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It's Not You, It's Me: Assessing an Emerging Relationship between Law and Social Science Essay

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“It’s Not You, It’s Me”: Assessing an Emerging Relationship Between Law and Social Science

TRISTIN K. GREEN

This Essay isolates and assesses an overlooked consideration on an emerging and significant issue in employment discrimination law. The emerging issue: When should employers be held liable for established widespread differential treatment within their organizations? The overlooked consideration: the relationship between law and social science. Although this Essay focuses closely on a specific doctrinal issue in employment discrimination law, it also sets broad theoretical groundwork for thinking about the implications of the relationships that might emerge between law and social science in a variety of legal realms.
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“It’s Not You, It’s Me”: Assessing an Emerging Relationship Between Law and Social Science

TRISTIN K. GREEN∗

I. INTRODUCTION

A lot of ink has been spilled over the past few years in the realm of employment discrimination law over plaintiffs’ use of social science expert testimony regarding whether a specific employment decision was—or specific decisions were—the product of stereotyped or otherwise biased thinking. This is not the only place, however, where a relationship between employment discrimination law and social science is likely to develop. Indeed, such a relationship has already begun to emerge at a second doctrinal point, with almost no thought paid to how the relationship should best be structured.

This new relationship between employment discrimination law and social science emerges as courts and legal scholars struggle to set limits on employer responsibility under Title VII of the Civil Rights Act for disparities that result from low-level decision makers’ widespread reliance on stereotypes and other biases. Recent cases, like the well-known Wal-


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Mart v. Dukes,\(^4\) have involved allegations that the defendants’ organizational structures, cultures, and policies—including but not limited to the practice of leaving decisions to the subjective discretion of managers—provide a certain context within which stereotyped decisions proliferate, resulting in differential treatment of women or racial minorities in pay, promotion, work assignments, discharge, etc.\(^5\) These cases involve the usual questions about whether and when discrimination is widespread within an organization, but they also raise questions about whether and when an organization should be held liable for established widespread differential treatment within its walls.\(^6\)

The shape of the law determines its relationship with social science. In this Essay, I focus on how choices about the law are likely to affect the law’s relationship with social science at this second doctrinal point: the question of employer responsibility once widespread differential treatment has been established. This question is on the cusp of judicial development, as I will show; yet it has seen almost no attention in the legal scholarship. Using specific examples, I identify three broad types of law-social science relationships that might emerge at this doctrinal point. I draw out the law’s expectations in each of these relationships for social science, and I assess some of the practical implications of the relationship types and the law’s expectations of social science within those relationships.

In addition to this practical goal\(^7\) situated very much within employment discrimination law, I also have a more broadly theoretical objective for this Essay: to use and improve upon the existing taxonomy or conceptual language for thinking about the relationship between law and

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\(^4\) Wal-Mart, 131 S. Ct. 2541.

\(^5\) Id. at 2547; see also Ellis v. Costco Wholesale Corp., 285 F.R.D. 492, 545 (N.D. Cal. 2012) (certifying and defining female plaintiff classes).

\(^6\) The issue has been raised and phrased in various ways. See, e.g., Wal-Mart, 131 S. Ct. at 2553 (suggesting a requirement that top-level decision makers must have adopted a “policy” of discrimination); Oral Argument at 40:00, Wal-Mart, 131 S. Ct. 2541 (No. 10-277), available at http://www.oyez.org/cases/2010-2019/2010/2010_10_277 (Kennedy, J.) (raising the possibility of a “deliberate indifference” inquiry); Richard Thompson Ford, Beyond Good and Evil in Civil Rights Law: The Case of Wal-Mart v. Dukes, 32 BERKELEY J. EMP. & LAB. L. 513, 528 (2011) (“The employer as an entity is vicariously liable for any and all discriminatory employment decisions and statistical proof of a pattern of discriminatory decisions can be sufficient, provided the statistical proof is compelling. However, a showing that an employer has made a conscientious effort to prevent discrimination might serve as an affirmative defense to liability.”); see also Melissa Hart, The Possibility of Avoiding Discrimination: Considering Compliance and Liability, 39 CONN. L. REV. 1623, 1623 (2007) (stating that an employer should not be liable under Title VII for widespread differential treatment if it “made substantial compliance efforts, even if those efforts have not eliminated inequalities”); Deborah M. Weiss, A Grudging Defense of Wal-Mart v. Dukes, 24 YALE J.L. & FEMINISM 119, 122 (2012) (arguing in favor of a negligence standard to determine employer liability for widespread differential treatment within organizations).

Although I do provide some preliminary cautions about the risks of the various types of relationships, my aim here is to enrich inquiry into the proper shape of the law in this area rather than to advance one relationship or approach over another.
social science. I refer throughout the Essay to the now well-established categories describing the ways that social science is used by law—as social fact, social framework, and social authority—and I develop a variation to the categories that has not yet been examined: a variation of embeddedness.

