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Antidiscrimination Law's Effects on Implicit Bias

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Over the past two decades, a broad consensus has developed among scholars of antidiscrimination law. The consensus is that the problem of bias on the basis of race and other traits in American society today is primarily a problem of *implicit* rather than conscious bias. As Charles Lawrence suggested nearly twenty years ago, while consciously bigoted attitudes may have declined over time, the problem of implicit, or unconscious, bias on the basis of race and other traits has persisted.¹ On this view, while actors might well have no conscious prejudice and

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¹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23, 328-44 (1987).

sincerely disclaim and reject bigotry, they might nonetheless harbor deep-rooted bias that subtly shapes their behavior across many domains.² And existing antidiscrimination law doctrine, according to this modern consensus, has paid far too little attention to implicit bias and its effects on individuals' behavior.³

This broad consensus among scholars of antidiscrimination law has ultimately left the field at a difficult crossroads. The consensus suggests that existing antidiscrimination law doctrine is to a large degree a marginal force, aiming at a target – consciously biased behavior – that is distinctly out-of-date in today's world. At the same time, the field of antidiscrimination law has failed to make progress of any sort on efforts to reform this law in response to the problem of implicitly biased behavior.⁴ The resulting sense of deep dispirit about existing antidiscrimination law threatens both the broad-based political and societal support this law has always enjoyed and, on a more practical level, the degree of enforcement effort brought to bear in making sure the promises of existing antidiscrimination law are fully realized. If current law governing discrimination is so hopeless in addressing the central fault line around bias in American society today, it is natural to wonder whether this law can for long retain the grip it has always held on the American psyche.

This paper suggests, however, that an important piece of the relationship between antidiscrimination law and implicit bias has been overlooked entirely in the existing debate. The missing piece is the way in which current antidiscrimination law – although it concededly does not aim at implicitly biased behavior in a significant way – nonetheless tends to have the *effect*, in a wide range of important respects, of

² The antidiscrimination law literature adopting this view is vast. See sources cited *infra* note 14. Analyses of implicit bias outside of the area of antidiscrimination law include Jody David Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995) (analyzing the implications of implicit bias for courtroom evidentiary rules), and Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (analyzing the implications of implicit bias for broadcast communications policy).

³ Again, the antidiscrimination law literature is vast. See sources cited *infra* note 15.

⁴ See *infra* Part I.A.

reducing implicit bias. In this account of antidiscrimination law, the existing legal regime occupies a far more positive, although admittedly still imperfect, relationship with implicit bias. As explored in detail below, in diverse areas ranging from employment law to education law to the law governing various types of voluntary organizations, current antidiscrimination doctrines are likely to shape and affect the level of people's implicit bias in important ways. Understanding these previously ignored effects of current antidiscrimination law allows us to appreciate what is valuable, good, and worth celebrating about this law, notwithstanding its undeniable shortcomings.

The analysis offered in this paper takes as its starting point a particularly striking recent finding from the enormous and much-discussed social science literature on implicit bias – a finding that (unlike much of the social science work on implicit bias) has received little attention in the legal literature.⁵ The finding, stated in broad terms, is that discrete changes in either the population make-up of a group or the physical and sensory features of an environment can substantially reduce the degree of implicit bias exhibited by those present. To give one evocative example, the simple step of having an African-American individual in a leadership role in a group setting turns out to have a substantial effect on the level of implicit racial bias exhibited by others in the group.⁶ As described below, application of this sort of insight – even when viewed in light of appropriate caveats about the potential limits of the existing social science evidence⁷ – points to the real effects of existing antidiscrimination law in reducing the likely level of implicit bias across a range of important contexts. Below I explore both simple and subtle mechanisms through which existing antidiscrimination law may reduce implicit bias.

⁵ For a nonexhaustive list of work in the legal literature discussing social science research on implicit bias (although not the finding emphasized in this paper), see *infra* note 42.

⁶ See Brian S. Lowery, Curtis D. Hardin & Stacey Sinclair, *Social Influence Effects on Automatic Racial Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 842, 844-45, 846-47, 850-51 (2001). For a full description of the Lowery et al. study, see *infra* note 60 and accompanying text. For descriptions of a variety of other studies on the effects of population make-up and the physical and sensory environment on the level of implicit bias, see *infra* notes 61-69, 111-114 and accompanying text.

⁷ See *infra* Parts I.B, III.

Part I of the paper offers an account of how the antidiscrimination law debate came to be at its current difficult crossroads, with scholars in the field highly skeptical of the modern-day relevance of existing antidiscrimination law but also not able to progress in any real way on a range of attempted reforms of this law. Part II develops the paper's central argument that current antidiscrimination law, while it admittedly does not aim at implicitly biased behavior in any significant way, nonetheless tends to have the effect of reducing implicit bias in workplaces, schools, universities, and various types of voluntary organizations. This analysis offers a perspective on current antidiscrimination law that has been entirely missing from the existing debate. Part III briefly comments on competing normative perspectives on implicit bias.

For all of its unquestioned limitations in addressing implicitly biased behavior, existing antidiscrimination law nonetheless plays an important role in reducing the level of implicit bias across a wide range of contexts. While this law is certainly not perfect, it is just as certainly not the hopeless creature it is often depicted to be by antidiscrimination law scholars. The hope of this paper is that we will come to recognize that our current body of antidiscrimination law, while surely imperfect in a world characterized at least as much by implicit as by conscious bias, is worth saving, worth a serious commitment of our enforcement resources, and, indeed, worth cherishing despite its imperfections.

I. The Difficult Crossroads: Antidiscrimination Law and Implicit Bias

Not so long ago in American society, conscious discrimination was a frequent occurrence. Employment advertisements regularly classified jobs by race and sex, while schools, swimming pools, and other facilities were widely segregated.⁸ The idea that current antidiscrimination law has played, and continues to play, an

⁸ See Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 235 (1998) (employment advertisements); sources cited *infra* notes 91-92, 100 (schools, swimming pools, and other facilities).

instrumental and desirable role in reducing such forms of consciously biased action is largely uncontroversial in existing antidiscrimination law scholarship.⁹

Equally uncontroversial in existing antidiscrimination law scholarship is the idea that the central problem in American society today is not the traditional problem of consciously biased behavior but, instead, the more subtle and insidious problem of implicitly biased behavior.¹⁰ Such behavior, in sharp contrast to consciously biased behavior, reflects attitudes of which actors are unaware and, indeed, would often sincerely disclaim. A striking recent demonstration of the prevalence of such attitudes comes from the “Implicit Association Test” (IAT), which has received extensive discussion in the legal literature over the past five years.¹¹ The IAT is compelling in its simplicity. Individuals are asked to categorize a series of words or pictures into four groups, two of which are racial or other demographic opposites, such as “black” and “white,” and two of which are the categories “pleasant” and “unpleasant.” Groups are paired, so that a respondent is asked to press one key on the computer for either “black” or “unpleasant” words or pictures and a different key for either “white” or “pleasant” words or pictures (a stereotype-consistent pairing); or is asked to press one key on the computer for either “black” or “pleasant” words or pictures and a different key for either “white” or “unpleasant” words or pictures (a stereotype-inconsistent pairing). Implicit bias against blacks is defined as faster categorization when the “black” and “unpleasant” categories are paired than when the “black” and “pleasant” categories are paired. As it turns out, almost everyone displays substantial implicit racial bias on the IAT.¹²

⁹ A rare exception is the work of Richard Epstein. See RICHARD EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* xii (1992).

¹⁰ See sources cited *infra* note 14.

¹¹ See sources cited *infra* note 42.

¹² See, e.g., Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 105 (2002).

In an important disjunct highlighted by a large body of existing antidiscrimination law scholarship, however, current antidiscrimination law doctrines do relatively little to regulate implicitly biased behavior.¹³ Existing antidiscrimination law scholarship, in response to this gap, has attempted to craft a wide range of reforms of both constitutional and statutory antidiscrimination law (Part I.A below). In many instances this scholarship has drawn on a large body of recent social science research, while neglecting a separate gap between that research and the kinds of decisions antidiscrimination law polices (Part I.B). The present lack of any real momentum on legal reform, set against the backdrop of strong disparagement of the modern-day relevance of existing antidiscrimination law, has left the field at a difficult – and dangerous – crossroads (Part I.C).

A. Antidiscrimination Law and Implicitly Biased Behavior

As suggested just above, an enormous body of modern antidiscrimination law scholarship emphasizes the importance of implicitly biased behavior,¹⁴ deplores current antidiscrimination law's

¹³ See sources cited *infra* note 15.

¹⁴ See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. (forthcoming 2006); Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969-79, 981-85 (1993); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structured Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95-111 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-1211 (1995); Lawrence, *supra* note 1, at 322-23, 328-44; R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 825-36 (2004); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L. J. 1717, 1785-98, 1806-25 (2000); David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 902-15 (1992); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180-235 (2005); Marc. R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?* 7 EMPLOYEE RTS. & EMP. POL'Y J. 459, 461-62 (2003); Reshma M. Saujani, "The Implicit Association Test": A

general failure to target such behavior,¹⁵ and, as described in this

Measure of Unconscious Racism in Legislative Decision-Making, 8 MICH. J. RACE & L. 395, 406-09 (2003); Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136-37 (1997); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM L. REV. 458, 468-74 (2001).

