DISCRIMINATION LAUNDERING

THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW

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DISCRIMINATION LAUNDERING

While discrimination in the workplace is often perceived to be instigated by "rogue" employees acting against the better interest of their employers, the truth is often the opposite: organizations are inciting discrimination through the work environments that they create. Worse, the law increasingly ignores this reality and exacerbates the problem. In this groundbreaking book, *Discrimination Laundering*, Tristin K. Green describes the process of discrimination laundering, showing how judges are changing the law to protect employers, and why. By bringing organizations back into the discussion of discrimination, with real-world stories and extensive social-science research, Green shows how organizational and legal efforts to minimize discrimination – usually by policing individuals over broader organizational change – are taking us in the wrong direction, and how the law could do better by creating incentives for organizational efforts that are likely to minimize discrimination, instead of inciting it.

Tristin K. Green is a professor of law at the University of San Francisco and a member of the Law and Society Association. She has written extensively in the field of employment discrimination law, seeking to better understand how discrimination operates and how to better structure the law to incentivize meaningful change. She has co-authored an article with Alexandra Kalev, a sociologist, on the relational nature of discrimination, and co-authored a casebook edition with Herma Hill Kay entitled *Sex-Based Discrimination*.

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Introduction

Equal opportunity – an ideal that Americans agreed upon in the 1960s and have valued ever since – is under threat. Equal opportunity as equal treatment, pure and simple. A common commitment to a workplace where racial and gender stereotypes and biases will not infect employment decisions, will not determine worker success. The threat is playing out in the American courts as they shape employment discrimination law under Title VII of the Civil Rights Act, the principal federal statute prohibiting discrimination in the United States. Over the past several decades, the courts have driven the law in a dramatic turn toward protecting employers from liability for discrimination. The shift is pervasive and in forward motion. It is affecting all areas, from the law governing individual acts of discrimination and harassment to the law of systemic discrimination. Worse, hidden as it is behind talk of procedure, agency principles, and civility codes, the shift is going unnoticed.

The root of the threat lies not in outright judicial hostility to equal opportunity law or civil rights generally, although there is some of that, but in a deeper, more fundamental change in view about how discrimination operates within organizations. Employment discrimination is increasingly seen as a problem of low-level, rogue employees acting on biases that are socially constructed and carried out without the influence and against the interest of the organizations for which they work. Organizations are innocent under this view. They provide the venue, the neutral physical architecture for discrimination, but nothing more.

This book tells the story of discrimination laundering: the rise of organizational innocence in the courts' understanding of employment discrimination and the corresponding narrowing of employer liability in the law. We are used to thinking about laundering in the financial context as a process of taking dirty, illegal money, accumulated through racketeering,

illegal drug sales, and gun deals, for example, and superficially cleansing it by running it through legitimate organizations. Discrimination laundering is a similar process, but it is a process of law, a process whereby the law cleanses the workplace of unlawful discrimination – not in reality, but in perception, by sleight of hand. Employment discrimination today is being recast as interpersonal conflict and not properly the subject of Title VII concern. And organizations are being recast as mere bystanders, even victims, of the discrimination that is recognized by law. Once recast, organizations are increasingly protected by the law from responsibility for their own role in inciting bias and discrimination within their walls.

Discrimination laundering falls squarely within the great American risk shift of the twenty-first century.[1] Employees bear more of their health and retirement costs than ever before. Organizations increasingly undertake routine mass layoffs, firing workers on an economic downturn or moving mammoth factories to areas with cheaper labor. They are hiring more part-time, contingent workers with hourly pay and variable schedules that can literally fluctuate with market demands.[2] Discrimination laundering similarly places the costs of discrimination principally on individual employees, both the victims and the perceived or potential discriminators, leaving employers with little responsibility.

Discrimination laundering also aligns with powerful ideological movements in American law, organizations, and society. Individuals and individual agency dominate an American discourse of liberal individualism. In so many ways we tend in American culture to emphasize individuals over all else, as causal actors and as victims, from the rhetoric of choice to that of civil rights. Neo-liberalism takes this emphasis on individuals even further to position the individuals as rational and empowered participants in an unfettered capitalist and increasingly globalized market.[3]

Post-racialism (and post-sexism) similarly permeates the social lens.[4] The idea here is that we as a society are past making race or sex matter in our policies. Inequalities experienced by members of racial groups in American society are seen as a product principally if not exclusively of individuals' bad choices rather than of discrimination, disadvantage, and group privilege. Post-racialism also translates today into a pervasive and growing sense among whites and men that race and sex are just not a big deal anymore, even when expressly encountered in day-to-day interactions. Under this view, race and sex are simply sidelines to interpersonal conflicts, preferences, and tensions that can occur in a variety of venues of our lives. Post-racialism wipes the slate clean, leaving us with no more reason to see racial or gender insult or discrimination than to see insult on some other basis, or no basis at all ("Those two just never got along.").