When social science is used as social fact, it is used as evidence that directly engages disputes and factual issues specific to the parties in a lawsuit. The use of empirical research to determine consumer confusion in trademark cases is a classic example of social science being used as social fact. The social scientist discerns facts relevant to the case first-hand (in this situation, creating a survey using the plaintiff’s and defendant’s marks) and undertakes professional analysis of those facts to aid the fact finder in determining whether confusion between the two marks is likely.

Social science is used as social framework when it is presented as background or context within which to determine facts in a specific dispute. Social science testimony is often presented as social framework in employment discrimination cases on the question mentioned at the outset: whether a decision or decisions within an organization were sex or race based. The social scientist testifies in these cases as to the body of research on stereotyping and operation of biases and the conditions under which those biases and stereotypes are likely to influence employment decisions. The fact finder relies on the testimony in these cases only as background knowledge about how and under what conditions stereotypes
and biases are likely to operate and result in differential treatment. The fact finder must still infer from other evidence that a decision was or decisions were more likely than not based on race or sex. Such evidence can include conditions specific to the organization and statistical analysis showing unaccounted-for, statistically significant disparities in a systemic discrimination case or comparative evidence and statements reflecting bias on the part of an identified decision maker in a case involving discrimination against a single individual.

Social science is used as social authority when it is relied on in the creation of legal rules of broad applicability. The Supreme Court’s famous reliance on the doll studies in Brown v. Board of Education to declare separate schools unconstitutional is a classic example of social science being used as social authority. There are many other such examples. Indeed, the movement of behavioral realism pushes us to realize how often legal frameworks and specific judicial decisions, particularly in the area of employment discrimination law, rest on theories about the nature of the real-world phenomena of human behavior: “what discrimination is, what causes it to occur, how it can be prevented, and how its presence or absence can best be discerned in particular cases . . .”

These categories of social fact, social framework, and social authority have been used primarily for guiding the understanding of how courts and other legal bodies, such as administrative entities or legislatures, should treat social science testimony submitted to them, and whether they should seek out additional social science research or testimony. Social science testimony submitted to a court as a social fact, for example, is typically evaluated under the Federal Rules of Evidence and is limited to that which is submitted by the parties. Conversely, it has been argued that social science testimony submitted to a court or legislative or executive body as social authority should be treated much more loosely. It might be treated by courts, for example, under a standard of legal precedent and by legislative and administrative bodies under principles of thorough and careful consideration, warranting independent gathering of relevant social science research on the part of both legislatures and administrative agencies.

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14 Monahan & Walker, Twenty-Five Years, supra note 9, at 76.
16 Id. at 494 n.11.
17 See Monahan & Walker, Twenty-Five Years, supra note 9, at 76 (noting the role of social science research in school district racial balancing, Title IX, and death penalty litigation).
In this Essay, I urge the use of these same categories for situating and understanding the law’s expectations for social science on specific doctrinal issues and its long-term relationship with social science. Moreover, in addition to relying on the foundational categories (social fact, social framework, and social authority), I develop a variation of the categories that more thickly describes the relationship between law and social science in some circumstances—a variation of embeddedness. I argue that social science can become embedded in law either as social fact or social authority, and that when social science becomes embedded in law, the relationship between the two becomes more intimate. Law and social science (rather than social science and the individuals or entities being regulated) must interact on a more regular basis than when social science is not embedded in law. Social science is embedded in law as social fact when social science testimony is required by law (and not merely regularly or occasionally relied upon by parties) to make a legally acceptable factual finding in each case. It is embedded in law as social authority when it is used to formulate specific social science-based directives for regulated individuals or entities.

Using these categories (and developing more fully the variation of embeddedness) in the material that follows, I identify three relationship types that might emerge between law and social science at the doctrinal point of employer liability once widespread differential treatment within a defendant organization has been established. I then draw out the expectations for social science that exist in each relationship and present some practical implications and cautions.

II. RELATIONSHIP #1: WILL YOU MARRY ME (BE MY LIFE PARTNER)?

A. Describing the Relationship

One type of relationship that might emerge between systemic discrimination law and social science on the issue of employer responsibility is one of absolute reliance. In this relationship, the law requires social science testimony for factual findings in each case. Social

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20 The term “embedded” is sometimes used to describe the law’s reliance on social science generally. See, e.g., Krieger & Fiske, supra note 18, at 999 (“Behavioral theories can thus enter and remain embedded in legal doctrine long after they have been disconfirmed or superseded by advances in the empirical social sciences.”). Used in this sense, social science is always embedded in law, at least in laws that rely on beliefs about human behavior. I seek to develop the term more specifically in this Essay to describe relationships with a high degree of intimacy between law and social science.