¹⁵ See Bagenstos, *supra* note 14 (stating that the “remedies provided by existing law are no match” for implicitly biased behavior in today’s workplace); Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L. J. 2009, 2018-30 (1995) (concluding that existing statutory employment discrimination law would not provide relief for an employee who was disadvantaged by the implicit use of criteria that are more strongly associated with whites than nonwhites); Flagg, *supra* note 14, at 958 (stating that existing Equal Protection Clause doctrine “perfectly” reflects whites’ failure to “scrutinize the whiteness of facially neutral norms”); Green, *supra* note 14, at 111 (stating that existing statutory employment discrimination law “is ill-equipped to address the forms of discrimination that derive from organizational structure and institutional practice in the modern workplace”); Krieger, *supra* note 14, at 1164 (arguing that the way in which statutory employment discrimination law “constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias” prevalent today); Lawrence, *supra* note 1, at 323 (stating that existing Equal Protection Clause doctrine “ignores much of what we understand about how the human mind works” and “disregards . . . the profound effect that the history of American race relations has had on the individual and collective unconscious”); Lenhardt, *supra* note 14, at 878 (recognizing the “limitations inherent in the Supreme Court’s current approach” under the Equal Protection Clause); Lopez, *supra* note 14, at 1830-43 (describing the gap between subtle forms of discriminatory conduct and current Equal Protection Clause doctrine); Oppenheimer, *supra* note 14, at 972 (stating that while “much employment discrimination” results from unintentional behavior, “the courts have looked at employment discrimination as a problem of conscious, intentional wrongdoing”); Page, *supra* note 14, at 179-80 (arguing that existing Equal Protection Clause doctrine in the context of peremptory challenges to jurors fails to respond in an effective manner to implicit discrimination); Poirier, *supra* note 14, at 459-63 (criticizing, in light of evidence of implicitly biased behavior, the focus of employment discrimination law on various forms of intentional misconduct); Saujani, *supra* note 14, at 413 (asserting that existing Equal Protection Clause doctrine is “incapable of rooting out racial discrimination where it is most pernicious”);

section, argues extensively for reforming this law in a variety of ways. In many respects initiating this literature, Charles Lawrence's article about implicit bias and constitutional law argues that the Supreme Court's Equal Protection Clause jurisprudence traditionally, but incorrectly, views allegedly discriminatory conduct as either "intentionally and unconstitutionally . . . discriminatory" or "unintentionally and constitutionally discriminatory."¹⁶ The traditional view is incorrect, according to Lawrence, because in fact much such conduct is "neither intentional – in the sense that certain outcomes are self-consciously sought – nor unintentional – in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision maker's beliefs, desires, and wishes."¹⁷ When, for instance, a law enforcement agency adopts a hiring approach that results in the exclusion of many African-Americans from law enforcement positions, the action may reflect neither a willful, conscious effort to keep this group out of the workplace nor a step that is free of racially inflected "beliefs, desires, and wishes."¹⁸ Thus, Lawrence claims, the existing focus under the Equal Protection Clause on consciously biased conduct is too narrow and, he suggests, should be replaced by judicial inquiry into whether the "cultural meaning" of the challenged conduct points to implicit bias.¹⁹ (He suggests reasons to think the law enforcement agency noted above could be liable under this test.²⁰) Other constitutional law scholars have echoed Lawrence's critique of existing Equal Protection Clause doctrine²¹ and have suggested alternative

Siegel, *supra* note 14, at 1137 (stating that "the empirical literature on racial bias" suggests that "most race-dependent governmental decision-making will elude equal protection scrutiny"). The distinctive perspective of Susan Sturm is discussed *infra* text accompanying notes 53-56.

¹⁶ Lawrence, *supra* note 1, at 322. The Equal Protection Clause states that "[N]o State shall . . . deny to any person . . . the equal protection of the laws." U.S. Const. Amend. XIV, §1.

¹⁷ Lawrence, *supra* note 1, at 322.

¹⁸ *See id.* at 369-76.

¹⁹ *See id.* at 324, 355-81.

²⁰ *See id.* at 370-76.

²¹ *See, e.g.,* Flagg, *supra* note 14, at 980-91; Lopez, *supra* note 14, at 1830-43; Page, *supra* note 14, at 179-80; Saujani, *supra* note 14, at 413.

means of bringing implicitly biased behavior within the reach of the Equal Protection Clause.²²

While the constitutional law scholars' diagnosis of the problem of the treatment of implicitly biased behavior under the Equal Protection Clause has met with hardly any disagreement, their proposed solutions have met with hardly any agreement. Lawrence's proposed "cultural meaning" test has received only a small fraction of the mammoth scholarly attention devoted to his field-opening article,²³ and much of the discussion that does exist has been critical. Prominent antidiscrimination law scholars who strongly support the focus on implicitly biased behavior have argued that the cultural meaning test is difficult if not impossible to apply²⁴ or is flawed on other grounds.²⁵ Meanwhile, other proposals to reform Equal Protection Clause doctrine have typically met with even greater skepticism – again by those who share the same underlying concerns and commitments.²⁶

The same pattern of broad consensus on the problem and broad disagreement on the solution appears in existing scholarship on statutory antidiscrimination law. A threshold question raised by the shift in the discussion here from constitutional to statutory antidiscrimination law is whether reform on the statutory side in response to the problem of

²² See, e.g., Flagg, *supra* note 14, at 991-1017; Saujani, *supra* note 14, at 413-18.

²³ A Westlaw search revealed 1,351 law review articles citing Lawrence's article. Of these, 1,132 did not even contain the phrase "cultural meaning." Seventy-nine articles mentioned the "cultural meaning test," but many of those contained only a passing reference to the test.

²⁴ See, e.g., Richard Delgado, *Two Ways To Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2295 (2001); Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 665 (2003).

²⁵ See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1033 (1988); Lopez, *supra* note 14, at 1842 n.458.

²⁶ See, e.g., Kang, *supra* note 2, at 1537 n.245 (stating, in response to a proposal to incorporate measures of implicit bias directly into determinations of liability under the Equal Protection Clause, that "leading social cognitionists" would view such approaches as "crude").

implicitly biased behavior is as necessary as reform on the constitutional side in response to this problem. In the employment setting – on which most of the existing statutory antidiscrimination law scholarship has focused – the governing statute at the federal level, Title VII of the Civil Rights Act of 1964,²⁷ unquestionably goes beyond the constitutional standard under the Equal Protection Clause. Under Title VII, employers face liability not only for intentional discrimination under the law’s “disparate treatment” branch, but also, under its “disparate impact” branch, for facially neutral employment practices that disproportionately and unjustifiably disadvantage on the basis of race or other protected traits.²⁸ On occasion scholars addressing statutory antidiscrimination law have advocated expanded versions of Title VII’s disparate impact branch to address the problem of implicit bias in employment decisions, as discussed more fully below.²⁹ But most scholars discussing such implicit bias under Title VII have taken the view that disparate impact liability is not an effective tool in real-world litigation³⁰ (a point discussed more fully in Part II.A.2 below) and, accordingly, have given predominant emphasis to Title VII’s disparate treatment branch. In this respect, then, the scholarship on statutory antidiscrimination law ends up operating in a framework similar to the framework in which the constitutional analysis occurs.³¹

A very large literature has urged reforms of Title VII’s disparate treatment branch to better address implicit bias in employment decisions. Some scholars have argued for a negligence-like approach under Title VII, creating liability on an employer for (as one scholar put

²⁷ 42 U.S.C. §§2000e–2000e-17.

²⁸ *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

²⁹ *See infra* note 40.

³⁰ *See, e.g.*, Green, *supra* note 14, at 138-44; Krieger, *supra* note 14, at 1162 n.3; Poirier, *supra* note 14, at 460.

³¹ The standard of intent under Title VII’s disparate treatment branch may, however, differ somewhat from the standard of intent under the Equal Protection Clause. Indeed, a few scholars have suggested how Title VII’s disparate treatment branch may reach some instances of implicitly biased behavior. *See, e.g.*, Selmi, *supra* note 24, at 661-63, 666-68. But even these scholars do not seem to question the notion that Title VII’s disparate treatment branch, like the governing standard under the Equal Protection Clause, aims centrally at consciously biased behavior.

it) “making employment decisions which have a discriminatory effect, without first scrutinizing its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping.”³² Linda Hamilton Krieger, in an important article that in a sense did for statutory antidiscrimination law what Lawrence’s article did for constitutional antidiscrimination law, expresses serious skepticism about the broad negligence-like approach on grounds of administrability³³ but advances an alternative set of Title VII reforms that emphasize whether implicit bias was an “actuating factor” in an employment decision.³⁴ Thus, for instance, in Krieger’s example of a Salvadoran man dismissed from his job at a box manufacturing plant, the dismissal did not appear to have resulted from conscious prejudice against Latinos, but, nonetheless, the “subtle, yet discernible pattern of differential treatment” of Latinos at the plant should, in Krieger’s view, have a much more natural counterpart in Title VII law than is the case under existing doctrine.³⁵ Other Title VII scholars, in turn, have expressed doubts about Krieger’s proposed reformulation of disparate treatment liability to focus on whether implicit bias was an “actuating factor” in employment decisions; in one such scholar’s view, this reformulation “simply fails to provide a conceptual foundation for addressing the role that organizational structure and institutional practices play in enabling discriminatory bias and perpetrating inequity in the modern workplace.”³⁶ On this view, employers should be held directly liable under Title VII’s disparate treatment branch “for organizational choices, institutional practices, and workplace dynamics that enable the operation of discriminatory bias on the basis of protected characteristics.”³⁷

³² Oppenheimer, *supra* note 14, at 969-70; *see also* Poirier, *supra* note 14, at 478-91 (also offering a negligence-like approach). While, as just noted, most Title VII scholars writing on implicit bias emphasize the disparate treatment branch, Oppenheimer’s argument makes reference to both disparate treatment and disparate impact. However, subsequent scholars writing in the disparate treatment area have taken his work as a point of departure; the text above does that as well.

³³ *See* Krieger, *supra* note 14, at 1245-47.

³⁴ *See id.* at 1186-1217, 1241-44.

³⁵ *See id.* at 1161-63, 1242.

³⁶ Green, *supra* note 14, at 127.

³⁷ *Id.* at 145.

Recently, scholars have begun to express broader doubts about the entire enterprise of reforming disparate treatment analysis under Title VII to target implicit bias in employment decisions. In the words of one commentator, while “the last decade or so of legal scholarship has concentrated on how discrimination is now more frequently subtle in form rather than overt in nature,” this “concentration has failed to capture much support either in the courts or in our social conscience.”³⁸ Likewise, Susan Sturm, in a widely-discussed article, seems to favor not a general reformulation of existing disparate treatment doctrine along any of the various lines described above, but instead a sustained emphasis on the role of private parties in addressing the problem of implicitly biased behavior – a point to which Part I.C below returns.³⁹ Other scholars directly challenge the impulse to reform statutory antidiscrimination law in response to the problem of implicit bias in employment decisions.⁴⁰

In sum, there is currently a relatively broad consensus in the field of antidiscrimination law, both constitutional and statutory, that existing doctrines are quite limited in responding to the problem of implicitly biased behavior. There is also a relatively broad consensus that these doctrines should be significantly reformed to create meaningful liability for such behavior. However, in the nearly twenty years since Lawrence’s seminal 1987 article, essentially no progress has been made in establishing momentum behind any particular type of reform of antidiscrimination law in response to such behavior. The discussion below, after providing some further background on implicit

³⁸ Selmi, *supra* note 24, at 659.