The rhetoric of diversity pervasive in the management profession, organizations, and broader society adds further fuel to the personalizing fire. "Managing diversity" describes a managerial as opposed to a legal obligation.[5] It emphasizes individual conduct in discrete interactions rather than change in the structural or cultural influences on those interactions, and it fosters mediation of personal conflict that can arise out of difference of all kinds, not just difference around categories like race and sex protected under Title VII. In this way, diversity and conflict around diversity are driven to the personal and business purview and severed from nondiscrimination goals.

Indeed, the personalizing of discrimination (so that much discrimination is rendered invisible to and not actionable by law, and so that organizations have narrow legal responsibility for the discrimination that remains) may be the single most dominant refrain in the rise of organizational innocence, the new frame for thinking about how discrimination operates, and in the narrowing of employer responsibility for inequality and discrimination in the law. Organizations are seen at worst to provide a physical venue for discrimination, just as neighborhoods provide geographic proximity for gangs or family-run picnics and schools maintain playgrounds where kids can play and also tease and bully their peers.

But the frame of organizational innocence is wrong. It misses the many ways in which organizations construct, leverage, and capitalize on race and sex today. Brands, sales forces, and advertising teams are designed to appeal to people along race and sex lines. Employees are matched to markets and sometimes even job categories according to their race and sex. And even when organizations do not formally sanction discrimination, they can incite discrimination through the structures, practices, and cultures that they create and maintain. Organizations actively shape their cultures using specific management tools, many of which are regularly outlined in the business literature, on the pages of the *Harvard Business Review* and similar publications. Organizations recruit and reward certain behavioral and appearance styles, encouraging a cultural "fit" with the industry and the organization. They structure account distribution, family accommodation policies, and pay, promotion, and discipline systems with employee behavior expressly in mind. These systems, practices, and cultures in turn affect the interactions, judgments, and decisions of the employees who operate within them on a daily basis.

Not only is the story of organizational innocence wrong; the practical effects of the discrimination laundering that it fuels are dire. The shift in law alters the legal pressure put on organizations so that in the laundered workplace, organizations have little antidiscrimination work to do. High-level executives

must refrain from making comments that reflect bias in the process of making their policy decisions, and from instructing lower-level decision makers to discriminate. Beyond that, organizations can focus their nondiscrimination efforts almost exclusively on creating systems for individual complaint and on responding to complaints within those systems, investigating discrete incidents and delivering discipline, where appropriate. Organizations have no legal incentive to monitor for patterns of discrimination or to consider whether their structures, practices, or cultures are inciting biases and resulting in disparate outcomes for women and racial minorities.

And this is precisely how things are playing out in the field, as organizations focus on individuals over all else. Aside from formal nondiscrimination policies and grievance processes, diversity training is the most popular diversity measure adopted by organizations today, alongside measures designed to insulate managerial decisions from bias. These measures have been shown to be largely ineffective, even harmful. Complaints, investigations, and disciplinary actions result in individual policing without attention to broader structural causes. Under these measures, individual employees – including those who are perceived to have discriminated by making an insensitive remark or a decision tainted by racial or gender bias – take the brunt of nondiscrimination efforts while much of the discrimination that produces disparate outcomes in employment continues.

Yet stratification and segregation persist along race and sex lines both in the overall American workplace and in some industries and some organizations more than others. Just a quick glance at recent research tells us this much. Before the Civil Rights Act, black men, black women, and white women almost never held the same job in the same workplace as white men. That changed in the 1960s, when black men made strong gains in skilled blue-collar jobs and black women made gains in clerical work. But in 1980, occupational integration stalled, and since then in some cases has taken a step backward. Transportation services, media and motion pictures, construction, securities and commodities brokerages all reflect a trend toward re-segregation today.[6] Women of all races have also made inroads into men's jobs since the 1960s, but segregation and stratification persist. Half of women or men in this country would have to change occupations for there to be gender parity across occupations.[7] And segregation is directly related to the pay gap. Women's median earnings are less than men's in nearly all occupations, and occupations dominated by men tend to pay more than occupations that are female dominated.[8]