21 For reasons that should become clear, embeddedness describes an intimacy between law and social science that is unlikely to develop when social science is used only as social framework, even when it is presented regularly in legal cases. This said, when social framework is used regularly (and in large, high-profile class actions), similar concerns as those that center around embeddedness might surface.
Science, in other words, is embedded in law as social fact.

Social science embedded as social fact is different from other uses of social science testimony for determining facts, such as the survey measuring confusion in a trademark case. If social science is not embedded in law, then a fact finder may make a legally acceptable finding without social science testimony. It may find, for example, likely confusion between two marks based on evidence of actual confusion (e.g., consumers testifying that they were confused) even if no social scientist conducts a survey with results that indicate likely confusion. When the law embeds social science as social fact, in contrast, it marries legal outcome to social science in every case. Some courts have held that a plaintiff’s failure to present social science testimony based on a conducted survey using the marks at issue in a trademark case “counts against” a finding of confusion. To the extent these courts have begun to require social science in order for plaintiffs to succeed in proving likely confusion, the courts have begun to embed social science as social fact.

The requirement under Title VII of the Civil Rights Act that employment tests with a disparate impact on a protected group be professionally validated is another example of social science becoming embedded in law as social fact. Sociologist Robin Stryker and her colleagues show in a recent article in the Journal of Law and Social Inquiry that the Supreme Court came to embed social science as social fact in the area of testing and disparate impact by requiring situational specificity—that each test with a disparate impact be validated for the specific job, employer, and population for which it is used.

When the Civil Rights Act passed in 1964, section 703(h) protected employers from liability for the administration and use of “professionally developed ability test[s].” Teaming up with industrial psychologists in

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22 See supra notes 9–11 and accompanying text.
24 See 42 U.S.C. § 2000e-2(h) (2006) (providing that it is not unlawful “for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin”).
26 Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 257. The relevant provision now states: “[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test . . . is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(h) (2006).
1966, the Equal Employment Opportunity Commission (EEOC) issued guidelines stating that a test does not automatically qualify as “professionally developed” under section 703(h) simply because it was designed by someone “claiming expertise in test preparation.” Rather, the EEOC interpreted the provision to mean “a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant’s ability to perform a particular job or class of jobs.” When the Supreme Court embraced disparate impact theory in *Griggs v. Duke Power* in 1971, it also embraced the idea that professionally developed tests must be validated. In a later case, *Albemarle v. Moody*, as Stryker shows, the Court cemented its commitment to situational specificity and differential validity, thereby embedding the use of social science as social fact in disparate impact cases involving professionally developed tests.

On the relationship emerging at the doctrinal point of employer responsibility for widespread differential treatment, the law might similarly embed social science as social fact through disparate impact law. Several courts have recently certified classes in cases much like *Wal-Mart v. Dukes* using disparate impact law. In *McReynolds v. Merrill Lynch*, for example, the Seventh Circuit reversed a district court’s denial of class certification. The plaintiffs in the case alleged that identified disparities in pay between white and black brokers at Merrill Lynch resulted from differential treatment exercised through discretionary decisions made by brokers at the many Merrill Lynch offices. Specifically, they alleged that

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27 EQUAL EMP’T OPPORTUNITY COMM’N, GUIDELINES ON EMPLOYMENT TESTING PROCEDURES 2 (1966) [hereinafter EEOC GUIDELINES]; see also Stryker et al., supra note 25, at 787–88 (discussing the EEOC guidelines).
28 EEOC GUIDELINES, supra note 27, at 2.
30 Stryker et al., supra note 25, at 785; see Griggs, 401 U.S. at 436 (“What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.”).
31 422 U.S. 405 (1975).
32 Stryker et al., supra note 25, at 791 (“The Court did not invoke the scientific term *situational specificity*, but the company’s failure to adhere to this idea drove Court concern that the test score entry-level job relationship was not validated. . . . The Supreme Court invoked the *Guidelines*’ differential validation requirement for minorities when technically feasible . . . .”).
33 Stryker and colleagues also argue that over time the industrial psychology field came to embrace a revolution toward “validity generalization” (the idea that the results of validity studies can be generalized to many jobs not actually studied), thus largely rejecting the requirement of situational specificity and to a lesser extent also differential validity. *Id.* at 797–98. The case law, however, still requires situational specificity and differential validity. See *id.* at 800 (discussing EEOC v. Atlas Paper Co., 868 F.2d 1487 (6th Cir. 1989)).
34 672 F.3d 482 (7th Cir. 2012).
35 *Id.* at 492.
36 *Id.* at 488.
stereotypes and biases exercised by white brokers restricted black brokers’ access to lucrative teams and reduced black brokers’ receipt of accounts distributed when brokers left the firm. Judge Posner, writing for the panel, isolated two elements of Merrill Lynch’s employment practices for disparate impact review: (1) the company’s teaming policy (a policy of allowing brokers to form their own teams); and (2) its account distribution policy (a policy of distributing accounts in a way that rewarded the most successful teams).