³⁹ See Sturm, *supra* note 14, at 479-537.

⁴⁰ See Amy L. Wax, *Discrimination as Accident*, 74 IND. L. J. 1129, 1132-33 (1999) (stating that reforming “the framework created by existing antidiscrimination statutes to cover implicit workplace disparate treatment is not a good idea because it is unlikely to serve the principal goals of a liability scheme – deterrence, compensation, insurance – in a cost effective manner”).

As noted earlier, on occasion Title VII scholars have considered potential reforms of disparate impact, rather than disparate treatment, liability in response to implicit bias in employment decisions. See, e.g., Flagg, *supra* note 15, at 2038-51. But progress here has been no greater, as (among other things) many Title VII scholars are skeptical of the potential of the disparate impact model at a fairly broad level, see *supra* note 30 and accompanying text.

bias, returns to the dangers posed by the current difficult crossroads in antidiscrimination law.

B. Implicit Bias and Implicitly Biased Behavior

While a large body of recent legal scholarship has examined cognitive biases such as “optimism bias,” “self-serving bias,” and other biases from psychology and behavioral economics,⁴¹ perhaps the most basic, everyday conception of a “bias” involves the attribution of negative traits on the basis of race or other group characteristics. As suggested above, the modern consensus is that the most common form of such bias in today’s world is implicit, in the sense that those exhibiting the bias are unaware of the negative attributions they make. The IAT discussed above is the most well-known measure of implicit racial and other bias and has been widely discussed in the legal literature over the past five years.⁴²

⁴¹ See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000).

⁴² Discussions in the legal literature include IAN AYRES, PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 419-25 (2001); Migha Butcher, *Using Mediation To Remedy Civil Rights Violations When the Defendant Is Not an Intentional Perpetrator*, 24 HAMLINE J. PUB. L. & POL’Y 225, 238-40 (2003); Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN L. REV. 2273, 2290-91 (2003); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DE PAUL L. REV. 1539, 1542-56 (2004); Blake D. Morant, *The Relevance of Gender Bias Studies*, 58 WASH. & L. REV. 1073, 1080 n.35 (2001); Lateef Mtima, *The Road to the Bench: Not Even Good (Subliminal) Intentions*, 8 U. CHI. L. SCH. ROUNDTABLE 135, 155-58 (2001); Poirier, *supra* note 14, at 489-91; Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 959-64 (1999); Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1051 n.144 (2002); Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CAL. L. REV. 2047, 2066-68 (2002); Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL’Y & L. 250, 256

But the IAT and similar tests measure implicit bias, not implicitly biased *behavior*. Yet it is the latter, not the former, on which the antidiscrimination law scholarship discussed above is focused. A major area of current social science research concerns the relationship between the IAT and other measures of implicit bias, on the one hand, and individuals' observed behavior, on the other. Part of the press for research in this area is that, as suggested above, even those who explicitly disclaim bias on the basis of race or other traits (on surveys that directly ask about racial and other attitudes) often display such bias on the IAT and other tests of implicit attitudes. Some, although not all, studies even find that individuals who register little or no conscious bias show levels of implicit bias just as high as those of individuals who show conscious bias on explicit measures.⁴³ Particularly given the mixed evidence on whether the IAT and other measures of implicit bias have any correlation with levels of conscious bias, it is natural to ask whether the attitudes measured by the tests of implicit bias are actually correlated with people's observed behavior.

Scores on the IAT and similar tests have been correlated with a range of behavior (although not with some verbal, and thus presumably more conscious, behavior) toward African-Americans and other groups.⁴⁴ In one study, for instance, "larger IAT effect scores predicted

(2004); and Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 401, 446-47 (2003).

⁴³ See Greenwald et al., *supra* note 12, at 1474-75 (finding limited correlation between measures of conscious and implicit bias); Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOCIAL PSYCHOL. 435, 440 (2001) (finding significant correlation between these measures). Whether a correlation is found may depend on the order in which the tests of conscious and implicit bias are administered. If subjects complete tests of conscious bias after tests for implicit bias, they may show less conscious bias because of being "sensitized" by the tests for implicit bias. See McConnell & Leibold, *supra*, at 440.

⁴⁴ See John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65 (2002); McConnell & Leibold, *supra* note 43, at 439.

greater speaking time, more smiling, [and] more extemporaneous social comments” in interactions with whites as compared to African-Americans.⁴⁵ Scores on the IAT and similar tests also show correlations with third parties’ assessments of the overall degree of friendliness individuals show toward African-Americans and other groups.⁴⁶

The effects of implicit bias on various forms of nonverbal behavior not only may be important in their own right, but also may have further important spillover effects on other observed outcomes. This is so because the behavior that is affected by implicit bias (such as speaking time, smiling, and general friendliness, as noted just above) may produce negative reactions in African-Americans or members of other targeted groups – reactions that, in turn, and in a disturbing form of self-fulfilling prophecy, provide new grounds for not selecting group members for whatever opportunity they are seeking.⁴⁷

While the evidence just described shows important behavioral effects of implicit bias, a critical issue for existing antidiscrimination law scholarship that draws on the IAT and similar measures (as many of

⁴⁵ McConnell & Leibold, *supra* note 43, at 439.

⁴⁶ See Dovidio et al., *supra* note 44, at 66; McConnell & Leibold, *supra* note 43, at 439-40. It bears noting, given the emphasis both in this paper and in the existing legal literature on the IAT as opposed to other social science measures of implicit bias, that while the McConnell and Leibold study referenced here and in notes 43-45 involved the IAT, the Dovidio et al. study involved a different measure of implicit bias, and it is noteworthy that in the McConnell and Leibold study IAT scores were highly correlated with measures of conscious bias as well as with respondents’ observed behavior, *see supra* note 43. A natural question is whether, if measures of conscious and implicit bias are highly correlated, there is any need for antidiscrimination law to be concerned about implicit bias. In fact, however, there is no reason to believe that simply giving people a legal reason to avoid consciously biased behavior – as under existing antidiscrimination law, *see, e.g.,* Lawrence, *supra* note 1, at 322 – will eliminate their implicit bias. In other words, regardless of how the ongoing social science controversy over the degree of correlation between conscious and implicit bias is resolved, it is reasonable to be concerned about the problem of implicit bias and how it may be affecting individuals’ behavior even in a world in which antidiscrimination liability significantly deters consciously biased behavior.

⁴⁷ For discussion of the evidence supporting this sort of self-fulfilling prophecy dynamic, see Kang, *supra* note 2, at 1524-25.

the works discussed in Part I.A above do) is that the evidence linking measures of implicit bias to observed behavior does not establish any connection between such measures and *the types of decisions that antidiscrimination law polices*. This is an important and underaddressed point. At the most basic level, the impetus for the reform efforts in existing antidiscrimination law scholarship is that decisions about employment, admission to educational institutions, and membership or participation in voluntary organizations – decisions that may diverge from largely implicit nonverbal behavior and “general friendliness” – are significantly shaped by implicit bias. But the social science evidence has not yet established that these kinds of decisions are in fact driven by implicit bias as measured by the IAT and similar tests. Without a firm empirical basis for the connection between the types of decisions antidiscrimination law polices and current social science measures of implicit bias, it may not be easy to make the case for significant reform of current antidiscrimination law in response to the problem of implicit bias.

For purposes of the present paper, by contrast, the nature of the relationship between implicit bias and the kinds of decisions policed by antidiscrimination law is not important. This is so because the paper’s essential goal is to describe how existing antidiscrimination law – although it has been broadly criticized for not aiming at implicitly biased behavior in any significant way – nonetheless tends to have the *effect* of reducing implicit bias in important contexts. For this descriptive claim about the effects of current antidiscrimination law on implicit bias to be of interest, it is only necessary that implicit bias be correlated with *some* actual behavior that we might care about, whether or not this is behavior that antidiscrimination law can directly regulate. What was said just above establishes clearly that the first correlation exists. (Thus, for instance, the evidence suggests that implicit bias is linked to an individual’s general friendliness toward African-Americans or members of other targeted groups. While neither current antidiscrimination law nor any plausible reform of this law could directly regulate such general friendliness, it is nonetheless relevant to learn that existing antidiscrimination law reduces implicit bias and, thus, the pattern of general unfriendliness associated with such bias.) In contrast to the case of existing proposals for reforming antidiscrimination law, an important virtue of the project of this paper is that it is not necessary that implicit bias be correlated with the specific

behaviors – such as employment decisions, admissions to educational institutions, and membership or participation in voluntary organizations – that antidiscrimination law policies.

C. The Dangers of Antidiscrimination Law’s Difficult Crossroads

Over the past two decades, progressive advances in social science research have steadily reoriented analysis of antidiscrimination law toward the problem of implicitly biased behavior. At the same time, the broad consensus among antidiscrimination law scholars is that existing antidiscrimination law does not offer a meaningful response to such behavior. And efforts to reform existing antidiscrimination law have thus far stalled on multiple fronts.

This combination of positions is highly dangerous. It cuts away the normative ground for existing antidiscrimination law, which has always commanded strong moral and political support. The state of current antidiscrimination law scholarship also threatens to leave this body of law without a theorized reason to emphasize, expand and refine efforts to enforce existing antidiscrimination law provisions.

The rhetoric of current antidiscrimination law scholarship highlights and underlines these scholars’ view of the perceived hollowness of existing law. Recent commentators have variously referred to antidiscrimination law as “mired in the model of a tort that involves invidious intent” – a model that is “seriously inadequate as an overall description of disadvantage in the workplace”⁴⁸; as “undercut[ting] the Constitution’s prohibition on racial discrimination”⁴⁹; as “ahistorical and willfully ignorant of relevant context”⁵⁰; and as “err[ing] fundamentally” and ultimately “indefensible” in light of modern forms of bias.⁵¹ The suggestion of this paper is that there are dangers to the current diatribes against existing antidiscrimination law, given the fact that we have not yet been able to

⁴⁸ Poirier, *supra* note 14, at 459, 462.

⁴⁹ Saujani, *supra* note 14, at 396.

⁵⁰ Lenhardt, *supra* note 14, at 877.