There are certainly many causes for the segregation and stratification that we see today in the American workforce and in American workplaces. Prison

and criminal sentencing policies, health-care disparities, poverty, worker preferences, housing segregation, education, family responsibilities; the list goes on. The research nonetheless consistently points to discrimination – inequities in treatment in employment – as one cause. Simple test studies in which sets of black and white job candidates are paired, given equivalent credentials, and sent to apply for jobs show not only that black applicants are less likely to receive an interview than their white counterparts, but also that if they get an interview, they are likely to have a shorter interview and to encounter more negative remarks. They are more likely to be denied a job and steered to less desirable jobs.[9] One recent study found that white applicants are preferred by many hiring managers even when the white applicant has a criminal record and the black applicant does not.[10] Sophisticated statistical studies similarly show that discrimination is a likely explanation for at least some of the segregation and stratification along race, sex, and race-sex lines in position and pay in this country.[11]

What we need is more positive inter-group interactions at work, not fewer, and yet the policing mindset that discrimination laundering promotes entrenches segregation and raises social anxiety to make productive inter-group interactions less likely. We need the law to pressure organizations to pay more attention to their structures, systems, and work cultures – to the context of the workplace over which they already exert substantial control – than to individuals and discrete moments of interaction or decision. Research shows that organizational-level changes to things such as recruitment practices, accountability structures (including having leaders who take seriously non-discrimination as an institutional goal), and systems for organizing work and for determining merit can improve organizational conditions so that they are likely to minimize rather than incite bias in the workplace. There is no single answer for all organizations, but there is reason to be optimistic: organizations can and do influence whether interactions within their walls are likely to be bias reducing or bias producing. We need organizations to put nondiscrimination on the table, in their boardrooms and their executive suites, not just to mandate the latest version of "bias-busting" training for managers or to tamp down on individuals as a way of checking a compliance box.

This book calls for a renewed, open, and deliberative conversation about employer responsibility and the future of equal employment opportunity law based on a full picture of how discrimination operates in workplaces. Understanding the full picture – and that organizational innocence presents only part of the picture – does not resolve all of the difficult questions about what the law should look like. But it does alter our perspective. Bringing organizations back in, acknowledging that they play a role in how and to

what extent discrimination operates within their walls, shows how important it is for the law to better see organizational sources of discrimination, to identify those organizations that are inciting bias and producing discrimination, and to incentivize organizational change that will actually avoid and reduce it.

The book makes several recommendations for how the law might do this. Most importantly, reversing discrimination laundering will require an acknowledgment of the limits of individual discrimination law and of the potential of systemic discrimination law. It will also require an openness to the law as a tool for change, including change of some of our longstanding work cultures, and steady resistance to the idea that organizations cannot effectively structure and manage their workforces in ways that minimize rather than incite discrimination.

THE BOOK'S APPROACH

This is a book primarily about the law, not as dry, abstract subject, but as ongoing influence on work organizations and in turn on people's everyday lives. It draws on and is intended to complement a very rich, developing body of research on how biases operate within organizations and on what organizations can do and what they are actually doing to reduce discrimination. Close analysis of the law is lagging behind advances in the social sciences. Although there has been some recent study of plaintiff and defendant success rates in employment discrimination litigation,[12] particularly on the heels of several significant procedural decisions of the Supreme Court, and also some recent work on litigant perceptions of fairness in employment discrimination litigation,[13] there has been relatively little attention paid to how the substantive law of employment discrimination as a whole has been shifting or to the consequences of that shift.

The book tells the story of discrimination laundering primarily through legal cases, many but not all decided by the Supreme Court of the United States. It situates these legal cases in the context of broader movements in law, legal scholarship, social science, organizations and the personnel profession, and society, seeking not to establish precise causal connections but to expose a general movement in understandings of and discourse around discrimination. Research shows that discrimination discourse – what we say about what discrimination is and who is at fault or responsible – has broad reach, from boardrooms to courtrooms. The future of equal opportunity in employment law will depend on shifting this discourse as much as on revising the legal doctrine.

Although principally about the law, the book is also about the relationship between the law and social science. Social science has driven critique of employment discrimination law for many years now. Understanding how biases operate in the workplace helps us to see better how and where the law is inadequate, and to see when it relies on stories that are incomplete. A less frequent (but potentially more productive) approach to the relationship between law and social science works the other way around. What should the law look like in light of the social science on discrimination within work organizations, including its limitations? How should the law incorporate knowledge from the social sciences, now and over time? There are better and worse ways for the law to structure its relationship with the social sciences on questions of how discrimination operates and how organizations can best avoid or reduce discrimination within their walls, and we should be careful to select the better ones over the worse.