To understand how proceeding in a case like Merrill Lynch under disparate impact law might embed social science as social fact requires a brief review of disparate impact law doctrine. Under disparate impact law, an employer is liable if it uses a practice that has a disparate impact, unless the employer can show that its use of the practice is “job related for the position in question and consistent with business necessity.” If the employer meets its burden on this defense, the plaintiffs can still succeed if they can point to an alternative employment practice that does not have the same impact and that the employer has refused to adopt.

A case like Merrill Lynch—or Wal-Mart, for that matter—throws into sharp relief the interaction between the employer’s defense to disparate impact, that the use is job related for the position in question and consistent with business necessity, and the plaintiffs’ opportunity to nonetheless succeed if they can point to an alternative employment practice that has a lesser impact. We can really only know, after all, if an employer’s reliance on subjectivity, whether exercised by brokers in selecting team members or by managers in making pay and promotion decisions, is legally permissible by looking at the use of that practice in the particular context in which it is being used, including the decision-making system as a whole and the workplace culture in which the practice is being carried out. The question, in other words, is not whether a practice in isolation (e.g., allowing subjectivity or teams) is job related and consistent with business necessity. Instead, the question comes down to whether the employer has instituted sufficient safeguards against differential treatment as part of its use of the practice.

The law might frame this question as the employer’s defense or as the plaintiffs’ opportunity to point to an alternative practice (and where the law places the inquiry will affect which party bears the burden of production.

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37 Id. at 488–89.
38 Id.
39 The EEOC Guidelines adopt a “four-fifths rule” under which a selection rate for any protected group that is less than four-fifths (80%) of the rate of the group with the highest rate will generally be regarded as evidence of disparate impact. 29 C.F.R. § 1607.4(D) (2012).
41 Id. § 2000e-2(k)(1)(A)(ii).
and proof). Either way, we can begin to see that social science will become embedded in law as social fact because in order to make a reasoned decision, a judge is likely to need social science testimony in each case concerning *this employer’s use of the practice in this workplace context*. The expert would testify after examining the entirety of the organization’s relevant practices, systems, and cultures in light of existing research as to what more the organization could do to reduce bias in its employment decisions. The final normative or legal question, of course, would remain for the court: If more can be done, then is the cost of doing more too much such that use of the existing practice “as is” is permissible, even given a disparate impact, or is the employer required to alter its use of the practice (or the context in which the practice is being used)? Without social science testimony as an initial matter, however, it is difficult to see how a court could reliably discern the alternatives from which to make the final legal determination of permissibility/liability.

**B. Expectations and Implications**

The law in this relationship expects social scientists to be able to discern from a specific study of an organization’s practices, in light of existing research, what the organization could do to reduce biases in its employment decisions. This expectation itself seems realistic, given recent

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42 We would also expect evidence to be presented on the potential cost to the employer of implementing bias-reducing mechanisms, although that evidence may take various forms and is not likely to be within the realm of social science testimony, unless the cost is framed as one of human behavior.

43 Courts have struggled to make sense of how subjectivity in personnel decision-making systems could be evaluated under disparate impact law, particularly when focusing narrowly on the job-related-and-consistent-with-business-necessity defense. See, e.g., Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991–98 (1988) (O’Connor, J., plurality) (expressing concern about applying a strict validation requirement to the use of subjective decision-making practices and arguing in favor of a relaxed standard of job relatedness and shift of the burden of persuasion on the issue to the plaintiff); see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989) (adopting the approach suggested by Justice O’Connor in Watson), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in Smith v. City of Jackson, 544 U.S. 227 (2005). This is not surprising. See Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1232 (1995) (“Validating subjective decisionmaking systems in accordance with professionally acceptable standards is neither empirically nor economically feasible, especially for jobs where intangible qualities, such as interpersonal skills, creativity, and the ability to make sound judgments under conditions of uncertainty, are critical.”). But the use of subjectivity need not be viewed so narrowly. Indeed, subjectivity is similar to many other employment practices that are problematic in implementation more than in isolation. See, e.g., Erin L. Kelly & Alexandra Kalev, Managing Flexible Work Arrangements in U.S. Organizations: Formalized Discretion or ‘A Right to Ask,’ 4 SOCIO-ECON. REV. 379, 408 (2006) (finding that “[f]ormalized discretion” in implementation of flexible work arrangements explained low use and unequal access); Michelle A. Travis, Equality in the Virtual Workplace, 24 BERKELEY J. EMP. & LAB. L. 283, 362–63 (2003) (describing some of the challenges in implementing telecommunication for women in specific workplaces).
advancements in scientific understanding of how biases operate under various conditions and of the mechanisms and contexts that tend to reduce differential outcomes.44