⁵¹ Lopez, *supra* note 14, at 1838.

make any meaningful progress toward reform of this law. The claim is not that existing antidiscrimination law is perfect or even close. It is simply that the aggressive disparagement of this law, coupled with the failure of scholars to “capture much support either in the courts or in our social conscience”⁵² for reform of any sort, leaves the field in a dangerous position.

Before proceeding to a more guardedly optimistic account of existing antidiscrimination law – emphasizing the ways in which important features of this law tend to reduce the degree of people’s implicit bias – the relationship between the approach taken in this paper and the existing work on antidiscrimination law by Susan Sturm bears noting.⁵³ Sturm’s analysis of antidiscrimination law departs from the general tone of the scholarship discussed above to the extent that it conceptualizes existing antidiscrimination law as setting broad standards that, in Sturm’s view, encourage at least some employers to respond in proactive ways to the problem of implicit bias in employment decisions.⁵⁴

While the departure from the sense of overriding pessimism about existing antidiscrimination law marks a parallel between Sturm’s work and the approach taken in this paper, at another level the approaches to the content and force of antidiscrimination law differ significantly. In Sturm’s view, antidiscrimination law is best conceptualized as a broad force that orchestrates the action that really matters – the proactive and constitutive behavior of regulated actors and the institutions with which they interact.⁵⁵ This approach – which “goes against the conventional wisdom that fears that privatization will result in . . . subordinating equality to the goals of promoting efficiency or preserving traditional ways of doing business”⁵⁶ – is not pursued in this paper. While in Sturm’s work the main focus of the analysis is on the initiatives and creativity of regulated actors, with the law as a general backdrop, the present work reflects the more traditional and

⁵² Selmi, *supra* note 24, at 659.

⁵³ See Sturm, *supra* note 14.

⁵⁴ See *id.* at 479-537.

⁵⁵ See *id.*

⁵⁶ Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 308 n.3 (2004).

conventional focus in law on the legal rules themselves as the source both of governance and of moral command. Part II below defends the paper's central claim that antidiscrimination law, conceptualized in this traditional and uncontroversial way, does speak meaningfully – although admittedly still imperfectly – to the problem of implicit bias.

II. Antidiscrimination Law's Effects on Implicit Bias

Across American workplaces, schools, universities, and various types of voluntary organizations, existing antidiscrimination law tends to have the effect of reducing implicit bias, as detailed in this Part. The analysis below considers existing prohibitions on discriminatory hiring, firing and promotion practices in the workplace (Part II.A); existing prohibitions on discriminatory admissions policies of educational institutions (Part II.B.1); existing prohibitions on discriminatory membership or participation policies of various types of voluntary organizations (Part II.B.2); and existing prohibitions on sexual and other harassment in workplaces, educational institutions, and various types of voluntary organizations (Part II.C). A final section puts together all of these forms of existing antidiscrimination law and shows their potentially reinforcing effects (Part II.D). Throughout, the analysis builds on new social science findings that significantly alter the prior understanding within antidiscrimination law scholarship of the ways in which implicit bias may be reduced. While a leading work was able to state as recently as a few years ago (based on then-current social science findings) that implicit bias “can be controlled only through subsequent, deliberate ‘mental correction’ that takes group status squarely into account” in ways well beyond what is required under existing antidiscrimination law,⁵⁷ the more recent social science findings described below suggest a very different view of the potential means of reducing implicit bias – and of their relation to existing antidiscrimination law.

⁵⁷ Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251, 1279 (1998).

A. Existing Prohibitions on Discriminatory Hiring, Firing and Promotion Practices

Laws regulating discrimination in the workplace are a basic component of American antidiscrimination law and have been the site of many of the existing critiques of the failure of existing doctrines to target implicitly biased behavior.⁵⁸ But, notwithstanding these critiques, even the simplest feature of such laws – prohibiting certain hiring, firing and promotion practices – will often have the effect of reducing the degree of implicit workplace bias through the simple mechanism of increasing workplace diversity.⁵⁹

1. Social Science Evidence on the Effects of Diverse Populations

A striking set of results in the social science literature on implicit bias demonstrates that diversity in the surrounding population will often shape and affect the degree of implicit bias individuals exhibit. The studies suggest that the others present in an individual's environment can significantly reduce the degree of implicit bias as measured by the Implicit Association Test (IAT) described above. At a broader level, both these studies and the evidence discussed later in this Part demonstrate the way in which the environment in which individuals find themselves structures and affects the degree of implicit bias such individuals exhibit on the IAT and similar measures.

One notable study of the effects of population make-up on implicit bias showed that individuals who were administered an in-person IAT by an African-American experimenter exhibited substantially less implicit racial bias than individuals who were

⁵⁸ *See supra* notes 32-37 and accompanying text.

⁵⁹ “Diversity” is used throughout this paper to refer to an increase in the representation of a traditionally underrepresented group. Theoretically such an increase could make a particular population less “diverse” if this specific population was not initially characterized by the general pattern of underrepresentation; but the usage here, which accords with popular usage, seems workable for purposes of this paper.

administered an in-person IAT by a white experimenter.⁶⁰ In other words, subjects' speed in categorizing black-unpleasant and white-pleasant (stereotype-consistent) pairs was closer to their speed in categorizing black-pleasant and white-unpleasant (stereotype-inconsistent) pairs when an African-American experimenter was standing in front of the room than when a white experimenter was standing in front of the room.

A second study paired white test participants with either white or African-American partners and then assigned the pair a task in which either the participant evaluated the partner or the participant was evaluated by the partner.⁶¹ Two results from the study are notable. First, echoing the results from the study noted in the previous paragraph, participants who were paired with an African-American partner – aggregating cases in which the partner was in the superior role and the subordinate role – exhibited less implicit racial bias as measured by the IAT than participants who were paired with a white partner.⁶² Thus, the simple fact of more diversity in the immediate environment meant less overall implicit bias. Second, within pairs involving an African-American partner, participants who were told to evaluate the African-American partner subsequently exhibited significantly more implicit racial bias than participants who were evaluated by the African-American partner.⁶³

While much empirical work by psychologists (including the two studies just described) involves laboratory experiments, a recent study provides dramatic field evidence of the role of population make-up on the degree of implicit bias exhibited by those present.⁶⁴ The study examined levels of implicit gender stereotyping, as measured by a gender-stereotype variant of the race IAT described in Part I above,

⁶⁰ See Lowery et al., *supra* note 6, at 844-45, 846-47.

⁶¹ See Jennifer A. Richeson & Nalini Ambady, *Effects of Situational Power on Automatic Racial Prejudice*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 177, 179 (2003).

⁶² See *id.* at 181 & Table 1.

⁶³ See *id.*

⁶⁴ See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotypes*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642 (2004).

among college-age women both before and after their first year at either a coeducational or a women's college. Notably, despite the plausibility of sorting across coeducational and women's colleges based on preexisting attitudes about gender issues, the groups of women from the two particular colleges in this study exhibited indistinguishable levels of implicit gender stereotyping during the first semester of college.⁶⁵ One year later, however, the students at the women's college exhibited no implicit gender stereotyping, while the female students at the coeducational college showed higher levels of implicit gender stereotyping than in the previous year.⁶⁶

What explains this difference? It turns out that the central explanation of the level of implicit gender stereotyping in the second year of college is the number of female professors encountered to that point. While this was true for both groups of students, the number of female professors encountered was generally far higher at the women's college, leading to overall lower levels of implicit gender stereotyping in that institution.⁶⁷ (Students at the women's college who had only modest numbers of female professors looked more like the students at the coeducational college.⁶⁸) Once again, the presence of a representative of the at-issue group in the environment significantly lowers implicit bias against members of that group. As the authors of the study put it, "[T]he more women see counterstereotypic ingroup members in their immediate environment[,] the more it undermines their automatic gender stereotypes."⁶⁹

2. Diverse Populations Under Existing Prohibitions on Discriminatory Hiring, Firing and Promotion Practices

The results just described suggest that the simple fact of having a diverse workforce may well be an important means of reducing the level of implicit bias in the workplace. If someone – and perhaps especially if someone in authority – in a white employee's workplace is African-

⁶⁵ *See id.* at 651.

⁶⁶ *See id.*

⁶⁷ *See id.* at 651-52.

⁶⁸ *See id.*

⁶⁹ *Id.* at 655.

American, the evidence strongly suggests that the white employee will tend to exhibit less implicit racial bias as measured by the IAT than if everyone in the workplace is white. In a sense, the story here is the implicit-bias counterpart to the old idea that contact with members of other groups should reduce conscious bias against these individuals; while the contact hypothesis has been much discussed, the analogous concept that workplace diversity can decrease *implicit* bias, without the need for various forms of “deliberate mental correction” in response to such bias,⁷⁰ has been overlooked in existing antidiscrimination law scholarship.⁷¹

A natural effect of existing prohibitions on discriminatory hiring, firing, and promotion practices is of course to increase the representation of members of protected groups; and in this way these existing prohibitions should tend to reduce implicit bias on the basis of race and other protected traits. (Note that antidiscrimination law’s consistent and forceful rejection of measures such as explicit quotas counters the risk that this law might paradoxically *increase* implicit bias by means of overly heavy-handed mechanisms of diversifying the workplace.⁷²) Note the central difference between the argument here and the analysis in the existing scholarly literature described in Part I.A above. At a general level, prohibitions on discriminatory hiring, firing, and promotion practices could seek to respond to the problem of implicit bias in two very different ways. One is the way envisioned by all of the existing scholarship discussed above; these prohibitions could create liability (as existing antidiscrimination law often does not) for

⁷⁰ Krieger, *supra* note 57, at 1279 (internal quotation marks omitted).

⁷¹ See sources cited *supra* note 15.

⁷² See, e.g., 42 U.S.C. § 2000e-2(j) (“Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.”). For discussion of social science evidence on the ways in which explicit preferential treatment of particular groups can increase various forms of bias against these groups, see Krieger, *supra* note 57, at 1263-70.

conduct stemming from implicit bias. But a second way of responding to the problem of implicit bias is to shape and affect the workplace population in a manner that lessens the underlying level of such bias. This, it is claimed here, *is* accomplished by existing law. The general insight is that it is possible to respond to the problem of implicit bias in ways other than creating direct legal liability for conduct stemming from such bias.