TERMINOLOGY AND CLARIFICATIONS

On Talking About Discrimination

Discrimination today can refer to many things. It can mean simply treating one person differently than another on any basis, or even simply noticing difference. For example, I can discriminate between two people, one wearing red shoelaces, the other blue, or I can have a discriminating eye. More often, however, the colloquial, everyday meaning of discrimination overlaps with its legal meaning. Treating a person differently than another because of their protected group status in making an employment decision or creating an environment that is hostile to members of a protected group is discrimination legally (it violates Title VII of the Civil Rights Act and sometimes the U.S. Constitution). But the law also defines as discrimination some employer actions that are not typically included in more colloquial use: disparate impact is a common example. The Supreme Court and Congress have determined that an employer can violate Title VII when it uses an employment practice that has a disparate impact on members of a protected group if the employer's use of the practice is not justified by business necessity. The employer is sometimes said to "discriminate" in this scenario, even though neither it nor its agents have made distinctions on the basis of a person's protected characteristics.[14]

When I use the term "discrimination" I usually mean the more colloquial, human process of bias influencing decisions or interactions in ways that result in different treatment of people belonging to different groups, whites and blacks, whites and Asians, men and women, etc. This book is most concerned

with discrimination as different treatment operating within institutions, specifically work organizations. When I do not intend the term to have that meaning, I will explain how and why I use the term.

Why Race and Sex (and What About Other Protected Groups?)

This book focuses principally on race- and sex-based discrimination. It does this for several reasons, both purposeful and practical. The Civil Rights Act was passed in 1964 after years of intense political battle, and many failures. It passed on a wave of tumult and social unrest, including when peaceful marchers, many of them schoolchildren, were met with fire hoses by Eugene "Bull" Connor, the police commissioner of Birmingham, Alabama. The images that flooded the media at the time were images of a racial caste system, white power, and black disempowerment, and they generated new momentum for a civil rights movement that envisioned minimal protections against longstanding racial inequality and discrimination.[15]

Neither the Civil Rights Act, though, nor Title VII is limited to race. Each also includes religion and national origin – and sex. Popular accounts once held that sex was added to the bill as a "joke," or a means of tanking the bill, though history tells us otherwise.[16] It was the result of an ongoing and hard-fought battle for women, who had long been kept in certain jobs and mostly out of the workplace. They entered the factories in droves during World War II, only to be sent back home when the men returned from war.

Race and sex have been and continue to be the most common forms of discrimination alleged by individuals in the United States.[17] National origin discrimination claims are also common, particularly involving discrimination against Latino and Latina workers, but also against Asians and Native Americans, and I include these claims under the broader terminology of race.[18] These categories – race and sex – also dominate in the social science research, and in the media.

It is also difficult to think about the big picture, a law of nondiscrimination obligation that involves multiple legal theories, without narrowing down the realm of inquiry in some way. Indeed, even with my focus on race and sex, readers will see places where I do not fully flesh out differences between the two, both in their legal histories and their lived experiences, yesterday and today.

The law of employment discrimination is nonetheless generally considered trans-substantive in that its major theories and doctrines carry across protected categories, even across statutory enactments, to inform the law, for example, of disability-based and age-based discrimination, which are covered by different

statutes. The Age Discrimination in Employment Act (ADEA), passed in 1972, prohibits age-based discrimination;[19] the Americans with Disabilities Act (ADA), passed in 1990 and substantially amended in 2008, prohibits disability-based discrimination.[20] These Acts differ in some important respects from Title VII, but they share core principles and the law of Title VII is, for the most part, applied to cases brought under these statutes, and vice versa. Indeed, in several places I draw on cases that involve allegations of discrimination on the basis of age and even veteran status when the legal theories applied in the cases can be expected also to apply to cases involving race and sex filed under Title VII. At the same time, I hope that telling the story of discrimination laundering as it is occurring in Title VII law, focusing on race and sex, will advance our capacity to address discrimination beyond these categories.

On Talking About the Law

I resist using legal theories to organize the conceptual frame for how we think about employment discrimination. Some legal scholars in particular may find this awkward, even off-putting. We are so accustomed to juxtaposing disparate impact theory against disparate treatment theory around proof of intent, for example, that we find it almost impossible to talk about the law in this area without doing so. But this habit of allowing legal theories to frame our conceptions of how discrimination operates is a mistake. To start from legal theories cabins us from seeing clearly what the law is missing and it constrains us from thinking practically about where the law should go. I will explain and address legal theories in this book, and I will propose amendments to the law that build on existing theories. However, I will try to start one step back, at the point of how discrimination is (and might be) identified in workplaces. I frame the law roughly around two principal categories: claims seeking redress and change focused on individual instances of discrimination and claims seeking redress and change focused on systemic discrimination, discrimination that is pervasive and often cannot be identified at the level of individual instance, with hostile work environments sometimes falling in the former category and sometimes in the latter.