There are, however, several implications of the embedded nature of this relationship of which we should be aware. First, just as when industrial organizational psychology was embedded as social fact in the area of tests and disparate impact law, bringing social scientists consistently into litigation as this relationship does will likely drive a particular market for social science that ultimately shapes social science at the same time that social science shapes the law and factual findings within the law.45 In their study of the relationship between industrial organizational psychology and disparate impact law in the area of tests, Stryker and her colleagues explain that “[o]nce I-O psychology routinely helped resolve questions of legal liability, legal issues likewise shaped scientific questions and research.”46 The fact that many social scientists continued to embrace situational specificity (which is required by disparate impact law), even after scientific evidence built in favor of validity generalization, serves as an example of this form of “co-production.”47

Second, embedding social science as social fact is likely to stir the already heated pot of controversy and debate in the social science and legal communities surrounding the validity of the methods used by social scientists in the context of litigation.48 This, again, is because courts will need to decide in each case whether the particular studies offered are admissible in court under the Federal Rules of Evidence.49 Although debate and controversy may not be sufficient reasons to shy away from a particular legal approach, the difficulty and cost entailed in developing agreed upon methods seem worthy of consideration.


45 See Stryker et al., supra note 25, at 803 (“[O]nce social science routinely is used to help resolve questions of legal liability, scientific issues become legal issues and vice versa. Illustrated by psychologists’ enthusiastic pursuit of differential validation research, law henceforth shapes scientific commitments and research agendas.”).

46 Id. at 791.

47 See id. at 797 (“Some who staked careers on situational specificity, or trained when it was consensual, maintained its truth until they died.”).

48 See sources cited supra note 2.

49 See FED. R. EVID. 702 (governing admission of testimony by expert witnesses).
III. RELATIONSHIP # 2: LET’S DANCE

A. Describing the Relationship

Another possibility is that law and social science will dance—that the law will ask, either (1) by embedding social science in legal rulemaking as social authority or (2) by inviting social science as social framework, that social science generally (rather than specifically) inform judicial decisions about employer responsibility. One way to think of the relationship in the former category is as a dance in which the social science leads, and the relationship in the latter category as a dance in which the law leads.50

1. You Lead

The law can use social science as social authority in a variety of ways. The most well known is when a legislature or a court relies on social science to make a broad legal ruling, like the Court’s reliance on the doll studies in *Brown v. Board of Education*.51 Empirical grounding for broad legal pronouncements like the one in *Brown* creates a longstanding relationship between law and social science such that the law should be modified if and when the grounding ever becomes sufficiently displaced. Nonetheless, the relationship between law and social science in this circumstance is relatively settled and smooth, and even to some degree hands-off.52

When the law embeds social science as social authority (in contrast to merely using it as social authority), it creates a more intimate relationship with social science, something more akin to a dance. As discussed above, the Supreme Court ultimately embedded social science as social fact in *Griggs* and *Albemarle* when it required specific validation of tests to meet the section 703(h) defense.53 The current EEOC guidelines on test

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50 By “dance” I do not mean the side-by-side hopping that one might see at middle school dances today, but more of a ballroom dance in which one partner leads the other in coordinated step.


52 See Monahan & Walker, *Social Authority*, supra note 8, at 478 (“[P]roblems [with the use of social science] stem largely from an early and unfortunate determination that social science materials should be treated as ‘facts,’ even when used to formulate a rule of law.”); see also Krieger, supra note 51, at 395 (arguing for greater use of social science in amicus briefs to inform judicial decisions about the law).

53 See supra notes 26–33 and accompanying text (describing EEOC guidelines regarding validation).
validation, however, actually provide an example of embedded social authority. Here, the law (the EEOC guidelines) states that “[n]ew strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.”\textsuperscript{54} The guidelines ask social science to define specific legal directives that will tell employers what they must do in order to avoid liability. Here, law and social science begin to dance.\textsuperscript{55}

On the issue of employer responsibility for widespread differential treatment, the dance is likely to be even more intimate. Several scholars have proposed a “best practices” defense to employer liability for widespread differential treatment.\textsuperscript{56} For instance, Professor Richard Thompson Ford states in a recent article that “a conscientious effort to prevent discrimination might serve as an affirmative defense to liability.”\textsuperscript{57} To raise this defense, he continues, “the employer, at a minimum, should be required to show that it followed the best practices in the industry to correct the vulnerability of its employment procedures to sexism.”\textsuperscript{58}

It is possible that Ford and others who make similar suggestions envision best practices as practices that emerge from the industry—that is, from the organizations being regulated—rather than from social science directly. This would be odd in the context of employment discrimination, however, where the practices are not being used to settle on common standards of behavior but rather to advance an end-goal of non-discrimination. Research by sociologist Alexandra Kalev and her colleagues shows quite starkly how dangerous accepting industry standards would be for equality goals.\textsuperscript{59} This research reveals that many of the measures adopted by organizations in response to employment discrimination laws and the rise of diversity management have been

\textsuperscript{54} Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5(A) (2012). The guidelines also state that the provisions for validating tests:

\begin{quote}
[A]re intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education . . . and standard textbooks and journals in the field of personnel selection.
\end{quote}

\textit{Id.} § 1607.5(C).