To be sure, if increasing population diversity were the only means by which existing antidiscrimination law tended to reduce implicit bias, the effect might be insufficient to dislodge the consensus view that existing antidiscrimination law is largely powerless in response to the problem of implicit bias. However, as explored in Parts II.C and II.D below, existing antidiscrimination law importantly affects other aspects of individuals' environments – beyond the diversity of the population make-up within these environments – as well. It is the *synergistic* effect of all of the provisions of existing antidiscrimination law discussed in this Part that ultimately suggests an important role for existing antidiscrimination law in reducing implicit bias.

a. Disparate Treatment Liability for Hiring, Firing, and Promotion Practices. Within the category of existing prohibitions on discriminatory hiring, firing, and promotion practices, there are several causal mechanisms by which these prohibitions tend to increase workplace diversity and, thus, reduce implicit bias; a few subtleties attach to each and will be discussed in the space below. The simplest and most obvious mechanism here is the illegalization of personnel decisions consciously made on the basis of race or other protected traits.⁷³ While this core prohibition has been at the heart of the criticism of existing antidiscrimination doctrine as insufficiently responsive to the problem of implicit bias, the analysis above suggests that it is important to recognize the way in which even existing prohibitions on conscious discrimination have some traction against the problem of implicit bias. This analysis suggests that the degree of implicit bias is importantly affected by the level of workplace diversity. Thus, as long as existing

⁷³ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-48 (1976) (liability for such decisions under the Equal Protection Clause); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (liability for such decisions under Title VII).

prohibitions on conscious discrimination in hiring, firing, and promotion practices have some positive effect on workplace diversity, these prohibitions – although they do not directly illegalize personnel decisions stemming from implicit bias – will tend to decrease such bias in the workplace.

Of course, if there were no remaining consciously biased behavior in today's world to be policed by these existing antidiscrimination law prohibitions, then these prohibitions would not have much, if any, effect. But the idea that implicitly biased behavior is the central problem in American society today certainly does not imply the absence of a significant remaining problem with consciously biased behavior. As Susan Sturm has noted in an article primarily emphasizing the problem of implicitly biased behavior, “The classic forms of deliberate exclusion based on race and gender that were characteristic of the early stages of the civil rights regime certainly have not disappeared.”⁷⁴

There are still two intriguing potential wrinkles in this account of the effect on implicit bias of existing disparate treatment liability for consciously biased hiring, firing, and promotion practices, however. First, as Krieger notes, some social science evidence suggests that “[t]he mere introduction of ‘groupness’ into a situation” generates various types of bias, and also that “[i]ncreasing the salience of group distinctions exacerbates these effects.”⁷⁵ Conceivably disparate treatment liability under existing antidiscrimination law, by illegalizing personnel practices based on protected traits, could “increase[e] the salience of group distinctions” – although probably not to a large degree in today's society. (Krieger does not address this issue because her focus is affirmative action rather than disparate treatment liability under existing antidiscrimination law.) However, as Krieger describes, there are important countervailing effects; “racial mixing in schools, universities, neighborhoods, or interdependent cooperative workgroups results in a greater likelihood that members of different racial groups will occupy ingroups constructed along social dimensions other than

⁷⁴ Susan Sturm, *Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 641 (1998).

⁷⁵ Krieger, *supra* note 57, at 1274.

race.”⁷⁶ That is, bias against other groups may be unavoidable, but diversity tends to affect the composition of the groups themselves. Moreover, “placing members of different social categories into situations involving cooperative interdependence and individuating social interactions also appears to reduce categorical responding” more generally.⁷⁷ Thus, in the present context, the social science evidence suggests that it is at least as likely that existing disparate treatment liability for hiring, firing and promotion practices will, on balance, reduce the salience of racial and other group lines as that it will increase the salience of those lines; and, therefore, a countervailing increase in bias from heightening the salience of such lines is not suggested by this evidence.

A second wrinkle in the account of disparate treatment liability offered here is that some scholars have suggested that such liability makes employers reluctant to *hire* individuals from protected groups by raising such individuals’ wages or making them difficult to fire – even for legitimate reasons – down the road; while the failure to hire is technically actionable, on this view practical obstacles make such hiring suits unlikely.⁷⁸ If this account is correct, then disparate treatment liability for discriminatory personnel practices under existing antidiscrimination law could have the perverse effect of *reducing* workplace diversity by discouraging employers from hiring a diverse workforce in the first place.

Definitive empirical evidence supporting the hiring-disincentive account has been difficult to come by, while the empirical evidence from Title VII’s early history suggests that the law’s protections clearly improved employment levels at least of African-Americans.⁷⁹ In the

⁷⁶ *Id.* at 1275-76.

⁷⁷ *Id.* at 1276.

⁷⁸ *See, e.g.,* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. Rev. 513, 517-19 (1987).

⁷⁹ Definitive treatments of Title VII’s early effects include John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603 (1991), and James J. Heckman & Brook Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138 (1989). The Heckman and Payner study in particular looks at

absence of contrary empirical evidence about the effects of antidiscrimination law today, most observers reasonably assume that existing antidiscrimination law's core prohibition on consciously discriminatory personnel practices increases rather than decreases workplace diversity. And if this is true, then this prohibition will tend to decrease the level of implicit bias in the workplace.

b. Disparate Impact Liability for Hiring, Firing and Promotion Practices. A second way in which existing antidiscrimination law tends to increase workplace diversity is the disparate impact branch of liability under Title VII. (As noted earlier, this form of liability is not available under the Equal Protection Clause.) As noted above, most Title VII commentators have been dismissive of disparate impact liability on grounds of practical importance in real-world litigation.⁸⁰ But there is reason to believe that the limited-importance objection has been overstated by some margin.⁸¹

While commentators have emphasized that disparate impact cases require plaintiffs both to set forth identifiable employment practices that disproportionately harm their group and to present statistical evidence in support of such harm,⁸² these same factors that make disparate impact cases somewhat difficult to bring, and thus less frequent in practice than disparate treatment claims, also mean that each disparate impact case is likely to have far greater impact than a given disparate treatment case targeting a specific employment action taken against a particular individual. If, to take one well-known recent disparate impact case, a no-beard rule is struck down in a suit against a Domino's pizza franchise on grounds of its disproportionate adverse impact on African-American men, many other employers are likely to

employment levels (as distinguished from wages) in detail. Subsequent empirical evidence suggests that the expansion of Title VII liability in 1991 had no overall effects (either positive or negative) on employment of protected groups, although employment seems to have increased in some industries and decreased in others. See Paul Oyer & Scott Schaefer, *Sorting, Quotas, and the Civil Rights Act of 1991: Who Hires When It's Hard to Fire?* 45 J. LAW & ECON. 41 (2002).

⁸⁰ See sources cited *supra* note 30.

⁸¹ See Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 670-72 (2001).

⁸² See, e.g., Krieger, *supra* note 14, at 1162 n.3.

consider altering their grooming policies in response. By contrast, a finding of individual discriminatory behavior by a Domino's franchise would presumably have relatively little effect outside of that particular Domino's franchise.⁸³

Different critiques of the role of disparate impact liability in increasing workplace diversity echo the groupness and hiring-disincentive points from above. While the groupness analysis carries over directly from above, a brief additional remark about the hiring-disincentive analysis is useful here. The hiring-disincentive account suggests that protection under antidiscrimination law could paradoxically reduce the representation of protected groups because the legal regime may increase the costs of employing group members and thus make employers reluctant to hire them.⁸⁴ In a sense this objection is the converse of the critique of disparate impact liability discussed just above, in that the present argument assumes that disparate impact liability meaningfully affects employers' ability to fire members of the protected group, while the prior argument assumes that disparate impact liability is largely irrelevant. As noted in the above discussion of disparate treatment liability for discriminatory personnel practices, however, the empirical evidence on antidiscrimination law's employment effects generally supports the conclusion that this law has had at least some positive effect on employment levels.⁸⁵

c. The Ban on Waivers. Legal regulation of discriminatory personnel practices also tends to reduce implicit bias through a less direct, but important, causal path. A much-noted feature of existing antidiscrimination law under Title VII is that individuals are not permitted to waive this law's protections against future discrimination against them.⁸⁶ The Supreme Court set forth the no-

⁸³ For further discussion of the Domino's disparate impact litigation, see Jolls, *supra* note 81, at 653-55.

⁸⁴ See *supra* note 78 and accompanying text; Ian Ayres & Peter Siegelman, *The Q-Word As Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEXAS L. REV. 1487, 1497-98 (1996).

⁸⁵ See *supra* note 79.

⁸⁶ See, e.g., *Cole v. Burns Int'l Sec Servs.*, 105 F. 3d 1465, 1482 (D.C. Cir. 1997); *Adams v. Philip Morris, Inc.*, 67 F. 3d 580, 584 (6th Cir. 1995). The discussion of waivers here does not address existing antidiscrimination law under the Equal Protection Clause because no court appears to have

waiver principle in *Alexander v. Gardner-Denver*⁸⁷ in the course of adjudicating the lawfulness of agreements to submit claims of race discrimination to arbitral rather than judicial resolution.⁸⁸ A natural effect of this ban is, of course, that less future discrimination in personnel decisions will occur (as none of it has been immunized, through waivers, from legal challenge).

A sensible understanding of the ban on waivers is that it has the effect of protecting individuals against potentially imprudent relinquishments of their own personal right to be free of future discrimination. But the evidence described above on population diversity and implicit bias shows that often *it is not only the individual contemplating a waiver who will be affected by future discriminatory personnel practices against that individual*. An individual's waiver of the right to be free of future discrimination would also tend to affect the future degree of implicit bias in the workplace toward members of the individual's group. Thus, if an employer, because of a waiver, faces no constraint on the ability to fire or refuse to promote an individual, including for discriminatory reasons, down the road, then workplace diversity, and with it the degree of implicit bias in the workplace, may suffer, with effects well beyond the individual who signed the waiver.⁸⁹

Until this point the discussion of waivers has focused on waiving protection against future discrimination. Antidiscrimination law treats waivers of protection against *past* discrimination very differently; such waivers are permitted under Title VII as long as conditions of knowingness and voluntariness are met.⁹⁰ Likewise, individuals are naturally permitted to settle lawsuits claiming discrimination without proceeding to trial and recovering damages. The permissibility of such ex post waivers obviously reduces to some degree the effect on implicit bias of the ban on ex ante waivers; employers may

addressed the permissibility of waivers of future Equal Protection Clause claims – though it seems rather doubtful that they would be permitted.