MAP

Part I tells the story of discrimination laundering. Chapter 1 sets important theoretical and empirical groundwork, including an initial tracing of the conceptual steps of organizational innocence. Chapters 2, 3, and 4 illustrate three different ways that discrimination is being laundered through law.

Two are doctrinal shifts: first, narrowing employer responsibility for individual instances of discrimination by introducing a duty of care (employers are expected to establish processes for complaint and to process complaints within that system); and second, hampering the law's ability to identify those organizations in which discrimination is widespread through aggregate statistics. The third is more subtle in the judicial perception of events and of Title VII purview: casting racial and gendered interactions as interpersonal conflict and resisting Title VII as a statute intended to disrupt gendered and racialized work cultures.

Part II shows what is wrong with discrimination laundering. Chapter 5 takes a close look at the laundered workplace, examining measures being taken by organizations to avoid or reduce discrimination. In the laundered workplace, organizations focus their attention on providing written nondiscrimination policies and systems for complaint, and on responding to individual complaints with investigation and appropriate discipline of individuals. The additional measures that organizations take to reduce discrimination are usually narrowly focused on training and trying to insulate key decisions from bias. Research suggests, however, that these measures are unlikely to reduce discrimination, and may actually hinder progress.

The diversity rhetoric that pervades organizations also translates narrowly into efforts to increase the numbers of women and racial minorities in higher status positions within organizations. Not only are these efforts minimal (and often ineffectual), even at this level, but no efforts at all are made at the lower levels of many organizations. Moreover, individuals are policed while organizational influences on biases and stereotypes remain in place.

Chapter 6 shows that organizations are not innocent bystanders to discrimination. It challenges organizational innocence by presenting a fuller picture of how employment discrimination operates – and how organizations discriminate. Research shows that organizations play a significant role in creating and sustaining discrimination and inequalities. Organizations actively construct and capitalize on race and gender, from enhancing their diversity banners to leveraging race and gender for market share to devising low-cost, disempowered labor classes. And they devise and shape the policies and structures, the practices and cultures that form the conditions for interaction and decisions by their employees and ultimately that shape their employees' opportunities for work success.

Part III proposes a way forward and identifies several key questions for debate. We need to tell new stories about how discrimination operates. The full story of how discrimination operates includes organizational sources as much as individual ones, and our law should reflect that reality. The law

should incentivize organizational choices that will result in work environments that reduce or minimize discrimination, not incite it.

GETTING STARTED: THINKING ABOUT INDIVIDUALS, ORGANIZATIONS, AND DISCRIMINATION

Discrimination is a human problem. We have a long history in the United States of categorizing along racial and gender lines and of subordinating out-groups in a multitude of ways. Whether we think about it in terms of stereotypes or animus, cognitive biases or emotions and discomfort and avoidance, people can and do continue to discriminate. We have made progress, no doubt. More Americans today are moving toward openly subscribing to an egalitarian ideal. But this progress does not mean that we are free of our discriminatory biases, no matter how much we may want to be. This is the human side of discrimination.

Discrimination is also an organizational problem. Organizations are actively involved in producing discrimination, even today, long after they have taken down their signs indicating that "No Negroes Need Apply." Some executives today continue to make consciously race- and sex-based decisions. But organizations also incite discrimination by creating the context for human decision making and day-to-day interaction at work. I will turn in later chapters to draw out more comprehensively the research indicating that organizations are active participants in discrimination.

For now, two brief introductory stories, one situated in the legal department of a large organization in the late-1980s, the other in a small venture capital firm in Silicon Valley in the 2010s. These stories are not intended to resolve controversial legal questions about when employers should be held responsible for discrimination; those questions will be addressed (if not entirely resolved) much later in the book. Rather, these stories are thought-provoking starters. They are intended to give readers some initial grounding, a taste of how discrimination can operate, raising questions and I hope also at least a vague awareness of why we should be troubled, even alarmed, by the discrimination laundering that is occurring on our watch.

INTRODUCTORY STORY NUMBER ONE

Large Company X, a successful product manufacturing and sales organization, was ordered by a federal court in the 1970s to create and implement an affirmative action program upon a judicial finding that the company had engaged in a pattern of "egregious discrimination" against women and blacks.[21] By the