\textsuperscript{55} Indeed, the law responded to changes in professional standards with the New Uniform Guidelines promulgated in 2007. For a very brief review of the history behind the latest guidelines, see \textsc{Michael Zimmer et al., Cases and Materials on Employment Discrimination} 279 (7th ed. 2008).

\textsuperscript{56} \textit{E.g.}, Ford, \textit{supra} note 6, at 528; Hart, \textit{supra} note 6, at 1647–48.

\textsuperscript{57} Ford, \textit{supra} note 6, at 528.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} See generally Kalev et al., \textit{supra} note 44 (examining the effects of commonly adopted diversity programs).
ineffective, even harmful to the success of women and minorities at work.\footnote{Id.}

Assuming that what Ford and others mean is best practices as identified by social science, then the law would be framed to embed social science as social authority. The law would rely on social science to develop specific directives for employers. The EEOC in this scenario might, for example, issue guidelines that lay out specific practices and state that if an employer follows these specified practices—e.g., “these five delineated mechanisms for reducing differential treatment”—then it will not be held liable, even if biases and stereotyping continue to result in substantial pay and promotion disparities within the employer’s work organization. This is a dance between law and social science, with the social science taking the lead.

2. I Lead

Another option for the dance is that the law leads. Here, the law is framed much more loosely. As Ford might put it, employers would have to make a “conscientious effort.”\footnote{Ford, supra note 6, at 528.} Or, as Professor Melissa Hart has argued, employers might avoid liability if they can show that they “made substantial compliance efforts.”\footnote{Hart, supra note 6, at 1623.} Social science naturally informs the law on what conscientious compliance efforts might look like, but the law (or more precisely the courts, deciding on a case by case basis) would hold the final word in each case under this scenario. Social science here is not embedded in the law, but it is invited as social framework to inform the court or other fact finder as to what organizations might do to reduce discrimination within their employment systems and work environments.

B. Expectations and Implications

In the “Let’s Dance” relationship, whether “You Lead” or “I Lead,” the law expects that social science can provide generalized recommendations that will reduce or are likely to reduce differential workplace treatment across organizations and industries. Unlike with the defendant-specific findings expected in the marriage-like relationship, research suggests that this expectation of generalizable recommendations might be unrealistic. The literature on bias and organizational behavior suggests that it will be difficult for social scientists to identify mechanisms for reducing differential treatment that are not inextricably intertwined with particular organizational context, including workplace culture, and are not dependent

\footnote{Id.}

\footnote{Ford, supra note 6, at 528.}

\footnote{Hart, supra note 6, at 1623. Others have proposed a negligence standard, which would be a variation on this approach. E.g., Weiss, supra note 6, at 122.}
on effective implementation by each organization.\textsuperscript{63}

Moreover, particularly with the latter scenario, there is the related problem of judicial deference to organizations that sociologist Lauren Edelman and others have uncovered in their work.\textsuperscript{64} This research shows that in conditions where the law is amorphous and social science inexact (precisely the “Let’s Dance, I Lead” relationship), courts are more likely to defer to organizations without meaningful review of the efficacy of the organizational practices being adopted.\textsuperscript{65}

IV. RELATIONSHIP #3: LET’S JUST BE FRIENDS

A. Describing the Relationship

In this last type of relationship, the law is framed to trigger reliance by others on social science, without intimate ongoing involvement between law and social science, whether in the form of specific legal findings or legal pronouncements of generally applicable directives or rules. The law and social science here are simply friends. They are aware of, indeed may even rely upon, each other, but without regular interaction or exchange between the two.

One variation of this type of relationship involves using outcome standards or benchmarks as signals of wrongdoing, though in some cases those benchmarks are set by the organizations being regulated. Rather than telling regulated entities exactly what to do, this approach sets standards for regulated entities to meet and lets the entities figure out how best to meet those standards.\textsuperscript{66} Environmental regulation in the past decade has sometimes taken this approach.\textsuperscript{67}

A more intimate, but still not embedded variation involves process-based requirements established by law, usually through administrative bodies acting in tandem with stakeholders. This approach has risen to the forefront in various ways in environmental law and, more recently, in the

\textsuperscript{63} See, e.g., Kim et al., supra note 44, at 211 (pointing to de-coupling as a reason for poor outcomes from some diversity measures and to directly engaging managers as a way of minimizing de-coupling). See generally sources cited supra note 44 (emphasizing the influence of context on bias and successful implementation of diversity measures).

\textsuperscript{64} See generally Lauren B. Edelman et al., When Organizations Rule: Judicial Deference to Institutionalized Employment Structures, 117 AM. J. SOC. 888 (2011).