⁸⁷ 415 U.S. 36 (1974).

⁸⁸ *See id.* at 38, 51-52.

⁸⁹ The responses to the groupness and hiring-disincentive objections to this argument would follow the same basic lines as the responses discussed above. *See supra* notes 75-79 and accompanying text.

⁹⁰ *See Alexander*, 415 U.S. at 52 & n.15.

be less reluctant to discharge or fail to promote members of protected groups given the possibility of an ex post waiver of antidiscrimination law's prohibition on discriminatory personnel practices than they would be were no ex post waiver possible. However, employers cannot know in advance how any given individual will respond to the employer's request for an ex post waiver, and as long as some substantial fraction of employees decline such waivers, employers will be deterred to some degree from taking employment actions that reduce workplace diversity.

B. Existing Prohibitions on Discriminatory Admissions and Participation Practices

Antidiscrimination law pervasively regulates not only the population make-up of modern workplaces but also the population make-up of schools, universities, and a large range of voluntary organizations in American society. Thus, in these areas, too, existing antidiscrimination law tends to have the effect of reducing people's implicit bias by increasing population diversity in their environments, as described below.

1. Admissions Practices of Educational Institutions

a. Antidiscrimination law and population diversity. Less than forty years ago, the University of Virginia – one of the country's leading public universities – did not admit women; other public educational institutions were all-male even more recently.⁹¹ With respect to race, some private educational institutions openly discriminated against nonwhites well into the 1970s.⁹²

Current antidiscrimination law under both the Equal Protection Clause and relevant statutes restricts such discriminatory admissions practices. Public and private educational institutions are forbidden

⁹¹ See *Kirstein v. Rector & Visitors of the Univ. of Virginia*, 309 F. Supp. 184, 186 (E.D. Va. 1970); *Vorchheimer v. School District of Philadelphia*, 532 F. 2d 880, 881 (3rd Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (per curiam).

⁹² See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 164-65 (1976).

under existing antidiscrimination law from engaging in admissions practices that exclude nonwhites, and public educational institutions are also limited in their ability to engage in admissions practices that exclude women or girls.⁹³ (Private educational institutions, by contrast, are relatively unrestricted in their ability to exclude women or girls.⁹⁴)

In these ways, existing antidiscrimination law has the effect of increasing the population diversity of educational institutions, which in turn should tend to reduce implicit bias of those associated with these institutions. Just as the evidence suggests that I will exhibit less implicit bias as measured by the IAT if my workplace is diverse than if it is all-white or all-male, so too the evidence suggests that I will exhibit less implicit bias if my educational environment is diverse than if it is all-white or all-male.

b. First Amendment dimensions of antidiscrimination law's effects on implicit bias. One difference between the educational context and the workplace context discussed above is that efforts to apply antidiscrimination law to increase the population diversity of educational institutions have often prompted First Amendment objections.⁹⁵ But nearly three decades ago, in *Runyon v. McCrary*,⁹⁶ the Supreme Court rejected the claim of a group of private schools, which were seeking to exclude nonwhite students, that the First Amendment right of association protected their exclusionary behavior.⁹⁷ While, according to the Court, there may be “a First Amendment right to send . . . children to educational institutions that promote the belief that racial segregation is desirable,” it does “not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle.”⁹⁸ Under *Runyon*, the First Amendment may prohibit the government from using antidiscrimination law to engage in

⁹³ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (public educational institutions, race); *Runyon*, 427 U.S. 160 (private educational institutions, race); *United States v. Virginia*, 518 U.S. 515 (1996) (public educational institutions, sex).

⁹⁴ Exclusion of nonwhites from private educational institutions is prohibited by 42 U.S.C. §1981, but this provision does not apply to sex.

⁹⁵ See, e.g., *Runyon*, 427 U.S. at 175-76.

⁹⁶ 427 U.S. 160 (1976).

⁹⁷ See *id.* at 175-76.

⁹⁸ *Id.* at 176.

direct regulation of the *beliefs* espoused by educational institutions, but it does not prohibit the government from using antidiscrimination law to end the “exclu[sion of] racial minorities” from these institutions.⁹⁹

But this paper’s analysis of the effects of existing antidiscrimination law governing educational institutions’ admissions practices seems to problematize the neat dichotomy drawn in *Runyon* between “practices” and “beliefs.” The core of the argument above about implicit bias is that the very fact of ending the exclusion of a particular group will tend to have an effect on the attitudes of those involved with an educational institution. Implicit bias will tend to be lower once otherwise-excluded groups have been included. Bias is not simply a fixed (conscious) belief that can be sharply separated – in the way seemingly envisioned in *Runyon* – from the issue of who is admitted to an educational institution. The same point applies to the voluntary organizations discussed in the next section.

2. Membership or Participation Practices of Voluntary Organizations

a. Antidiscrimination law and population diversity.

Under existing antidiscrimination law, voluntary organizations ranging from the Jaycees to Little League Baseball to swimming clubs have been required to admit individuals without regard to race and other traits.¹⁰⁰ Because the law in this area is primarily at the state rather than the federal level, membership or participation practices in some states are largely unregulated by existing antidiscrimination law.¹⁰¹ And in

⁹⁹ *Id.*

¹⁰⁰ See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (Minnesota statute); *National Organization of Women v. Little League Baseball, Inc.*, 318 A.2d 33 (N.J. Super. 1974), *aff’d*, 338 A.2d 198 (N.J. 1974) (New Jersey statute); *Clover Hill Swimming Club v. Goldsboro*, 219 A.2d 161 (1966) (New Jersey statute). On occasion, courts have found a federal antidiscrimination law right in the context of voluntary organizations. See *Watson v. Fraternal Order of Eagles*, 915 F.2d 235 (6th Cir. 1990) (finding a violation of 42 U.S.C. §1981 when a social club refused to sell soft drinks to African-Americans at a party held at the club).

¹⁰¹ See, e.g., *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1209-10 (N.J. 1999), *rev’d sub. nom. Boy Scouts of America v. Dale*, 530 U.S. 640

states that do generally regulate such practices under antidiscrimination law, only organizations that are reasonably nonrestrictive in their membership or participation (apart from race or other allegedly discriminatory lines) are typically covered by the state laws.¹⁰²

Subject to the limits just noted, existing antidiscrimination law governing voluntary organizations is a force toward increased population diversity within these organizations. And, as above, such increased diversity will tend to decrease the level of implicit bias that those associated with such organizations exhibit on the IAT. In general, implicit bias is likely to be lower at (for instance) both the Rotary Club and the swimming pool if these organizations have some racial and gender diversity than if they are all-white or all-male.

b. First Amendment dimensions of antidiscrimination law's effects on implicit bias. Parallel to the discussion above of educational institutions, the application of antidiscrimination law to voluntary organizations has led to First Amendment challenges. In the context of voluntary organizations, in contrast to the educational context, these challenges have met with some, although limited, success. The Supreme Court in *Roberts v. United States Jaycees*¹⁰³ and *Board of Directors of Rotary International v. Rotary Club of Duarte*¹⁰⁴ sustained the application of antidiscrimination law against First Amendment objections seeking to preserve the all-male status of these organizations.¹⁰⁵ But in *Boy Scouts of America v. Dale*,¹⁰⁶ the Court struck down application of a state antidiscrimination provision to the Boy Scouts on the ground that the application of the provision violated

(2000) (giving several examples of states that exclude voluntary organizations from the category of “places of public accommodation” covered by state antidiscrimination law unless such organizations occupy a fixed geographic location).

¹⁰² See, e.g., *Dale*, 734 A.2d at 1210-11, 1213-17 (emphasizing that the Boy Scouts engaged in broad public solicitation of members through advertising and recruiting and, thus, fell within New Jersey's antidiscrimination law).

¹⁰³ 468 U.S. 609 (1984).

¹⁰⁴ 481 U.S. 537 (1987).

¹⁰⁵ See *Roberts*, 468 U.S. at 622-29; *Board of Directors of Rotary Int'l*, 481 U.S. at 548-49.

¹⁰⁶ 530 U.S. 640 (2000).

the Boy Scouts' First Amendment right to control their organization's values and message by excluding gays.¹⁰⁷ Because the Scout Oath requires Scouts to affirm that they are "morally straight" and because the Scouts hold that "homosexual conduct is not morally straight," the "forced inclusion" of gays, in the view of the Court, violated the Scouts' "freedom of expressive association."¹⁰⁸ In this respect, then, the ultimate effect of antidiscrimination law on implicit bias may be somewhat weaker, by virtue of greater First Amendment constraints, in the context of voluntary organizations than in the employment and educational contexts discussed above. But it is also important not to overstate the point, as post-*Dale* state courts have continued to apply state antidiscrimination law to voluntary organizations without finding First Amendment bars.¹⁰⁹

C. Existing Prohibitions on Sexual and Other Harassment

Current antidiscrimination law regulates not only tangible decisions about employment, admission and membership or participation – the subject of Parts II.A and II.B above – but also the

¹⁰⁷ See *id.* at 647-61.

¹⁰⁸ *Id.* at 648-49, 651.

¹⁰⁹ See, e.g., *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 59 P.3d 655, 674-75 (Wash. 2002) (en banc) (Madsen, J., concurring). To the extent antidiscrimination law applies to voluntary organizations, the analysis in the text again seems to problematize the distinction between regulating "practices" and regulating "beliefs." For further discussion, see *supra* text following note 99.

While the discussion in the text has focused on the population make-up in workplaces, educational institutions, and voluntary organizations, the more general point about the relationship between existing antidiscrimination law and enhanced diversity (and, thus, between existing antidiscrimination law and reduced implicit bias) should be clear enough. Other potential applications, not explored here for reasons of space, include existing antidiscrimination prohibitions related to the composition of juries, see *Batson v. Kentucky*, 476 U.S. 79 (1986), and existing antidiscrimination prohibitions related to the composition of neighborhoods, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

environments of covered organizations more broadly.¹¹⁰ Among other things, antidiscrimination law shapes and regulates the physical and sensory environment in workplaces, educational institutions, and voluntary organizations. In this way, as well as in the ways discussed in Parts II.A and II.B above, existing antidiscrimination law tends to reduce the level of implicit bias in these settings. Not only must covered organizations have diverse populations under existing antidiscrimination law, but their physical and sensory environments must be structured in ways that, as explained below, tend to reduce the implicit bias of those present.

