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Workplace Law, Social Neuroscience, and the Right to be Different

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Susan D. Carle, [*Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*](#), 73 U. Miami L. Rev. 655 (2019).

Perhaps one of the biggest drawbacks in the current legal academic literature is its disconnect with the scientific community. Social science and scientific research have so much to offer the legal academy, but too often this wealth of valuable information goes overlooked and unnoticed. This information can be particularly instructive to workplace law, as scholars continue to explore the driving forces behind discriminatory bias, employer motivations and other related issues.

In her fascinating piece, *Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, Professor [Susan Carle](#) (American University) helps bridge this gap between the legal workplace literature and the academic sciences. The article is the last in a wonderful trilogy Professor Carle has written on discrimination and human behavior. I highly recommend the other two articles as well, which are available [here](#) and [here](#).

This final piece in the trilogy is particularly valuable in its deep exploration of the existing scientific research, and its potential impact on workplace doctrine. In this paper, Professor Carle examines the experimental sciences, looking specifically at the inter-disciplinary field of social neuroscience. Much has been written over the years on the topic of unconscious bias, as we have generally seen less overt acts of discrimination in the workplace over the years since the enactment of Title VII in 1964. As a society, we are now much more aware of the illegalities of discrimination than we were decades ago, and employers have enacted policies, training, and other tools to help prevent such unlawful conduct. The research examined by Professor Carle looks specifically at *unconscious* bias— and how we may *unknowingly* treat others who express behavioral differences.

In this paper, Professor Carle takes on the issue of implicit bias by mining the rich social neuroscience research on the topic. This research goes beyond the often more superficial conclusion that unlawful bias unconsciously occurs in the workplace and examines more precisely how implicit discrimination occurs in the brain, and why it takes place. This research explores how we “automatically and non-volitionally process cues” with respect to behavioral differences between groups. (P. 662.) Professor Carle finds that what typically “matters to the brain is not status or identity per se, but what the brain perceives about how a person’s behavior reflects identity.” (P. 662.)

Most impressively, Professor Carle takes the next important step in connecting these findings to anti-discrimination law doctrine. She reasons that the findings in the social neuroscience research suggest that workplace law must look more closely to the connection that exists between how the behavior of an employee is perceived and the effectuation of a discriminatory employment decision. Put more simply, discrimination law should more fully examine the link between an employer’s perception of worker conduct and discrimination. As Professor Carle explains, the real question in many discrimination cases is whether the negative treatment of individuals is the result of their “acting differently.” (P. 706.)

By exploring the existing neuroscience research in supporting these conclusions, Professor Carle discusses the scientific research which shows empirically how we react to those that act differently from ourselves. She also raises specific proposals on workplace law reform that go along with her findings, perhaps modestly referring to them as “immediate pragmatic tweaks” to existing doctrine. (P. 717.) While this discussion itself is illuminating, Professor Carle’s more groundbreaking proposal is what she characterizes as the “recognition of a general human right to act differently,” as long as those actions do not interfere with the rights of others. (P. 717.) Professor Carle discusses in

great detail this novel approach and explains exactly how the establishment of such a right could be effectuated under existing frameworks. As she concludes, “[i]t thus has become increasingly imperative that antidiscrimination advocates, using evidence-based research, promote appreciation for individuals’ “acting differently” (within the bounds of others’ rights) as a foundational value in anti-discrimination law.” (P. 730.) Professor Carle does a superb job of balancing her proposals against any potential objections and takes a well-rounded approach in the paper. Given the novel nature of what she suggests here, this type of cautious approach is particularly well warranted.

The descriptive value of Professor Carle’s analysis of social neuroscience research in this paper alone is invaluable. From her work, I learned a tremendous amount about the nature of implicit bias and how the brain works in making seemingly unconscious decisions. But this paper is so much more, as it uses this existing research to identify a new right for workers to act differently (within certain bounds). The research she discusses, and the new right she identifies, caused me to take a step back and reflect upon my own analysis and research of workplace law and anti-discrimination doctrine.

Simply put, this paper is a must read for anyone exploring implicit bias, or anyone studying the broader connection between scientific research and workplace law. I anticipate (and hope) that Professor Carle’s work here will encourage a deeper dive by others into the connection between the social sciences and other areas of employment law. And, I look forward to the robust debate which is sure to follow over the appropriateness and parameters of the new right— the right to act differently— that she sets forth in this work.

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