\textsuperscript{65} Id.

\textsuperscript{66} See Cary Coglianese et al., Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection, 55 ADMIN. L. REV. 705, 709 (2003) (“In contrast to a design standard or a technology-based standard that specifies exactly how to achieve compliance, a performance standard sets a goal and lets each regulated entity decide how to meet it.”). This approach is sometimes called performance-based regulation. Id.

\textsuperscript{67} See Dennis D. Hirsch, Symposium Introduction: Second Generation Policy and the New Economy, 29 CAP. U. L. REV. 1, 1–2 (2001) (describing several approaches within environmental law, including emissions trading, that look to outcomes over means of obtaining outcomes).
area of risk management in the financial services industry. In the employment realm, Executive Order 11,246 requires government contractors and recipients of federal funds to undertake affirmative action by developing a plan to increase equality within their organizations; this might fall within this latter, more process-based category.

How might the law establish a “Just Friends” relationship at the doctrinal point of employer responsibility for widespread differential treatment? One reading of systemic disparate treatment law would do this. For example, a legal finding that differential treatment is widespread within an organization—based on statistical analyses of pay and promotion data and any other evidence (including social science) tending to show that observed disparities are not likely due to legitimate factors or to chance—would trigger employer liability.0 Period. It would be up to the employer under this scenario to undertake effective (and legal) efforts to reduce that differential treatment in order to avoid liability.71

Social science in this scenario helps the law achieve its goals, but it does so without intimacy with law (or legal actors), either through case-by-case determinations or administrative delineation of specific social science-based directives. Indeed, the “Just Friends” relationship between law and social science on the doctrinal issue of employer responsibility opens up opportunity for social science to have a richer and more intimate relationship with employers, the entities being regulated by the law. Social science under this scenario provides employers directly with guidance about the best mechanisms for reducing discriminatory decisions given their particular organizational goals, structures, and work conditions.

The law of course relies on social science here, but it uses social science as (unembedded) social authority. It uses social science as empirical grounding for the framework that imposes liability based on evidence of differential treatment without undertaking a second doctrinal

68 Kenneth A. Bamberger, Technologies of Compliance: Risk and Regulation in a Digital Age, 88 TEX. L. REV. 669, 674 (2010).
69 30 Fed. Reg. 12,319, 12,320 (Sept. 28, 1965). A process-based “Just Friends” relationship can easily become one of embedded social authority. The more that the agency or other legal actor is involved in formulating the process and in doing so in relying on social science to determine the best contours of process, the more embedded social science will become in the law.
71 Quotas, for example, are not generally considered legal. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 208–09 (1979) (finding a permissible affirmative action plan, but cautioning against the use of quotas).
inquiry to determine employer responsibility.

A similar relationship could be created through a more process-based approach. This might involve the development of something like the affirmative action requirement for federal contractors for all employers. The law (through the EEOC or some other regulatory body) under this scenario would monitor organizations for compliance with processes within which the organizations themselves would be expected to devise mechanisms for reducing differential treatment within their specific organizations. Focusing more closely on the question of employer liability for widespread differential treatment, the EEOC might also decide which organizations to target for Title VII violations under systemic disparate treatment theory based both on whether differential treatment is widespread within the organization and also on whether the organization has a process in place for reducing differential treatment.

B. Expectations and Implications

The expectation for social science in the “Just Friends” scenario is one of empirical grounding for the legal framework. The law in this scenario expects that social science can show that organizations can do something about their personnel structures, systems, and cultures to reduce differential outcomes at a reasonable cost (at least in most cases), and that social science and social scientists can guide organizations directly to do those things, whether generally or specifically. Like with the first relationship, this seems to be a realistic expectation given existing social science research on biases and organizational behavior.

Unlike with the other relationships identified in this Essay, the “Just Friends” relationship might also expect social science to say something about cost as groundwork for the legal framework. Given that structuring workplaces, including adopting and implementing employment systems and practices and shaping workplace cultures, is an ongoing process for most organizations, an organization’s inclusion of equality and non-discrimination as factors to consider in that process is unlikely to impose substantial costs. That said, as with all legal frameworks or

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72 For a brief description of the obligation imposed by Executive Order 11,246 and a review of several studies of its effectiveness, see Faye J. Crosby & John F. Dovidio, Discrimination in America and Legal Strategies for Reducing It, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM, supra note 51, at 23, 29–36.

73 See supra note 44 (citing studies showing scientific advances in identifying organizational mechanisms for reducing discrimination).