1. Social Science Evidence on the Effects of the Physical and Sensory Environment

The composition of an organization, emphasized in Parts II.A and II.B above, is not the only factor that appears to play a role in determining the degree of implicit bias. Social science research suggests that implicit bias may also be reduced by the elimination of negative stereotypes in the physical and sensory surroundings, as well as by the promotion of counter-stereotypes in those surroundings.

In one study, for instance, participants exposed to pictures of Tiger Woods and Timothy McVeigh demonstrated far less implicit bias against African-Americans as measured by the IAT than participants not exposed to such pictures.¹¹¹ Parallel reductions in implicit bias have been observed with the display of pictures or portraits of historically important female leaders.¹¹²

¹¹⁰ See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (workplace environment under Title VII); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (school environment under Title IX of the Education Amendments of 1972); Minn. Stat. §363A.11 subd. 1 (voluntary organization environment under state law).

¹¹¹ See Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803-04 (2001).

¹¹² See Dasgupta & Asgari, *supra* note 64, at 646-47.

One fascinating study makes the role of the physical and sensory environment in shaping the nature and degree of implicit bias particularly explicit. In this study, subjects viewed a video clip of an Asian woman either putting on make-up or using chopsticks.¹¹³ Those who viewed the woman putting on make-up exhibited substantially more female stereotypes and fewer Asian stereotypes as measured by speed on a non-IAT classification task than those who viewed the woman using chopsticks.¹¹⁴

These studies have an intriguing potential real-world counterpart in a point familiar to (and highly evocative for) many university students and visitors to important public spaces. Students and others frequently take note of the portraits of famous scholars or benefactors that adorn classrooms, libraries, offices or other university or public spaces. In the typical case, the portraits are predominantly white and male. Many observers – perhaps especially university students – have a strong experience of these depictions as shaping and reinforcing an environment permeated in subtle ways with various forms of implicit bias. Part II.D below uses this observation to describe an additional way in which the provisions of existing antidiscrimination law discussed in Parts II.A and II.B above tend to reduce the level of implicit bias in workplaces, educational institutions, and voluntary organizations. Before turning to that account, the analysis below shows how the separate provisions of existing antidiscrimination law concerning workplace and other harassment also tend to reduce implicit bias in workplaces and other settings.

2. Workplace and Other Environments Under Existing Harassment Prohibitions

a. Antidiscrimination law and the physical and sensory environment. Because, as suggested above, the physical and sensory environment may exert significant influence over the level of implicit bias individuals exhibit on the IAT and similar measures,

¹¹³ See C. Neil Macrae, Galen V. Bodenhausen & Alan B. Milne, *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSYCHOL. 397, 402-03 (1995).

¹¹⁴ See *id.* at 403.

antidiscrimination law's limits on particular workplace and other environments will tend to reduce the degree of implicit bias in these settings. This is so because existing antidiscrimination law prohibits workplace and other environments that constitute unlawful harassment on the basis of a protected trait, most prominently sex¹¹⁵ – and a very common form for such unlawful harassment to take is demeaning visual depictions of a particular group. In the widely cited Title VII case of *Robinson v. Jacksonville Shipyards, Inc.*,¹¹⁶ for instance, the court held that sexually explicit photographs and “pinup” calendars with pictures of nude or partially nude women in often demeaning poses displayed throughout the work environment played a central role in establishing actionable sexual harassment.¹¹⁷ Likewise, in *Jenson v. Eveleth Taconite Co.*,¹¹⁸ the court relied on factors including sexually oriented pictures, graffiti, and cartoons in the workplace in ruling for female employees on their sexual harassment claim.¹¹⁹ Sexually-oriented posters were also present in a successful sexual harassment suit in the educational context under Title IX.¹²⁰

The social science evidence described above on the effects of the physical and sensory environment suggests that these aspects of existing antidiscrimination law will tend to reduce the degree of implicit bias in covered organizations. A study relied upon by the plaintiffs' expert witness in the *Robinson* case underlines the point; men who had viewed a pornographic film just before being interviewed by a woman remembered little about the interviewer other than her physical characteristics, while men who had watched a regular film before the

¹¹⁵ See sources cited *supra* note 110.

¹¹⁶ 760 F. Supp. 1486 (M.D. Fla. 1991).

¹¹⁷ See *id.* at 1522-27.

¹¹⁸ 824 F. Supp. 847 (D. Minn. 1993).

¹¹⁹ See *id.* at 879-86.

¹²⁰ See *Lipsett v. Univ. of Puerto Rico*, 637 F. Supp. 789, 793-94 (D. Puerto Rico 1986) (facts included pin-ups of nude women in a room used by both male and female participants in a university's medical residency program); *Lipsett v. University of Puerto Rico*, 864 F.2d 811 (1st Cir. 1988) (reversing district court's grant of summary judgment in favor of university); *Lipsett v. University of Puerto Rico*, 759 F. Supp. 40 (D. Puerto Rico 1991) (refusing to overturn jury's verdict in favor of the plaintiff on sexual harassment and other claims).

interview had meaningful recall of the interview's content.¹²¹ As the *Robinson* court put it, "[T]he availability of photographs of nude and partially nude women . . . may encourage a significant proportion of the male population in the workforce to view . . . women coworkers as if those women are sex objects."¹²² It would not be unreasonable to conclude that removing sexualized depictions of women from the workplace would tend to decrease the level of implicit bias (against the idea of women as competent workers rather than sex objects) of those present.

An important feature of this account of existing harassment law is that the law in this area makes its effects felt not only on the direct victim of the challenged behavior – the usual focus in harassment cases – but also on the individuals in the organization more broadly, including those who are mere bystanders to the harassing behavior. All women – not just those who are themselves directly exposed to sexually explicit posters or graffiti – will tend to face less implicit bias if such material is removed. This broader impact echoes the group as opposed to individual effects of existing antidiscrimination law's ban on waivers, discussed in Part II.A.2 above. Here, as there, the treatment of one employee in the workplace may have significant spillover effects on the level of implicit bias in the workplace more broadly.

b. First Amendment dimensions of antidiscrimination law's effects on implicit bias. Just as in the cases discussed in Part II.B above, liability under antidiscrimination law for sexual or other harassment has invited significant First Amendment scrutiny. Some scholars have suggested that the aspects of antidiscrimination law discussed just above, by virtue of prohibiting certain forms of expression in workplaces, educational institutions, and other organizations, run afoul of the free-speech protections of the First Amendment.¹²³ Courts, however, have not found First Amendment

¹²¹ See *Robinson*, 760 F. Supp. at 1503-04; Doug McKenzie-Mohr & Mark P. Zanna, *Treating Women as Sexual Objects: Look to the (Gender Schematic) Male Who Has Viewed Pornography*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 296, 303-04 (1990).

¹²² *Robinson*, 760 F. Supp. at 1503.

¹²³ See, e.g., Kingsley Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L. J. 481

barriers to existing harassment law.¹²⁴ As Richard Fallon has noted, when the Supreme Court addressed the standard for unlawful harassment in *Harris v. Forklift Systems*,¹²⁵ it did not express any concern over potential First Amendment violations even though the First Amendment issues were fully briefed in the case.¹²⁶ Under the Court's standard for unlawful harassment (at least under federal statutory antidiscrimination law), an environment does not become legally actionable unless the harassment is "severe."¹²⁷ And the standard view is that under the Court's decisions in this area, the First Amendment does not forbid the regulation of such harassing conduct – notwithstanding the fact that the regulated conduct takes the form of either speech or acts of an expressive nature.¹²⁸

(1991); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, U.C.L.A. L. REV. 1791 (1992).

¹²⁴ In a recent essay, Robert Post notes two judicial opinions raising questions about harassment law under the First Amendment; in both cases, however, the court's language was dicta. See Robert Post, *Sexual Harassment and the First Amendment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 382, 382 n.1 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); *DeAngelis v. El Paso Municipal Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995) (E. Jones, J.) ("Because we have concluded that insufficient evidence supports DeAngelis' claim of a sexually harassing work environment, we do not reach the difficult question whether Title VII may be violated by expressions of opinion Where pure expression is involved, Title VII steers into the territory of the First Amendment."); *Williams v. New York City Police Dept.*, 1997 U.S. Dist. LEXIS 13429, at *14 (S.D.N.Y. 1997) (briefly noting possible First Amendment issues with regulating "discussion of racial issues in the workplace, even when the discussion is not accompanied by any sort of insulting or threatening remarks," but concluding that the total quantity of remarks in the case at hand was insufficient to support a harassment verdict in any event).

¹²⁵ 510 U.S. 17 (1993).

¹²⁶ See Richard Fallon, *Sexual Harassment, Content-Neutrality, and the First Amendment Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 7-12; see also Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 124, at 355-56.

¹²⁷ *E.g.*, *Harris*, 510 U.S. at 21.

¹²⁸ See, *e.g.*, Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2304-06 (1999); Fallon, *supra* note 126, at 21-51; Schauer, *supra* note 126, at 355-60; see also Post, *supra* note 124, at 393-94 (offering reasons for more limited First Amendment constraints in the

Parallel to the discussion in Part II.B above, the recognition of the ways in which antidiscrimination law tends to affect the level of people's implicit bias reveals an important linkage between antidiscrimination law and people's underlying attitudes.¹²⁹ To be sure, any effort to punish potential thoughts or beliefs apart from a finding of harassing conduct would raise serious First Amendment questions under existing law. Jack Balkin, for instance, suggests the constitutional vulnerability of prohibiting male employees from privately viewing pornographic depictions of women outside the view of female employees.¹³⁰ But the point here is that, even when antidiscrimination law is regulating expressive acts that "so materially alter workplace conditions that they constitute . . . discrimination"¹³¹ and thus can unquestionably be regulated under existing law, the law is *also* shaping the nature of people's implicit attitudes, just as in Part II.B above.

