead as a burrowing in, uncovering, or illuminating.

Turning from metaphors of rise or fall to metaphors of reinterpreting, revealing, or re-imagining, scholarship has shown how race remains a salient social category and a powerful predictor and determinant of inequality. Indeed, discrimination scholarship has shown that the racial composition of those empowered officially to declare whether discrimination has occurred affects the meaning of anti-discrimination law. Specifically, changes in the demographics of the judiciary, including increased numbers of minorities and women on the bench, prompts scholars to explore what role, if any, race and gender has on judging in the anti-discrimination context. (cf. Boyd et al. 2007, Peresie 2005). The nature and meaning of race remain in flux in society and in law and social science scholarship. In studying this, legal scholarship has participated in a transformation of our understanding of the role of race in society and of the nature and sources of racial inequality, even as courts have all but given up on doing anything about it. Indeed, the general hostility (and occasional sympathy) of courts to anti-discrimination cases might itself provide the next generation of discrimination scholars with fascinating material for study.

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