74 Admittedly, research measuring the behavioral or financial costs of expanding business concerns when structuring work or decision making or when shaping culture is sparse, at least beyond the “business case for diversity.” See, e.g., David A. Thomas, Diversity as Strategy, 82 HARV. BUS. REV. 98, 98–99 (2004) (describing IBM’s successful effort to make diversity a key corporate strategy tied to real growth).
interpretations that rest in part on beliefs about human and organizational behavior (e.g., how biases work and how they and their influence on decisions can best be reduced within organizations), if the research does not bear out the empirical assumptions on which the legal framework sits, the framework will need to rest more principally on other, sometimes more normative footing, or be restructured.

In addition, the process-based variation of this relationship raises concerns similar to those raised by the “Let’s Dance” option: We need confidence that requiring process will lead to improved outcomes and not just calcification of processes without meaningful change. This is of particular concern given that the goals of regulated entities and the government in the area of employment discrimination are not likely to be as well aligned as in some other areas, such as worker safety, where a process-based approach has been proposed.

V. CONCLUSION

Thinking carefully about what the law of systemic discrimination should look like around the question of employer responsibility for widespread differential treatment within organizations requires attention to the various ways in which the law might structure its relationship with social science. More specifically, it requires attention both to the nature of relationship being created (i.e., with whom social science will most interact—administrative body or courts—and degree of intimacy) and the precise expectations by the law for social science within that relationship.

I have organized this Essay around relationship types rather than around legal approaches to the question of employer liability once widespread differential treatment has been established. For those who prefer organizing around legal approaches, I provide a chart below that shows in the first column, the legal approach—how the law might create the relationship—and in the second column, the relationship between law and social science, using an icon to indicate my shorthand characterization of the relationship types as well as the existing categorizing language for law’s use of social science.


This chart may be helpful for summarizing some of the various possible legal approaches to the specific doctrinal question of whether and when employers should be held liable for established widespread differential treatment and the type of relationship that is likely to emerge.
from each approach. However, it tells us nothing about the implications of the relationships or the expectations that the law has for social science in each of the relationships. These are the crucial considerations for judges, legal scholars, and other legal actors to keep in mind as they shape the law in this area.

It is important first that the law’s expectations of social science match social science’s capabilities. If social science cannot fulfill the expectations that arise from a law-social science relationship, then the relationship is likely to break down. The law in turn is likely to lose legitimacy (from ill-footed frameworks and erroneous case-by-case determinations) and efficacy (through bulletproofing and implementation of ineffectual measures as best practices or processes).

Embeddedness, too, can be important to the inquiry of how best to structure the law (and thereby the law’s relationship with social science). While the established categories tend to focus on how social science is being used and sometimes by which legal actor (i.e., administrative agency or court), the variation of embeddedness sheds light on the degree of intimacy between law and social science. In each of the embedded relationships, law and social science must interact on a more regular basis than they might otherwise do.

This is not to say that embedding social science in law will always be the wrong choice. Whether embedding social science in law as social authority makes sense depends in large part on whether social science can meet the expectations placed upon it. Even if it can meet those expectations, however, we should also consider how the relationship between law and social science is likely to affect social science’s relationship with others, particularly the entities being regulated, and how it is likely to affect the law’s ability to monitor effectively. As between the “Let’s Dance, You Lead” and “Let’s Dance, I Lead,” for example, research discussed above suggests that it would likely be better to embed social science in law as social authority than to merely invite it as social framework on a case-by-case basis to guide application and development of a loose legal standard.77

Related to this, it is also important to consider how the relationship between law and social science is likely to affect both the law and social science, including their “co-production.” This Essay has been admittedly law-centric, focusing on understanding better how the shape of the law is likely to affect the law’s relationship with social science at one doctrinal point—entity responsibility for widespread differential treatment within an organization—and the implications of that relationship for the efficacy of

77 See supra notes 64–65 and accompanying text (stating that courts are more likely to defer to organizations when the law is inexact).
the law. But it ultimately signals caution for social scientists as well. The relationship between law and social science seems to be developing without attention to the long-term implications of the relationship being created for not just law and its efficacy, but also for social science. An intimate relationship with the law might not always be the best route for helping the law achieve its goals, and it carries with it substantial risk that the development of social science—the path of research and methods used—will be skewed in negative ways.78

By putting the relationship between law and social science front and center in thinking about the shape of the law, I do not mean to suggest that the shape of the law will or should be determined solely by reference to that relationship. Rather, the relationship created should be one, multi-faceted consideration among others, including things like cost to the judicial and other legal systems and, of course, the strength of our normative commitment to reducing discrimination in the workplace. Indeed, the same is true beyond the realm of employment discrimination. As we learn more from social science about how humans operate in context, judges, legislators, administrative actors, and legal scholars working in areas from antitrust and securities law to environmental and poverty law should think carefully about the law’s existing and emerging relationships with social science.

78 Moreover, in many of the possible relationships, questions will arise about what counts as social science. Routinized application of social science techniques by management consultants, for example, even ones with disciplinary Ph.D.s, should raise concerns about standards and reliability when relied upon by law to aide in making liability determinations.