D. Existing Prohibitions on Discriminatory Hiring, Firing, Promotion, Admissions, and Participation Practices (Again)

The discussion just above of the effects of the physical and sensory environment on the degree of implicit bias points to a further respect in which the existing antidiscrimination law prohibitions discussed in Parts II.A and II.B above – on discriminatory hiring, firing, promotion, admissions, and participation practices – may reduce implicit bias. Recall the discussion above of the possible connection between effects of the physical and sensory environment on implicit bias and the frequent controversies in recent years over the portraiture at universities and other public places. The social science research discussed in Part II.C above suggests the possibility of significant effects from minimizing stimuli such as largely white and male portraits often observed at such institutions and, more expansively, affirmatively using portraits of important alternative figures, including a larger set of nonwhite and female figures, in their place. This evidence suggests that

workplace harassment context than in the traditional "public discourse" domain).

¹²⁹ See *supra* text following note 99.

¹³⁰ See Balkin, *supra* note 128, at 2316.

¹³¹ *Id.* at 2309.

positive images of members of these groups decrease the degree of implicit bias toward group members. Thus, under the plausible assumption that the precipitating force behind greater diversity in the physical and sensory environment is often members of the underrepresented groups, antidiscrimination law's effects on the population make-up of various organizations and groups, discussed in Parts II.A and II.B above, will – in addition to the direct effect discussed already – also have the indirect effect of altering the physical and sensory environment and, thus, further reducing implicit bias. Put differently, adding diversity to a group not only will tend to reduce implicit bias directly, but also will generate a push toward a physical and sensory environment that goes beyond the minimum legal requirements described in Part II.C above and, thus, tends to reduce further the level of implicit bias.

An example of this idea from the educational context is the controversy that occurred in the late 1990s at the University of Virginia School of Law over the school's decision to hang oil portraits of all of its former deans, all white men draped in black robes, in the law library.¹³² “When I first did see them it was a shock,” said one African-American law student. “[W]here are the representations of minorities and women? In light of that absence, it's offensive.”¹³³ The current dean of the law school responded by indicating that portraits of the school's first African-American and female students had been commissioned.¹³⁴

Recent events at Harvard University, too, illustrate this dynamic. A recent study at Harvard revealed that only a small number of portraits at the university depict woman, and most of those hang in Radcliffe buildings.¹³⁵ This state of affairs led one female student leader to comment, “Although it is a minor detail about our campus, it is really a thing that students internalize.”¹³⁶ “Studying in the Harry Widener

¹³² See *Univ. of Virginia Portraits of Law School Deans Focus Attention on Need For Diversity*, JET, Mar. 3, 1997, at 32.

¹³³ *Id.* at 32-33.

¹³⁴ See *id.* at 33.

¹³⁵ See Kate L. Rakoczy, *Men Still Rule on Harvard Walls*, THE HARVARD CRIMSON, Feb. 27, 2002, at 1.

¹³⁶ *Id.*

library or eating in Annenberg Dining Hall, Harvard scholars are forever in the company of men – men whose images adorn the University’s walls and halls.”¹³⁷ Likewise, Harvard students who conducted a comprehensive survey of portraits across campus found that only three of 302 portraits were of persons of color and reported their findings to the Harvard administration.¹³⁸ The administration responded by promising portraits of “persons of African-American, Asian-American, Latino-American and Native American backgrounds who have served Harvard with distinction” and stated that these portraits would be placed at “sites of significance” around the university campus.¹³⁹

A quite similar move has been afoot at the United States Capitol, where a few years ago a group of lawmakers and advocates for women persuaded Congress to locate a sculpture of three suffragists – Lucretia Mott, Elizabeth Cady Stanton and Susan B. Anthony – in the Capitol’s grand Rotunda.¹⁴⁰ Republican Senator Olympia J. Snowe commented on the placement: “It really talks about the values of our nation and the premium that we place on the role of women in our society. Every time I see that statue, I smile, because I think that’s where they belong.”¹⁴¹

It is important not to exaggerate the effects of the initiatives related to portraiture, and it is also important not to assume that only individuals from underrepresented groups will push for changes in portraiture. But the social science research described above suggests that Senator Snowe and others are correct to think that initiatives of this kind can have real effects on perceptions of previously underrepresented groups, and the accounts just described suggest the frequent role of underrepresented groups in undertaking these initiatives. Thus, the discussion here highlights the way in which existing provisions of antidiscrimination law can work synergistically, through multiple

¹³⁷ *Id.*

¹³⁸ See Ken Gewertz, *Adding Some Color to Harvard Portraits*, HARVARD UNIVERSITY GAZETTE, May 1, 2003, at 11.

¹³⁹ *Id.*

¹⁴⁰ See Sheryl Gay Stolberg, *Face Value at the Capitol: Senator Wants to “Promote Some Diversity” in Congressional Artwork*, N.Y. TIMES, Aug. 13, 2003, at B1, B5.

¹⁴¹ *Id.* at B5.

channels, to reduce the level of implicit bias in workplaces, educational institutions, and voluntary organizations.

III. Brief Comments on the Normative Status of Implicit Bias

Until this point, the analysis in this paper has focused on describing the effects of existing antidiscrimination law on the level of implicit bias, without addressing in any way the normative status of implicit bias. The central innovation in Part II was to show the ways in which existing antidiscrimination law, while broadly criticized in the current scholarly literature for not aiming at implicitly biased behavior in a significant way, nonetheless may have the effect of reducing implicit bias in a wide range of settings.

But is implicit bias a pernicious force? At some level the use of the term “bias” suggests an obvious answer, but things may not be so simple. To be sure, in some cases it seems most defensible to view implicit bias as a “mistake” of an eminently conventional sort, one that naturally can be viewed as “bad” and warranting correction. Indeed, as discussed in Part I.B above, in many instances individuals’ conscious belief is that (for instance) race should not and will not affect a particular judgment these individuals reach; but in fact implicit bias may be affecting that judgment. In this case the individuals are making “errors” the correction of which the individuals themselves should welcome, and it seems right to view their implicit attitudes in a negative light.

But in other contexts it would not be unreasonable to believe that much implicit bias is rational or accurate, rather than some sort of “mistake” or “prejudice.” The point may be especially strong with newer versions of the IAT; a recent magazine article, for instance, described two gay individuals who much more readily associated words such as “humiliate” and “painful” with gays than with heterosexuals and stated that these individuals therefore exhibited “bias” against gays.¹⁴² One might easily imagine other accounts (such as the fact that, in current society, there quite arguably *are* painful aspects of being gay –

¹⁴² See Shanker Vedantam, *See No Bias*, THE WASHINGTON POST MAGAZINE, Jan. 23, 2005, at 12, 14.

however regrettable this feature of current society is to many of us), for these gay individuals' associations.

While debates over the normative status of implicit bias are unlikely to be resolved soon and are obviously central to the efforts described in Part I.A above to reform antidiscrimination law in response to implicitly biased behavior, an important advantage of the approach taken in this paper is that, whether or not one believes implicit bias *should* be reduced, it is valuable to understand how existing law *is* presently shaping such bias. As with respect to the social science controversies discussed in Part I.B above over the correlation between implicit bias and observed behavior, this paper permits greater agnosticism, on multiple issues, than does the existing reform-oriented scholarly literature on antidiscrimination law and implicitly biased behavior. Even if one believes that, for instance, much implicit bias is rational rather than a “mistake,” it is still valuable to know the effects of existing antidiscrimination law.

IV. Conclusion

In recent years, the field of antidiscrimination law has struggled to reform a body of law created in a time of conscious bias for the modern age of implicit bias. Along the way the existing body of antidiscrimination law has come in for a fair amount of criticism and scorn, leaving it weakened in terms of its moral force, its political claim, and its call on limited enforcement resources. Overlooked entirely in the existing literature have been the important ways in which existing antidiscrimination law – although it concededly does not aim at implicitly biased behavior in a significant way – nonetheless tends to reduce implicit bias in workplaces, educational institutions, and various types of voluntary organizations.

The ways in which existing antidiscrimination law tends to reduce implicit bias differ in important respects from the mechanisms by which this law may operate to reduce conventional forms of conscious bias. Conscious bias is, by definition, within one's awareness, and, thus, presumably its reduction in response to antidiscrimination law is within one's awareness as well. Implicit bias is different, and so too are the ways in which existing antidiscrimination

law tends to reduce such bias in the account given in this paper. If a workplace or a school is characterized by demeaning pictures that – according to the social science evidence discussed above – increase implicit bias against female employees or students, the law does not respond primarily by creating incentives for people to (for example) become more consciously aware of the effects of their environment, begin to raise questions among themselves about the content of that environment, and so forth. Instead, existing antidiscrimination law says (if its requirements are met) that the pictures must come down; and this in turn is likely to have the effect – without any conscious awareness on anyone’s part – of reducing people’s implicit bias.

Should antidiscrimination law emphasize this sort of response to implicit bias? Because there is no reason to think that any feature of existing antidiscrimination law was designed with the problem of implicit bias at all in mind, the normative desirability of the approach of existing antidiscrimination law to this problem remains wholly unexamined. While to some the approach of existing antidiscrimination law, as explicated in this paper, may be a promising example of “fight[ing] implicit fire with implicit fire,”¹⁴³ to others the approach may raise fears of “thought control.”¹⁴⁴ The point of this paper is not to resolve, but only to raise, these important normative questions through a *descriptive* account of the previously ignored effects of existing antidiscrimination law on the level of implicit bias. The normative analysis will be complex because, among other things, answers may vary significantly not only across the contexts – workplaces, educational institutions, and various types of voluntary organizations – examined in this paper, but also across other contexts – juries, neighborhoods – in which existing antidiscrimination law may shape the level of implicit bias.¹⁴⁵

Before concluding, it bears repeating that the claim in this paper is not for the idealness of existing antidiscrimination law as a response to the problem of implicit bias. Although existing law tends to reduce such bias relative to the absence of existing law, there is probably still a

¹⁴³ Kang, *supra* note 2, at 1562 n.400.

¹⁴⁴ American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (Easterbrook, J.), *aff’d*, 475 U.S. 1001 (1986).

¹⁴⁵ See *supra* note 109.

fair amount of both implicit bias and implicitly biased behavior remaining with existing antidiscrimination law in place. If so, then it is reasonable to demand that more be done, if we can only make progress on reaching even a modest level of consensus on what this “more” should look like. At the same time, if this paper has succeeded in creating a sense of much that is worth saving and cherishing in current antidiscrimination law, even in our modern world of implicit bias, then it will have accomplished its most important mission.